

# The Resolution of Election Disputes

Legal Principles That Control  
Election Challenges

Barry H. Weinberg

IFES  
Washington, D.C.



**The Resolution of Election Disputes**  
*Legal Principles That Control Election Challenges, 2<sup>nd</sup> Edition*

By Barry H. Weinberg

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## **Author's Note to the First Edition**

This book grew out of a series of seminars that were presented in Monrovia, Liberia, in late July, 2005. In the seminars, United States state court decisions were used to illustrate the legal principles involved in election dispute adjudication (Liberia's law is based on U.S. law and precedents).

Those court decisions comprise the core of this book. The text emphasizes the facts of the cases, borrowing extensively from the courts' descriptions, and demonstrates how the legal principles that were applied by the courts flowed logically from the facts, quoting liberally from the judges' opinions. Most of the cases illustrate more than one of the legal principles used in the resolution of election disputes, so most of the cases are discussed in more than one place in the book. When that happens, the narrative indicates the other places in the book where the cases are discussed.

The book is intended to be used as a reference book for election administrators, a source book for lawyers and an instruction book for teachers. Accordingly, the book may be read as a whole, or chapters of the book may be read independently (each chapter refers to corresponding information in other chapters).

Barry H. Weinberg  
Washington, D.C., May 2006

## **Author's Note to the Second Edition**

I was delighted when I received a call from IFES earlier this year asking me to write a second edition of *The Resolution of Election Disputes*. Since the publication of the first edition, I have continued to travel and speak in the United States and internationally about election disputes. The many contacts I have had with election administrators, election lawyers and judges during this time reinforced my belief that the legal principles set out in this book are universal.

The second edition of this book gives me a chance to expand the discussion of some of the legal principles and to give examples of how those principles apply to other election procedures. It also gives me an opportunity, in a separate section, to highlight the concept of substantial compliance with the law and show how that concept affects the outcome of election dispute cases.

Finally, because there is no other source for the information contained in this book and all the copies of the first edition have been sold, it is gratifying to know that *The Resolution of Election Disputes* will continue to be available to let people know about these important legal principles that govern election dispute resolution.

Barry H. Weinberg  
Washington, D.C., September 2008



## **About the Author**

Barry H. Weinberg, former Acting Chief of the Voting Section of the Civil Rights Division in the US Department of Justice, served with the Justice Department from 1965 until his retirement in 2000. Mr. Weinberg has held several international consultancies with IFES, in addition to authorship of *The Resolution of Election Disputes*. Mr. Weinberg's work with IFES started in 1995 in Kazakhstan where he led workshops on voting rights. Over 2000 and 2001, Mr. Weinberg served as a consultant in analysing and drafting election laws as well as leading workshops on election complaint adjudication in Georgia, and spoke on election complaint adjudication in Ukraine. In 2005, Mr. Weinberg led topical discussions and assisted with preparation of trainings on election dispute adjudication in Liberia, and in 2006 he led seminars on the resolution of election disputes for lawyers, judges, political parties, civil society media and election officials in Nigeria, and authored the publication, *The Resolution of Election Disputes: Legal Principles That Control Election Challenges*. In 2007, Mr. Weinberg represented IFES as a panelist at the Global Electoral Organization (GEO) Conference sponsored by IFES in Washington, D.C. Most recently, Mr. Weinberg helped develop and conduct trainings for election tribunal judges, and analyzed their performance, in Nigeria.

Mr. Weinberg resides in Bethesda, Maryland with his wife.



## Acknowledgements

This book is the brainchild of Violaine Autheman when she was at IFES. It was her idea that I should write this book based on the seminars I and my colleagues presented for IFES in Monrovia, Liberia. She was the primary editor of the first edition of the book, reading it, discussing it and making valuable suggestions as it grew into its full length. Nate Van Dusen was in charge of the African desk at IFES and saw to it that there were adequate time and support to prepare the case material for the seminars in Liberia which provided the foundation for this book.

This would not be the book it is without the sharp eye and analytical thinking of IFES's Lisa Kammerud. Lisa was the final editor of the first edition of this book, she conceived of the second edition, invited me to write it, and edited it with great skill and insight. Throughout the writing of both editions of *The Resolution of Election Disputes*, Rakesh Sharma provided the umbrella at IFES under which the book was written. For the many times I have been able to serve abroad as a consultant to IFES and for the opportunity to write this book, I thank Jean-Pierre Kingsley, the President of IFES, and Richard W. Soudriette, the past President of IFES.

The ideas in this book were developed during the years I worked with at the U.S. Department of Justice and afterward with my friend Craig Donsanto, Director of the Election Crimes Branch of the Criminal Division's Public Integrity Section, and more recently with my friend Florida Circuit Court Judge Nikki Ann Clark. Craig and Nikki were of great help, too, in reading drafts of the book, sharing their reactions and offering their suggestions. Jill Van Buren, Supervisor of Elections, Benton County, Oregon, and Dick Smolka, the Editor of Election Administration Reports, were kind enough to read an early draft of the first edition of this book and give me their helpful and valuable comments.

As always, I am indebted to my wife and family for their support.



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## Introduction

No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.

*Wesberry v. Saunders*, 376 U.S. 1 (1964)

An accurate vote count is one of the essential foundations of our democracy. The very purpose of elections laws is to obtain a correct expression of the intent of the voters, without imposing unnecessary and unreasonable restraint on that right.

*Jacobs v. Seminole County Canvassing Board*, Case Number CL 00-2816, slip op. (2d Cir. Leon County, Fla., December 8, 2000, Judge Nikki Ann Clark)

All formalities have an arbitrary edge. So long as these are reasonable and fairly knowable beforehand, their enforcement enhances the right facilitated, as when we turn away the voter three minutes late or deny one who delivers his ballot at his local tavern. Election contests are about formalities.

*Wilbourn v. Hobson*, 608 So.2d 1187, 1196 (Miss. 1992) (Robertson, Justice, concurring)

This is a book of stories about candidates who were sure they had won elections that they really lost, candidates who cheated to make sure they won elections, election officials who did not follow the rules and sometimes changed the outcome of elections, and voters who did not mark their ballots the way they were supposed to. The stories are told by the litigants in dozens of cases where judges applied legal principles to the facts in order to resolve election disputes that the candidates, election officials and voters caused.

The stories and the legal principles they illustrate are strikingly similar across the United States. This is noteworthy because the individual states in the United States do not have a single, common set of election laws or methods for adjudicating election disputes. True, the states are all bound by the U.S. Constitution, and some topics have been preempted by federal laws, such as campaign financing in contests for federal office, which federal agencies can enforce. But the specific laws that control election procedures in the United States are found in the constitution, statutes and regulations of each of the 50 states and the District of Columbia; there is not a federal system in the United States for administering elections and adjudicating election disputes.

The cases in this book were brought before a state's lowest level board, commission or court, as the particular state's law required. That board, commission or court decided whether there had been a violation of the state's laws or regulations, and if so, what remedy was appropriate under state law. The cases then were appealed and eventually decided by the state's appellate courts. (The punishment of an election officer, candidate or other person(s) who caused election irregularities would be the subject of a separate proceeding—apart from the election challenge—which could vary, from a job-related disciplinary hearing to a criminal prosecution and various proceedings in between.) Although states use a variety of methods to adjudicate election disputes, the legal principles set out in this book apply to cases throughout the country.

Similarly, the method for adjudicating election disputes differs from country to country, but the basic principles still apply. In some countries, challenges to the election of a candidate or the conduct of an election are brought before an election commission which hears and decides the challenges in the first instance. Their initial decisions can be appealed to a higher-level election commission or to a court of regular jurisdiction. In other countries, the dispute is heard initially in a court. Those decisions are appealable to a higher court.

I have discussed the legal principles in this book extensively in the United States and internationally. It is remarkable that the quotations above from court decisions in cases in the United States easily could be read as excerpts from the decisions of courts resolving election disputes in many countries.

Taken together, the court decisions in this book reflect the basic goals of election dispute resolution:

- to give effect to the will of the electorate,
- to give effect to the desire of the voter,
- to avoid upsetting the results of an election where possible, and
- to respect specific legislative commands.

In many cases, a court's decision depends upon the way the court balances respect for legislative commands, on the one hand, and effecting the voters' will, on the other.

The stories that make up the cases in this book involve a myriad of problems that arise in elections:

- miscounted ballots,
- harassment and intimidation of voters,
- vote buying,
- missed filing deadlines,
- incorrect voter application forms,
- misspelled write-in ballots,
- ineligible candidates,
- lapsed ballot secrecy,
- ballot box stuffing,
- fraudulent petition signatures,
- jailed campaigners,
- deficient absentee ballots,
- multiple voting,
- dead candidates,
- withheld ballots,
- political use of official supplies,
- nonresident voters,
- excess ballots,
- official misconduct in the polls,
- failure to pay qualifying fees,
- polling place changes, and
- mismarked ballots.

The cases were selected because they illustrate the fundamental legal principles that apply to election disputes; because they illustrate different procedures that occur before, during and after elections; and because the stories they tell are entertaining.

The chapters in this book show how a person must follow the rules to get a court to hear an election challenge, describe the standards that apply to lawsuits that challenge elections, and depict what happens when irregularities taint an election and what a person can expect if he or she proves that election irregularities occurred (not all legal victories translate into election wins). A list of the principles that are discussed in a chapter is set out in the summary at the end of the chapter, all of the principles discussed in the book are set out in the conclusion of the book for easy reference, and all of the cases discussed in the book are collected following the conclusion.

## CHAPTER I

### Challenges to Elections Must be Based on Written Authority: Constitutions, Laws and Regulations

What do you mean I *lost* the election? I can *prove* that I won it!

What do you mean that my candidacy registration was *rejected*? I can *prove* that I qualified!

What do I do now?

After reading this book, you will know that before you take any step to challenge the election or the ruling against you, you must look at the constitutional provisions, the statutes and the regulations that apply to elections. They will tell you what you must do, and when you must do it. They will also tell you that you cannot rely on theories of equity or other common law principles to establish your claim in a lawsuit challenging the decision against you.

#### A. There is no common law basis for election challenges.

The right to contest an election is only conferred by statute, and contestants must strictly comply with the provisions of the statute in order to confer jurisdiction. Thus, contestants are limited to the scheme provided by the legislature.

These are the words of the Iowa Supreme Court in the case of *Taylor v. Central City Community School District*, 733 N.W.2d 655,657 (2007), where four votes out of a total vote of 907 determined whether a \$4,605,000 bond issue passed.

Large consequences flow from small details in state laws that regulate challenges to election results, such as those regarding filing an election contest at the right time and in the right manner. That is because there is no common law basis for a challenge to an election. This means that there is no right to challenge elections except as is set out in the constitution, laws or regulations. Taken together, these documents set out all of the rules that apply to election challenges, including (1) the steps that must be followed in challenging an election and (2) the procedures that must be followed during an election. You will not be allowed to challenge an election if you do not follow the required procedural steps and present factual evidence that violations of required election procedures occurred.

The rules define:

- against whom a challenge must be brought,
- who can file a challenge to an election,
- when a challenge can be made,
- where a challenge must be filed,
- in what form a challenge must be filed,
- what information must accompany the filing of a challenge,

- whether a bond must be posted to file a challenge (and how much the bond must be for),
- when a challenge will be heard,
- by whom a challenge will be heard,
- what evidence will be necessary to sustain a challenge, and
- what remedies are available if a challenge is sustained.

Different countries run elections in different ways. In many countries, there is a central election commission that conducts all of the elections in the country. That commission must follow the constitutional provisions, laws and regulations that apply to elections. In the United States, each state conducts its own elections. Usually, the state's power to conduct elections is passed on by state law to the counties and cities in the state. They must follow the state constitutional provisions, laws and regulations that apply to elections. No matter how the administration of elections is organized, the principle is the same: the rules that govern elections contain all of the rules for challenging an election, and there are no other grounds on which an election challenge can be made.

The reason for this principle was set out clearly by an Ohio court in a case where John Mirlisena lost an election for the city council in Cincinnati by 62 votes out of a total of 76,592 votes cast. He challenged—as irregularities—the location of a polling place, the absence of voters' names from the poll books, an incorrect verbal instruction to a voter by a poll worker, the failure to send voters notice of their registration and the return of voter notices as undeliverable by the post office. Before the court looked at any of Mr. Mirlisena's claims, it defined the boundaries within which it was constrained to act:

The court must be ever mindful in an election contest that it has been delegated responsibility in a basically political matter and is not free to create criteria that may, in its opinion, be more suitable than those the legislature has established:

It has been definitely held by this court that an election contest is a political matter and not a judicial matter \* \* \*. *Williams v. O'Neill* (1944), 142 Ohio St. 467, 468, 52 N.E.2d 858 [27 O.O. 400].

\* \* \* [M]any highly technical requirements in elections laws exist.

\* \* \* [C]ourts should be careful not to read requirements into election laws which are not specifically there. *State, ex rel. Leslie v. Duffy* (1955) 164 Ohio St. 178, 183, 129 N.E.2d 632 [57 O.O. 371].

*Mirlisena v. Fellerhoff*, 463 N.E.2d 115, 118-119 (Ct. Comm. Pleas 1984)<sup>1</sup>.

## **B. Statutory procedures must be strictly followed.**

The principle that there is no common law basis for a challenge to an election was crucial in deciding the case of *Taylor v. Roche*, 248 S.E.2d 580 (S.C. 1978). In 1976, the State of South Carolina held a referendum to amend the state constitution to allow county school boards to issue bonds to raise money, without first holding an election to get the voters' approval to issue the bonds. The referendum question was adopted in the election, amending the constitution. The new provision became effective in November 1977. But Theodore N. Taylor claimed that the voters were tricked when they voted in favor of amending the South Carolina Constitution, because the wording on the ballot was so confusing and deceptively worded that the voters did not realize what the ballot question meant.

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<sup>1</sup> We will find out about the particular irregularities Mr. Mirlisena complained of, and how the court dealt with them, in Chapter 2, Section D. Inferences about irregularities can be drawn from facts, but not from other inferences.

*B.1. Exhaust Administrative Remedies*

Mr. Taylor said he did not know that the bonds were going to be issued until he got a notice of the proposed issuance of the bonds. So in August 1978, Mr. Taylor filed a lawsuit in a state court against the county school board to stop the board from issuing \$2.7 million in bonds to build schools in the county. Mr. Taylor said that because the ballot question was misleading, it was improperly submitted to the voters, and therefore the new constitutional permission was without legal effect.<sup>2</sup>

Was Mr. Taylor tricked? Was he misled? Were the other citizens of South Carolina misled when they voted to amend their constitution? We will never know because, as it turned out, Mr. Taylor did not follow the rules for challenging an election, and the case was ended by the South Carolina Supreme Court before it got to those questions.

The South Carolina Constitution allowed the South Carolina legislature to set up procedures for contesting elections:

1. Each County Board of Canvassers would decide “all cases under protest or contest.”
2. Appeals from the County Board of Canvassers would go to the State Board of Canvassers.
  - The state board had the responsibility to decide “all cases under protest or contest...involving more than one county.”
  - The State Board of Canvassers would meet within 10 days after the election to canvass the vote on all constitutional issues.
3. Appeals from the state board would go to the Supreme Court of South Carolina.

The supreme court in this case cited older cases to conclude that the state canvassing board’s authority applied to issues about the sufficiency of ballot questions. Furthermore, questions like Mr. Taylor’s—of whether a constitutional amendment was properly adopted—must first have been brought before the County Board of Canvassers, with any appeal going to the State Board of Canvassers. The court said,

*Under the common law there is no right to contest an election. The right to contest an election exists only under the constitutional and statutory provisions, and the procedure proscribed by statute must be strictly followed. The determination of election contests is judicial only when and to the extent authorized by statute; and the constitutional and statutory provisions in the various jurisdictions determine what tribunal shall entertain the proceeding, and only such tribunal shall do so. See 29 C.J.S. Elections §§ 246, 247, 252 (1965); 26 Am.Jur.2d Elections §§ 316, 318.*

At 582 (emphasis supplied).

Here, the plaintiff below did not bring his objections to the election process before either the County Board or the State Board of Canvassers. Nor did he attempt to challenge the explanations before this Court before the general election, as he could have done under [state law]. Therefore, we hold that the plaintiff’s failure to pursue his statutorily provided remedies precludes this attack on the election process.

<sup>2</sup> In the words of the South Carolina Supreme Court, Mr. Taylor said in his lawsuit “that the ballot question created a latent defect in the amendment by misleading him so he did not know that the election requirement was being removed until he received notice of the proposed issuance of the bonds in Newberry County.” At 581. This lawsuit had great importance throughout South Carolina: other bonds in other counties had been sold but could not be delivered with the lawsuit pending, nor could other counties’ bond issues—or bond issues of the state—be offered while the lawsuit was pending.

At 583.<sup>3</sup>

*B.2. Keep claims within dictates of statutory procedures*

By not bringing a claim in a timely manner, a plaintiff effectively waives his or her right of action. But even if a claim is brought within the time period set out in the state law, it will fail if the irregularities being complained of do not involve procedures required by a state statute.

For example, in 2005 the same court decided a case brought by another Taylor, Charlene Taylor, who lost badly in her attempt to be mayor of Atlantic Beach, South Carolina.<sup>4</sup> *Taylor v. Town of Atlantic Beach Election Commission*, 609 S.E.2d 500. The day after the election, Ms. Taylor and two candidates who lost badly in their races for town council seats filed letters with the town election commission contesting the election results and claiming that there were a number of irregularities in the election. The election commission replied with a letter saying that some of the claimed violations were not proven and that the others would not have changed the result of the election. The commission rejected their complaint.

Ms. Taylor and the two council candidates then sued the town council and the winning candidates in circuit court, claiming again that there were a number of irregularities, including the violation of voters' right to secrecy of the ballot. The plaintiffs asked the court to either set aside the election or send the matter back to the town election commission because the commission failed to set out in writing the reasons they rejected the plaintiffs' alleged violations. They lost, and the case was appealed to the South Carolina Supreme Court.

The supreme court looked first at whether the case should have been sent back to the Atlantic Beach election commission to give the losing candidates more details about its findings and reasons. The supreme court said,

There was no right to contest an election under the common law. "*The right to contest an election exists only under the [state] constitutional and statutory provisions, and the procedure proscribed by statute must be strictly followed.*" *Taylor v. Roche*, 271 S.C. 505, 509, 248 S.E.2d 580, 582 (1978); *see also* S.C. Const. Art. II, 10 ("General Assembly shall...establish procedures for contested elections, and enact other provisions necessary to the fulfillment of and integrity of the election process.").

Appellants have not cited, nor have we found, any South Carolina statute or case establishing standards for written orders issued by an election commission.

[S.C.Code Ann.] 5-15-130 requires an election commission to conduct a hearing, decide the issues raised, file a report with the testimony and exhibits, and notify the parties of the decision. The statute does not require a written order containing findings of fact or conclusions of law similar to those, e.g., required of tribunals in [the Administrative Procedures Act] or family court proceedings. . . *It is within the plenary power of the Legislature, not this Court, to promulgate election standards or enact statutory election requirements which address the necessity or substance of written orders issued by an election commissions.*

At 503-504 (some internal citation omitted) (emphasis supplied).

<sup>3</sup> Even so, the court wanted everyone to know that Mr. Taylor would have lost anyway because he waited too long to bring his lawsuit, *i.e.*, his lawsuit would have been precluded under the doctrine of laches (the inequity of permitting a claim to proceed, usually because of the change of position of the parties. See Black's Law Dictionary, 395 (2d Pocket Ed. 2001)). The penultimate paragraph in the court's opinion took note of the many millions of dollars in general obligation bonds that the state issued in reliance on the change in the constitution. The court said that Mr. Taylor could have known about the effect of the amendment on school bond elections many months earlier, and thus could have brought his lawsuit many months earlier, because in 1977 the state legislature passed a statute implementing the constitutional amendment that made it clear that an election was no longer required for issuing school bonds.

<sup>4</sup> She came in third of four candidates. The winning candidate got 104 votes, and the other three candidates got, respectively, 34, 18 and 13 votes. Ms. Taylor was the candidate with 18 votes.

Both *Taylor* cases demonstrate that challenges to an election must, in the first instance, be within the dictates of the written election laws. Mr. Taylor lost his case because he did not take the steps that the statute required, and Ms. Taylor lost on her claim because the steps she wanted the election commission to take were not required by the statutes. Would the same fate befall Penny Pullen?

### B.3. *Timely filing*

In the March 20, 1990 primary election for nomination as the Republican Party candidate for a seat in the Illinois House of Representatives, Penny Pullen came in second to Rosemary Mulligan. Ms. Mulligan received 7,431 votes and Ms. Pullen 7,400, a difference of 31 votes out of 14,831 total votes cast. On April 9, the State Board of Elections certified Ms. Mulligan as the winner. Ten days later, on April 19, Ms. Pullen filed an election contest in the Cook County Circuit Court. Ms. Pullen alleged that a number of irregularities occurred in the election and asked the court to declare her the winner. Ms. Mulligan disagreed about those irregularities, but claimed that other irregularities occurred in the vote count, and asked the court to dismiss Ms. Pullen's petition. This set the stage for *Pullen v. Mulligan*, 561 N.E.2d 585 (Ill. 1990), one of the leading cases in the law of election challenges and a case we will come back to several times in the course of this book.

The circuit court denied Ms. Mulligan's motion to dismiss the case and ordered a recount of all of the ballots in that contest. After the recount, Ms. Mulligan and Ms. Pullen each tried to prove that some ballots should be counted while others should not. The circuit court agreed with some of these claims and disagreed with others. When the candidates' vote totals were adjusted according to the judge's rulings, Ms. Pullen gained 1 vote and Ms. Mulligan lost 30 votes: the two candidates were tied. The trial court ordered the State Board of Elections to conduct a lottery to determine the winner, as required by the state election code. The lottery was the flip of a coin. Ms. Mulligan won. Then Ms. Pullen appealed the circuit court's rulings that had been in Ms. Mulligan's favor, Ms. Mulligan cross-appealed the rulings that had been in Ms. Pullen's favor, and the Illinois Supreme Court allowed the appeal to be brought directly to it.

When the Illinois Supreme Court looked at the case, it first asked whether Ms. Pullen's initial petition to contest the election was filed in time. The Illinois Supreme Court's discussion of this question spans nearly seven pages of closely reasoned analysis focusing on the meaning of five words in an Illinois statute. The statute says that a candidate can challenge the nomination of another candidate in a party primary by filing a petition that "...shall be filed within 10 days after the completion of the canvass of the returns by the canvassing board making *the final canvass of returns*. . . (Ill.Rev.Stat.1989, sh. 46, par. 7-63)." At 589 (emphasis supplied).

But more than one canvassing board is involved in the election process in Illinois. There is the county canvassing board, which canvasses (examines and tabulates) the returns (the votes) within the county, as well as the State Board of Elections, which canvasses (reviews) the tabulated statement of returns (each candidate's vote totals) it receives from the county canvassing board before proclaiming the result of the primary election.

The wording of the statute led to the question: which canvassing board made "the *final canvass of returns*?" This question was crucial to Ms. Pullen's ability to maintain her lawsuit because courts can en-

certain election contests, i.e., they have jurisdiction, only where the statute governing the procedures for election contests have been satisfied. If the final canvass was made by the State Board of Elections, Ms. Pullen's petition was filed on time. If the final canvass was the one made by the county canvassing board, Ms. Pullen's petition was filed too late.

To determine which board made the final canvass of returns in the manner dictated by the statute, the Illinois Supreme Court began by saying,

Courts have no inherent power to hear election contests, but may do so only when authorized by statute and in the manner dictated by statute.

At 589.

The supreme court then provided an overview of the relevant provisions of the state election code. Various provisions mentioned the canvasses conducted by each of the two boards, when they were to be conducted and what happened after they were conducted. Ms. Pullen argued that the state board's canvass was the final one, and Ms. Mulligan argued that the canvass was completed by the county board.<sup>5</sup> Both candidates relied on decisions of Illinois courts from earlier cases.

After examining the court decisions that each candidate relied on, the statutes themselves and definitions in Webster's Dictionary, the supreme court, at the end of its seven-page discussion, concluded that under the "clear" language of the statute it is the State Board of Elections that made the final canvass of returns. Accordingly, Ms. Pullen was found to have filed her petition in time to contest the election and the Supreme Court moved on to consider which ballots should have been counted, and which ballots should not have been counted.

The question of which ballots to count and which ballots not to count will be discussed in Chapter 3 when we consider the difference between mandatory and directory statutory words. For now, it is clear that no matter how badly Penny Pullen thought she had been treated by poll workers during the election or during the vote count, or by the decisions of the county and state boards of canvassers or the trial court, no court could hear her complaints unless she first satisfied the procedural requirements for filing her complaints under the state's election laws.<sup>6</sup>

#### *B.4. Identify procedural defects: Fundamental v. technical*

James Logic was not as astute as Penny Pullen. He had run for mayor of South Milwaukee, Wisconsin, against David Kieck, the incumbent, in an April 6, 2004 election. The election resulted in a tie. Mayor Kieck requested that the board of canvassers conduct a recount, which they did, and Mayor Kieck was reelected by one vote. Mr. Logic filed a lawsuit claiming that the board of canvassers erred in the recount. *Logic v. City of South Milwaukee Board of Canvassers*, 689 N.W.2d 692 (Wis. Ct. App. 2004).

The controlling state statute said that a candidate could appeal a decision of the board of canvassers to the circuit court within five days of the board's decision "by serving a written notice of appeal on the

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<sup>5</sup> Ms. Mulligan argued that because the district in which she and Ms. Pullen were running (the 55th Representative District) was wholly inside Cook County, the state board did not have anything to canvass after the county board finished its work, and its only job was to proclaim a winner once it got the statement of returns from the county canvassing board.

<sup>6</sup> Another example of a filing deadline being central to the jurisdiction of the court is *Keating v. Iozzo*, 508 N.E.2d 503 (Ill.App. 1987), which will be discussed more fully in Chapter 6. In *Keating*, the court said, "...Mieszczak's motion raised the question of jurisdiction which may be raised at any time. If the Board lacked jurisdiction over the objections to Mieszczak's nominating papers on the basis of untimeliness, it also lacked jurisdiction over the other objections which were filed at the same time. Thus, none of the petitioners are barred from raising the timeliness issue on appeal." At 505.

other candidates.” Wis. Stat. § 9.01(6)(a), at p. 693. Mr. Logic did not serve a notice of appeal on Mayor Kieck, but a law clerk working in the office of the lawyer who represented Mr. Logic did serve a notice of appeal on the South Milwaukee City Clerk. And there was a Wisconsin statute that said that personal service could be made by serving “an agent authorized to accept service of summons for the defendant.” Wisc. Stat. Rule 801.11(1)(d), at 695. In addition, Mr. Kieck knew of the appeal and was allowed to intervene (participate) in the case. But the circuit court dismissed Mr. Logic’s appeal because he did not serve Mayor Kieck directly. Mr. Logic appealed the circuit court’s decision.

The appeals court began by saying that generally a court does not have jurisdiction over an action if a defect in filing the action or serving a party was fundamental rather than technical. The court ruled that “A defect is ‘fundamental’ if it defeats ‘the purpose of the rule,’” at 694, and that the purpose of requiring service of the notice of the appeal in this situation was to give the other candidates a chance to protect their interests. The appeals court found that because the failure to serve the notice of appeal defeated the purpose of allowing another candidate to protect his or her interests, that failure was fundamental. And because Mr. Logic’s failure to serve notice was a fundamental failure, the court did not have jurisdiction over his case; it did not matter that Mayor Kieck actually knew about the appeal.

The appeals court then examined Mr. Logic’s argument that the statute requiring service of the notice of appeal should be interpreted, like most election laws, to be *directory* not *mandatory* in order to preserve the *will of the electorate*. The questions of when election procedures are mandatory and when they are directory, and how courts should protect the will of the electorate, are large topics that are crucial to the resolution of election disputes and will be discussed throughout the rest of this book (and in detail in Chapter 3). For now, however, it is sufficient to know that Mr. Logic was asking the appeals court to apply a broadly accepted rule that the people’s expression of their will, through casting their ballots, should be honored even though there has been some irregularity in some procedure, as long as the irregularity is not basic to the election process, does not change the result of the election and was not the result of fraud.

But the appeals court concluded that the notice requirement that allows other candidates a chance to protect their interests has nothing to do with the will of the electorate. The court said,

[T]his is an electorate-will neutral requirement—no vote’s validity is affected directly by the application of [the statute]. Accordingly, the will-of-the-electorate rule does not apply here.

At 694-695. And the appeals court went further and said that even if the will of the electorate was involved in this case, *the failure to serve notice was fundamental* and therefore it was basic to the appeal process. So the requirement that other candidates be served with notice of the appeal would be *mandatory*, not *directory*.

Finally, the appeals court addressed Mr. Logic’s argument that the mayor actually *was* served in his personal capacity because service was made on the city clerk, and service on the city clerk should have been considered the same as service on the mayor. The appeals court disagreed, saying that Mayor Kieck was running for office in his *personal* capacity, not in his *official* capacity. And even if the city clerk was the proper person to serve if the mayor was being sued in his official capacity for something he did as the mayor, the city clerk was not the proper person to serve with the notice of appeal in this case because there was no evidence that Mayor Kieck had authorized or appointed the city clerk to accept service for him in his capacity as a candidate.

*B.5. Follow the letter of the law*

The *Logic* case illustrates how careful you have to be if you are initiating a challenge to an election. It may seem that the *Logic* decision defies logic because it penalizes a candidate for violating a requirement whose object (notifying Mayor Kieck of the appeal so he could protect his interests) was accomplished anyway: Mayor Kieck knew about the appeal and had taken steps to protect his interests (he intervened in the lawsuit). One explanation for this seemingly anomalous result lies in the fact that the court was examining whether it had *jurisdiction* to intrude in decisions affecting election results. Courts are reluctant to disturb election results, and courts will be very strict in determining whether a plaintiff has done all he or she was required to do in bringing the court into an election dispute.<sup>7</sup>

By the same token, courts will not go beyond the statutory requirements in determining whether a plaintiff has met the requirements for bringing an election challenge. The inadequate service of summons was one of the grounds claimed by Jessie Pearl Curtis when she filed a motion to quash the summons and dismiss the appeal in *Jernigan v. Curtis*, 622 S.W.2d 686 (Ky. App. 1981). Patsy Jernigan had filed the lawsuit to void the results of the May 26, 1981 primary election for the Monroe County, Kentucky, Circuit Clerk of Court, after she had lost to Ms. Curtis by four votes out of 4,607 total votes cast.

The summons had been delivered to Ms. Curtis by Ms. Jernigan's lawyer. Ms. Curtis's motion to dismiss said that the summons had to have been served by the sheriff or someone else who was *authorized* to serve a summons. But the statute for serving a summons did not mention *who* should serve the summons. The statute just said that the summons could be personally served, a copy could be left at the person's house with a family member over 16 years old, or a copy could be posted on the door of the person's house. In other words, the statute only talked about how a summons should be served. The court concluded,

It would appear that since the contest was filed and the summons issued within the time period required by the statute and since the contestee did receive actual service of the summons, the contestee cannot complain of any technical defect *if indeed there was one*.

At 688 (emphasis supplied).

Here, in contrast to *Logic*, Ms. Curtis was personally served, and the service was not different from the procedure specifically spelled out in the statute. Because the plaintiff did all she needed to do to under the statute to perfect her lawsuit, she succeeded in bringing the election dispute under the jurisdiction of the court. But even if a candidate fails to follow the required steps to file an election challenge, he or she will not be prevented from having his or her day in court because of circumstances beyond his or her control—especially if, as in *Jernigan*, those circumstances involve efforts by the candidate's opponent to hide an attempt to steal the election (see section C below).

Even where the court's jurisdiction hinged on whether an action was in compliance with a state statute, being in substantial compliance with a statutory requirement was sufficient for Frederick I. Taft to comply with a requirement that a petition to contest an election “shall be accompanied by a bond with surety to be approved by the clerk of the appropriate court in a sum sufficient, as determined by him, to pay all the costs of the contest.”

*In Taft v. Cuyaboga Board of Elections*, 854 N.E.2d 472 (Ohio 2006), Mr. Taft and Richard M. Bain both received 1,124 votes in the November 8, 2005 election for the fourth council seat in the City of Pepper

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<sup>7</sup> Later in this chapter, we will see that once a court has jurisdiction, judges are equally reluctant to disturb official decisions regarding irregularities that have occurred in election procedures.

Pike, Ohio. A coin flip made Mr. Taft the winner. But following an automatic recount, Mr. Taft's total was reduced by one vote in Precinct D, and Mr. Bain was declared to be the winner. Five days later, the board of elections examined all of the ballots in Precinct D and found that one ballot had a chad<sup>8</sup> next to Mr. Taft's name that was attached by only one corner. Under state law, a ballot could be counted if the chad was hanging by two corners or fewer, but the county prosecutor told the board it could not change the certified election result so the result went unchanged.

Five days after that, Mr. Taft filed an election contest. In response, Mr. Bain swore that when he saw that ballot, the chad was hanging by three corners (and therefore an invalid vote), and that the handling by the election officials changed the ballot's condition (to become a valid vote). Two masters aiding the court examined the ballot, found that the chad was hanging by one corner and that the ballot should be counted for Mr. Taft, which resulted in Mr. Taft and Mr. Bain being tied again. The court then decided that no evidence could be presented by Mr. Bain beyond the documents already presented in the case, ruled that the election was tied, and told the board of elections to decide by lot who should be the winner. Since the board of elections already had flipped a coin to decide that Mr. Taft won the earlier tie vote, they saw no reason to flip a coin again and declared that Mr. Taft won.

On appeal, the Ohio Supreme Court first had to decide whether Mr. Bain was correct in claiming that the lower court did not have jurisdiction to handle Mr. Taft's lawsuit because Mr. Taft did not file an adequate bond for his lawsuit: he had filed a cash bond, not a surety bond; the bond did not obligate Mr. Taft to pay all of the expenses of the lawsuit; and it said that Mr. Taft bound himself only to the board of elections. The supreme court began its decision by saying,

Bain is correct that, in general, "[t]he procedure prescribed by statute to bring an election contest within the jurisdiction of a judge must be strictly followed." If the contestor fails to comply with the bond requirement of [the statute], "the court is without jurisdiction to hear or determine the controversy."

Nevertheless, we have adopted and applied a substantial compliance standard for the statutory bond requirement.

At 476 (internal citations omitted).

The supreme court noted that the clerk of the lower court had approved the form and amount of Mr. Taft's bond, and went on to find that Mr. Taft had substantially complied with the statute's requirements because paying in cash instead of a surety check was acceptable, and the bond obligated Mr. Taft to pay the costs incurred by him, although he could have used clearer language to say so. And it made no difference that Mr. Taft bound himself only to the board of elections, because he was willing to pay all the costs of the contest. Finally, the supreme court found that there was no evidence that Mr. Bain had been prejudiced because of the bond that Mr. Taft posted and the clerk approved.

Thus, Mr. Taft was able to meet the threshold requirements for getting his lawsuit started. But he did not do so well on other issues in the case. Once the bond question was disposed of, the supreme court ruled that Mr. Bain should have been allowed to have an evidentiary hearing, and that the board of elections was wrong in not conducting a second flip of the coin, and reversed those aspects of the lower court's decision.<sup>9</sup>

<sup>8</sup> A chad is the little piece of a cardboard ballot that is punched out to cast a vote. Sometimes the punch does not completely detach the chad (in the shape of a circle, square or rectangle), raising a question as to whether the voter intended to punch it out.

<sup>9</sup> The concept of substantial compliance affects substantive issues as well as procedural issues in election dispute adjudication. This concept is discussed at length in Chapter 3.

### C. Common law principles ensure fairness in election challenges: Due diligence.

When a candidate has been *prevented* from following the state's procedural requirements for filing an election challenge, the courts will avoid an injustice by turning to common law principles. This is especially true when facts were hidden from a candidate, especially if the facts were hidden by the candidate's opponent.

Stated another way, not all election irregularities arise in circumstances that are neat and clean. Even though there is no common law *basis* for challenges to elections, courts will apply common law *principles* to the facts of an election challenge when fairness demands that they be applied. The doctrine of fairness in an election context routinely is couched in terms of determining *the free expression of the public's will*. This term will come up throughout this book. It is the touchstone of courts' discussions of how to treat the facts in these cases.

This approach was taken by the Pennsylvania Supreme Court in *In re General Election for District Justice*, 670 A.2d 629 (Pa. 1996), and *after remand*, 695 A.2d 476 (1997), when it analyzed the aftermath of Joseph Zupsic and Delores Laughlin's race for state judge in one judicial district in Beaver County, Pennsylvania, on November 2, 1993.<sup>10</sup> After the polls closed, the ballots from all the districts were taken to the Beaver County courthouse in 156 ballot boxes. Each ballot box had on it a red numbered seal that was put on at the precinct, and each ballot box was locked with a padlock. However, the padlocks on all the ballot boxes were identical; each of the 156 boxes could be opened with the same key. Between 160 and 170 padlock keys existed. There were 22 ballot boxes in the judicial district where Mr. Zupsic and Ms. Laughlin ran.

At the courthouse, election officials unlocked the ballot boxes, broke the seals and ran the ballots through the tabulating machines. Then the ballots were put back in the ballot boxes, which were locked with the padlocks, resealed and locked in the tabulation room. Three people had keys to the tabulation room.

Then the following sequence of events transpired:

- On November 5, three days after the election, the ballot boxes were reopened to allow for an audit of the tallies and a count of the write-in votes. All of the ballots were counted together, and *Mr. Zupsic won a 36-vote victory over Ms. Laughlin*.
- On December 1, Ms. Laughlin asked for a recount of 14 of the 22 ballot boxes in the judicial district.
- On December 8 and 9, a hand recount of those boxes gave *Ms. Laughlin 46 more votes*, while *Mr. Zupsic lost 36 votes*. Mr. Zupsic then asked for a recount of the remaining boxes.
- On December 20, a recount of those boxes *gave each candidate one additional ballot*. (Both candidates challenged a number of ballots during these recounts.)
- On January 5, the election board held a second machine count, which tabulated all the contests on the ballot. The re-tabulated totals in the race for district judge matched the hand recounts: *Ms. Laughlin won by 42 votes*, with 3,792 votes to Mr. Zupsic's 3,750.
- On January 10, 1994, five days after the machine re-tabulation but more than two months

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<sup>10</sup> In the United States, federal judges are appointed and remain in office for life. But each state has its own arrangement for putting state judges in office; they do not have life-time terms, and in many instances, they are elected. In some states, judges are appointed, and then run for election after their first term and for each subsequent term. In other states, judges are appointed and then subject to a yes-or-no vote after each term. Still other states have judges run for election from the start. (In these states, it is not unusual for a judge to resign before her or his term is over, so the next judge can be appointed to fill the vacancy until the term is over and then run as the incumbent when he or she faces first election.)

after the election, Mr. Zupsic filed an election contest *nunc pro tunc*.<sup>11</sup> The Pennsylvania statutes required that election contests be filed within 20 days of the election. Mr. Zupsic said he should be entitled to proceed even though he filed his contest long after the 20 day post-election period because he only *found out* about the irregularities when the votes were tabulated on January 5.

The trial court agreed with Mr. Zupsic. It then found that sometime between November 2 and January 5, somebody opened the ballot boxes and marked enough ballots to change the election result in Ms. Laughlin's favor.<sup>12</sup> Most of the differences between the vote counts on November 2 and January 5 were in five of the precincts, and all the differences were *only* in the Zupsic-Laughlin race; the votes for the candidates in the other contests on the ballot were unchanged. The trial court also found that there was no way to determine exactly how many ballots were altered, and so the trial court concluded that the election should be set aside and a special election held. Ms. Laughlin appealed that decision to the state supreme court.

Before deciding what to do about either the discrepancy in the ballot counts or the trial court's conclusions about the number of ballots that were altered, the Pennsylvania Supreme Court had to determine whether Mr. Zupsic followed the appropriate steps in filing his challenge. This was the same approach taken with Mr. Taylor's election challenge in South Carolina, Mr. Logic's election challenge in Wisconsin and Ms. Pullen's election challenge in Illinois. To make this determination, the Pennsylvania Supreme Court had to answer two questions.

First, the Pennsylvania Supreme Court decided that Mr. Zupsic did not have to file his challenge by November 22 (20 days after the election). It said,

...where a petitioner does not learn of a problem with the election until the filing period has expired and his ignorance is not due to any "fault or dereliction" on his part, the Court has allowed the petitioner to seek relief *nunc pro tunc*.

670 A.2d at 635-636.

In reaching this decision, the supreme court relied on two earlier Pennsylvania cases where the fact situations showed:

- The candidate did not know that his name was misspelled by an election official on a return sheet that was sent to the county board, and
- The candidate did not know election officials made a mistake in writing the vote totals on the return sheet (the totals were correct on the tabulation sheet).

But Ms. Laughlin did not give up. Next, she argued that Mr. Zupsic was *at* the recount on December 9 when the difference between the recount results and the initial results became known. Since Mr. Zupsic should have been aware of the problem then, he should not be allowed to wait another month, to January 10, before bringing his election challenge. Ms. Laughlin counted the statutory 20 days from December 9 and said that even under this generous interpretation of the requirement, Mr. Zupsic missed the extended December 29 deadline by 12 days.

<sup>11</sup> *Nunc pro tunc* is defined as "A phrase applied to acts allowed to be done after the time when they should be done, with a retroactive effect, *i.e.*, with the same effect as if regularly done." Black's Law Dictionary 489 (2d Pocket Ed. 2001).

<sup>12</sup> There was an increase in the number of overvotes—marks for Ms. Laughlin on ballots that already had been marked for Mr. Zupsic—which spoiled those ballots and therefore decreased the number of ballots recorded for Mr. Zupsic. There also was a decrease in the number of undervotes—marks for Ms. Laughlin were put on ballots that previously had no marks for either Mr. Zupsic or Ms. Laughlin—which increased the ballot total for Ms. Laughlin.

The supreme court thought that Ms. Laughlin's argument had some merit but chose, instead, to look further at common law. It said,

Rather than imposing a new twenty-day limit on the petitioner, this Court has evaluated the timing of nunc pro tunc petitions by considering whether the petitioner is guilty of laches...*For laches to apply, there must be a lack of due diligence in pursuing a cause of action and resulting prejudice to the other party.*

A petitioner generally cannot delay contesting an election while recounts are being completed... However, we are hesitant to deny a petitioner the right to contest an election where an initial problem with the election is *raised by his opponent after the time to contest has expired*. Here, although Zupsic arguably had reason to file his Petition to Contest earlier than January 10, no evidence exists to indicate that Laughlin was prejudiced by any delay.

670 A.2d at 636 (emphasis supplied). In other words, the supreme court found that there was no evidence that Ms. Laughlin was injured by the timing of Mr. Zupsic's election challenge filing.

Thus, the Pennsylvania Supreme Court concluded that Mr. Zupsic's election challenge was not barred by the fact that it was filed nearly 50 days after the statutory 20-day period expired.

A similar result was reached when a Louisiana court found that Andy Valence, the incumbent mayor of Grand Isle, Louisiana, could proceed with a trial on the merits to contest his I7-vote loss to Robert Rosiere in *Valence v. Rosiere*, 675 So.2d 1138 (La. Ct. App. 1996).

The case involving Mr. Valence, like many cases of election challenges in the United States, focused on the treatment accorded absentee ballots. Although it has become common to classify as "absentee ballots" all ballots that are cast before election day and/or cast outside of the election-day polling places, the term "absentee ballots" as used in this book refers to ballots that are:

- cast by mail
- by qualified voters
- who are unable to get to their polling place on election day.

State law defines:

- who is authorized to obtain an absentee ballot,
- to whom absentee ballots must be mailed, and
- when the absentee ballots must be received in order to be counted.

States include in this category people who are in the military<sup>13</sup>; people who are infirm; people who will be out of their city, county or state on election day; and so on. The process of getting an absentee ballot also is a matter of state procedure. Usually a voter can apply for an absentee ballot by mail, receive the ballot by mail and return the ballot to the election office by mail. Absentee ballot designs also vary by state, but generally come back to the election office in two envelopes: an exterior return envelope that has the voter's name and other required information on it, and an interior envelope containing the actual ballot (and without information identifying the voter to preserve the secrecy of the voter's ballot). Once the election

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<sup>13</sup> Military people, their dependents and United States citizens who are overseas are entitled to register to vote and to vote absentee by the Uniformed and Overseas Citizens Absentee Voting Act, 42 U.S.C. §§ 1973ff to -6, a federal law.

officials determine from the return envelope that the absentee voter's information is in order, the interior envelope is removed, and later the ballots are removed and commingled with the other ballots.

Election challenges involve absentee balloting so often because absentee voting is the one occasion in the election process when ballots leave the custody of election officials—the ballots are unguarded until they are returned to election officials as voted ballots. This gives an opportunity to people who want to mark or alter *another* voter's ballot for a candidate that the *marker* wants.<sup>14</sup>

In *Valence v. Rosiere*, Mr. Valence was leading in the vote count on the voting machines by 31 votes, 443 to 412. But Mr. Rosiere got 48 more absentee ballots (129 to Mr. Valence's 81), making Mr. Rosiere the winner by 17 votes. Mr. Valence filed an election challenge saying that there were at least 20 illegal absentee ballots cast at the election: seven voters filled out a form showing that they did not live in Grand Isle, 12 absentee ballots had forged signatures and one ballot was cast by a voter who was assisted illegally under Louisiana law by Mr. Rosiere.

Louisiana had a requirement that absentee ballots had to be challenged by the fourth day before the election. Another Louisiana statute said that a challenge to a voter's qualifications or to an election irregularity is waived if, with due diligence, it could have been raised by a challenge or an objection at the polls.

At trial, Mr. Valence claimed that he could prove his allegations, but he said he could not have gotten the proof early enough to enter his challenges under state law, despite his due diligence, because the forgeries were hidden by his opponent. The trial court disagreed with Mr. Valence and dismissed his claims, without a trial, for failure to file his challenge within the period required by state law. Mr. Valence appealed.

The appellate court began its decision by stating the well-known standard for reviewing motions to dismiss: for the purpose of determining whether to sustain a motion to dismiss, "all well pleaded allegations of fact are accepted as true and must be construed most favorably from the plaintiff's standpoint to afford him an opportunity to present his evidence at a trial." At 1139. The court then noted Mr. Valence's assertion that "he was not able to ascertain this information despite due diligence with sufficient time to challenge the election," and noted another Louisiana case that recognized that "due diligence does not require a candidate to research every registered voter to determine their current eligibility to vote." At 1139.

The court then concluded:

Accepting these allegations as true...plaintiff has sufficiently identified 20 alleged illegal votes which satisfies the requirements for stating a valid cause of action. Further, under the facts alleged and due to the nature of the alleged illegal activities, plaintiff's contention that, *despite due diligence*, he was unable to challenge these voters at the times required...must also be accepted as true...

Accordingly, the allegations of Valence's petition are sufficient to state a cause of action requiring a trial on the merits concerning the allegations of forgery of ballots, nonresident voting... and illegal assistance of voters by the defendant, Rosiere.

At 1141 (emphasis supplied). The court then remanded the case to the trial court to conduct further hearings.

<sup>14</sup> Some elections are conducted entirely by mail, including all elections in the State of Oregon. These elections are subject to the same concerns about illegality as are elections using mail-in absentee ballots.

Thus, in following the statutes governing election procedures the court applied the common law principle of due diligence to allow proof of illegal voting that would otherwise have prevented the free expression of the voters' will.

The way that the Pennsylvania Supreme Court applied the principle of due diligence is similar to the way that the principle of equitable estoppel was treated in *Taft v. Cuyaboga Board of Elections*, 854 N.E.2d 472 (Ohio 2006). Equitable estoppel stops a litigant from pursuing a claim in court when the litigant took a different position on the claim earlier, and the opposing litigant relied on the original position.

Mr. Taft and Richard M. Bain both received 1,124 votes in the November 8, 2005 election for the fourth council seat in the City of Pepper Pike, Ohio. A coin flip made Mr. Taft the winner. But a state law required an automatic recount when the margin between the winning and losing candidates was less than one-half of 1%.

Following an automatic recount, Mr. Taft's total was reduced by one vote in Precinct D, and Mr. Bain was declared to be the winner. Five days later, the board of elections examined all of the ballots in Precinct D and found that one ballot had a chad next to Mr. Taft's name that was attached by only one corner. Under state law, a ballot could be counted if the chad was hanging by two corners or fewer, but the county prosecutor told the board it could not change the certified election result. Then Mr. Taft began a series of challenges, including a challenge to the procedures followed during the recount, which resulted in an appeal to the Ohio Supreme Court.

Among other things, Mr. Bain argued that Mr. Taft was estopped from challenging the recount procedure because he acquiesced in the procedure when the recount was held. The supreme court said,

“In cases in which we have found equitable estoppel in an election context, irregularities were plain on the face of the ballot, and the contestors were aware of the alleged defects prior to the election.”

Taft is not estopped from instituting his election contest. His claimed election irregularity—the board's improper counting of a single ballot from Precinct D during its initial recount—was not plain on the face of the unpunched ballots, and Taft was not aware of the potential defect until after the board's [later] administrative review and...investigative report. In addition, this is not a case where he should have been aware of the single ballot in question before the board's investigation.

At 478-479 (internal citations omitted).

#### **D. The challenger's burden of proof can determine the outcome of a lawsuit.**

Legal victories or losses are often determined by which party has the burden of proof. In a civil case, which is what a lawsuit challenging an election is, the plaintiff must prove the truth of the facts that he or she alleges by a preponderance of the evidence.<sup>15</sup> That is, he or she has “the burden of proof.” The determinative nature of bearing the burden of proof in a lawsuit or administrative action was recognized

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<sup>15</sup> As opposed to a criminal case where the prosecution must prove its case beyond a reasonable doubt, which is a much stricter standard.

by the United States Congress when it passed legislation to eradicate some of the worst voting irregularities in United States history: the widespread practice by Southern election officials of using and misusing voting procedures to deny voting rights to African Americans. The announced and official resistance to African-American voting that was the highlight of Southern voter registration practices and voting procedures is a thing of the past, as are most of the voting irregularities that were spawned by that resistance.<sup>16</sup> The surprising thing is that those irregularities have been prevented from recurring by a law that shifted the burden of proof: it makes *jurisdictions* prove that their new voting practices or procedures are not racially discriminatory.

The Voting Rights Act of 1965 was drafted to address both generalized and particular actions by which white people kept African Americans from registering to vote, and from voting, in the American South.<sup>17</sup> For example, voter registrars (who were county officials) ruled that well-educated African Americans had failed state literacy tests because the period after their middle initial was indistinct. States required that two registered voters in the precinct must vouch for an applicant's good moral character; all of the registered voters were white, and white people would not vouch for the character of African-American applicants. And if African Americans could get registered to vote, they faced harassment at the polls.<sup>18</sup>

Lawsuits were brought to enjoin these and other official impediments to African-American voting. But when the plaintiffs won their lawsuit, the county officials would simply adopt a different tactic for keeping African Americans off of the voting rolls, or the state would change the voter registration requirements to adopt a different, but equally effective rule that, when applied, kept African Americans off the rolls.

Accordingly, the Voting Rights Act contains several sections that are called “special” provisions because they:

- Apply only to the parts of the country where Congress determined these racially discriminatory tactics existed (this is called “special coverage”), and
- Empower the federal government to administratively interrupt the racially discriminatory tactics that were used.

For example, the original wording of Section 4 of the Voting Rights Act allowed federal employees to conduct voter registration in specially covered jurisdictions (states or counties) where the U.S. Attorney General determined that the county registrars had unfairly kept African Americans off of the voting rolls (Section 4, 42 U.S.C. § 1973b). The Voting Rights Act continues to allow federal observers to be assigned to monitor polling places during elections (Section 8, 42 U.S.C. § 1973f).<sup>19</sup>

<sup>16</sup> Some people believe that racial discrimination in voting practices does not happen any more—that we took care of it years ago. In fact, racial discrimination still occurs in voting, and not just in the Southern United States but all over the country, as is demonstrated by the continuing trail of victories won in court by individuals, organizations and the United States Department of Justice. Information about these cases is available on the web sites of organizations such as the Lawyers' Committee for Civil Rights Under Law ([www.lawyerscomm.org](http://www.lawyerscomm.org)), the NAACP Legal Defense and Educational Fund, Inc. ([www.naacpldf.org](http://www.naacpldf.org)), the Mexican American Legal Defense and Educational Fund ([www.maldef.org](http://www.maldef.org)), the American Civil Liberties Union ([www.aclu.org/voting rights/minority](http://www.aclu.org/voting%20rights/minority)) and the United States Department of Justice ([www.doj.gov/crt/voting](http://www.doj.gov/crt/voting)). See also, Barry H. Weinberg and Lyn Utrecht, Problems in America's Polling Places: How They Can Be Stopped, 11 Temp. Pol. & Civ. Rts. L. Rev., 401, 408-424 (2002).

<sup>17</sup> In addition to addressing known discriminatory practices, the law also included a formula for determining if a state or county should be specially covered under the act: if the state or county maintained a test or device, such as a literacy test, and less than 50% of persons of voting age were registered to vote or had voted in the 1964 Presidential election. The base year was updated in subsequent amendments.

<sup>18</sup> Harassment included making African American voters stand aside until white voters cast their ballots, calling African American voters by their first names but addressing white people as Mr. or Mrs., telling African American voters that their names were not on the voter rolls even though they were, and threatening African Americans with later reprisals for voting.

<sup>19</sup> Specially covered jurisdictions may terminate their special coverage by proving that they do not discriminate and have complied with the Voting Rights Act. 42 U.S.C. § 1973b(a). For the author's more complete discussion of the history of the Voting Rights Act and its special provisions, the kinds of actions that have been used to discriminate against minority group members in voting, and especially the use of federal observers in monitoring polling places, see Barry H. Weinberg and Lyn Utrecht, Problems in America's Polling Places: How They Can Be Stopped, 11 Temp. Pol. & Civ. Rts. L. Rev., 401, 403-424 (2002).

Most important for our discussion here is the provision that stopped the practice by which officials would adopt a new discriminatory voting practice after a court had enjoined a discriminatory voting practice. Under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, whenever a change in a voting practice or procedure is made by a specially covered jurisdiction or any entity within a specially covered county (such as a school board or city), that voting change is legally *unenforceable* unless the entity proves that the change has neither the purpose nor the effect of discriminating on the basis of race, color or membership in a language minority group.<sup>20</sup> This finding can be obtained by either:

- Winning a declaratory judgment lawsuit in a Washington, D.C., federal district court, or
- Getting a determination from the U.S. Attorney General.

In that lawsuit or request to the Attorney General, the jurisdiction that wants to implement the voting change has the burden of proving that the change is nondiscriminatory. In other words, Section 5 of the Voting Rights Act freezes voting practices and procedures in specially covered jurisdictions until the jurisdiction can prove that the change in voting practice or procedure it wants to make does not discriminate on the basis of race, color or membership in a language minority group. If the jurisdiction does not offer sufficient proof to the court or the U.S. Attorney General that the voting change it wants to make will *not* have a discriminatory purpose or effect, the court will deny the jurisdiction's request for declaratory judgment, or the Attorney General will object to the implementation of the change.

No longer do the victims of racial discrimination have to go through the lengthy and expensive process of preparing and pursuing a lawsuit seeking to enjoin each newly instituted discriminatory voting practice and procedure in a specially covered jurisdiction. Now, the officials who institute those voting practices and procedures have to make the effort. By shifting the burden of proof, this single section in a single federal law can prevent racial discrimination in voting before it happens: it shifts the advantage of time and inertia from the people who would discriminate against racial and language minority group members to the people who would be their victims.<sup>21</sup>

#### **E. Official actions and results are presumed to be valid.**

Other than the above unique exception, it may seem axiomatic to say that, as in most civil lawsuits or administrative actions, the plaintiff or complainant filing an election challenge has the burden of proof and must prove his or her case by a preponderance of the evidence. But in election challenges, the burden is even greater because the complaint often is filed against election officials or otherwise impugns their integrity. And that brings up a second hurdle of evidence that the challenger has to overcome: there is a strong presumption of regularity on the part of officials and official actions, and that presumption must be overcome if the court is to rule in favor of the plaintiff.

The need to satisfy the burden of proof was central to the claim of a candidate for a Florida state judgeship in *Boardman v. Esteva*, 323 So.2d 259 (Fla. 1975). Edward F. Boardman had been declared the winner over Henry Esteva on the basis of the 3,389 absentee votes cast. Mr. Esteva had received 404 more votes

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<sup>20</sup> Later, members of language minority groups were added to those protected by the Voting Rights Act.

<sup>21</sup> Because of the expense and effort involved in bringing a lawsuit in Washington, D.C., nearly all changes in voting practices and procedures made by specially covered jurisdictions are submitted to the U.S. Attorney General for review and determination. Under the statute, the U.S. Attorney General has 60 days to render a decision on each of the thousands of voting changes that are received every year. 42 U.S.C. § 1973c. The decision of the U.S. Attorney General not to object to a voting change is not reviewable. It is crucial, therefore, that the U.S. Justice Department's decisions not be influenced by political or other nonsubstantive factors. After an objection by the Attorney General, a lawsuit can still be brought before a three-judge panel of the District of Columbia federal court for a trial on the substance of whether the voting change has a discriminatory purpose or effect; the fact that the Attorney General objected to the use of the change has no effect on the trial, *i.e.*, the lawsuit does not challenge or appeal the Attorney General's decision, but initiates a trial of the issue from the beginning. In legal terms, it is a trial *de novo*.

on the voting machines in the polling places, but Mr. Boardman got 653 more absentee ballot votes and won by an overall margin of 249 votes. Thus, the election result could be changed by only 250 votes. Not surprisingly, the post-election battle was over the absentee ballots.<sup>22</sup>

Mr. Esteva said that there were 1,450 errors in the absentee ballots, and they all should be thrown out.<sup>23</sup> He said that because the 1,450 invalid absentee votes had been commingled with the valid absentee voters, nobody could tell which was which. Mr. Esteva argued that he should win the election because the votes on the voting machines were the only reliable votes cast, and he won the most votes on the voting machines. Mr. Boardman disagreed, and so did the trial court. The court examined all of the absentee ballots and found that while there were many irregularities, only 88 of the absentee ballots were illegal. Obviously, the trial court did not agree with Mr. Esteva about many of the 1,450 errors he claimed in the absentee ballots.

Mr. Esteva appealed. On appeal, among other things, the state district court of appeal viewed as illegal 429 ballots that were missing their return envelopes, which contained the absentee voters' affidavits required by state law. The envelopes had been either lost or destroyed by the canvassing boards in three Florida counties in the judicial district that was being contested. Mr. Esteva prevailed on his appeal.

Mr. Boardman then appealed to the Florida Supreme Court. The supreme court, in a wide-ranging opinion, considered the whole body of voting laws in the light of their goal of honoring "a full, fair and free expression of the voters' will." At 265. It is in that context that the supreme court considered Mr. Esteva's burden of proof with regard to those 429 ballots without envelopes and said,

As to the actual validity of the ballots whose return envelopes are missing, we first point out that as a general rule *election officials are presumed to perform their duties in a proper and lawful manner* in the absence of a sufficient showing to the contrary. . . and also there is a presumption that *returns certified by election officials are presumed to be correct. . . The burden is clearly on the contestor to establish that the ballots have been irregularly cast. . .* There is nothing in the record to indicate that the absentee ballots in question were not cast by qualified registered voters who were entitled to vote absentee, therefore, the presumption of the correctness of the election officials' returns stands.

At 268 (emphasis supplied).

As we will see when the *Boardman* case is discussed in detail in Chapter 3, this statement by the Florida Supreme Court meant that Mr. Esteva lost the lawsuit. Mr. Boardman won the election.

#### F. Summary: Written authority is necessary for election challenges.

- There is no common law basis for an election challenge.
  - However, courts will apply common law principles in an election challenge when fairness demands.

<sup>22</sup> Grounds for being able to vote by absentee ballot under Florida law included being in the military service, being absent from the county on election day, being physically unable to get to the polls and being unable to go to the polls on the particular election day because of a religious belief. *Boardman* at 264. See also the discussion of absentee ballots in Chapter I, Section C. Common law principles ensure fairness in election challenges: due diligence.

<sup>23</sup> The errors included applications for absentee ballots (1) that were not signed by the applicant, (2) whose return envelopes were not signed across the flap, (3) in which the official title of the subscribing witness was not indicated, (4) for which the names of the electors were not on record, (5) for which the reason for voting absentee was not specifically indicated on the return envelope, (6) in which the address of the attesting witness was omitted, (7) which had no post office cancellation stamp and (8) which had vague identification of witnesses.

- Procedures and deadlines in laws and regulations must be strictly followed in bringing a lawsuit to challenge election procedures.
  - A plaintiff will not be allowed to challenge an election if he or she does not follow the required procedures.
  - The failure to serve notice of an election challenge is fundamental because it does not allow the other candidates to protect their interests.
  - An election challenge beyond a statutory deadline may be allowed if the plaintiff could not have discovered the violation earlier even with the exercise of due diligence.
- A court does not have jurisdiction to hear a challenge to election irregularities if a statute governing a fundamental procedure for election contests has not been satisfied.
- The plaintiff who challenges an election must prove by a preponderance of the evidence that ballots have been irregularly cast and/or that some votes are otherwise illegitimate.
- Election officials are presumed to perform their duties in a proper and lawful manner in the absence of a sufficient showing to the contrary.
- Returns certified by election officials are presumed correct.

## CHAPTER 2

### Election Results Stand Unless a Violation Materially Affects the Outcome

Throughout this chapter two points will be made. In order to overturn the results of an election you must prove:

1. there were enough irregularities or illegal votes to *change the result* of the election, or
2. the irregularities or illegal votes were so widespread and flagrant as to make it *impossible to determine* how the election would have resulted if they had not occurred.

There are various ways to say this, and different lawyers and judges have phrased these propositions slightly differently.<sup>24</sup> But however the propositions are stated they are easier said than proven, as this chapter shows.

#### A. A successful challenge must prove that irregularities changed the result of the election or resulted from fraud.

The mandate that a successful challenge must prove that irregularities changed the result of the election or resulted from fraud is a long-standing legal tenet based on the principle that an election will not be invalidated by irregularities unless the irregularities *materially affected* the results of the election. *Andrews v. Blackman*, 59 So. 769 (La. 1912), where several major errors were committed by election officials nearly 100 years ago, is included in this chapter to demonstrate how deeply ingrained this principle is.

On September 3, 1912, a Democratic Party primary election was held for the position of district judge for the Thirteenth Judicial District of Louisiana. The election district for the judgeship covered two parishes (counties): Rapides Parish and Grant Parish. Both parishes had several voting precincts. Wilbur F. Blackman, the incumbent, was declared the winner over James Andrews by 307 votes, having gotten 1,609 votes to Mr. Andrews' 1,302 votes out of the 2,911 total votes cast. In other words, Mr. Blackman got 55% of the vote, and it was not a very close election.

Nevertheless, Mr. Andrews sued to have the election declared null and void or, in the alternative, to have himself declared the winner, because of a number of irregularities that occurred during and after the election.

- Some voters objected to using the official ballots, which were white, because they had detachable slips on which there was a number.<sup>25</sup> In Grant Parish, election officials in some of the polling places instructed the voters to vote on sample ballots which were yellow but had no numbers on them.
- The Democratic Party committee chairman did not obtain all of the returns (the tabulation of the votes in each precinct) from the precincts after the balloting was over as he was required to under state law, because some of the returns mistakenly had been put into the ballot boxes, which had been resealed at the precincts.

<sup>24</sup> For example, one person I know would set out these propositions as: (1) the contestant would have prevailed but for the irregularities or frauds, or (2) that the defects were so pervasive that the adjudicator cannot determine the will of the electorate.

<sup>25</sup> The court surmised that the voters believed that their ballot could be identified by tracing the number on the slip to the number on the ballot.

- The Democratic Party committee did not convene after the election as it was required to, and it was not until five days after the election that some non-committee people, who had proxies from the Democratic committee members, showed up to meet.
- When the Democratic committee (made up of the proxy people) met, some of the Grant Parish returns and all of the Rapides Parish returns were still missing, so the proxy committee members adjourned for another four days while the ballot boxes were obtained under court order and opened to retrieve the missing returns.
- When the ballot boxes were opened, it was discovered that the tally sheets in the ballot boxes were not signed and sworn by the precinct officials as required by state law.
- There were no voting booths at four precincts, making the secrecy of the ballot an issue: at two of the precincts, voters could go into a separate room to vote; at the third, there was an area screened off by a curtain; and in the fourth, there was an area screened off by a “suspended blanket.”

Mr. Blackman won the vote district-wide with or without the yellow ballots, which is probably why Mr. Andrews sought to have the election invalidated and did not seek to just have the yellow ballots thrown out. Moreover, after a recount was held, Mr. Andrews admitted that, except for the four precincts at which there were no voting booths, there was no tampering with the ballot boxes from the time they were sealed following the election, that no tally sheet was altered, and that the voting took place at the usual polling places for each precinct.

On these facts, the Louisiana Supreme Court found that,

The testimony of all the witnesses, whether for contestant or contestee (and there are quite a number), practically concurs to the effect that there was no fraud, no intimidation, no overlooking of voters who were preparing their ballots; that the votes were counted and entered on the tally sheets; that the ballots were replaced in the boxes, with the tally sheets and poll lists; that the boxes, having been sealed, were delivered to the returning officers, and by them delivered to the clerk.

On the whole, we are satisfied that the election was fairly conducted; that the result as promulgated represents the declared wishes of a majority (by some 300) of the qualified electors who participated therein; that no one who desired to vote, and was entitled so to do, was deprived of that privilege by reason of any action of the officers conducting the election; and that, *if all the errors shown to have been committed were corrected, and all the omissions supplied, the result would be the same*—the contestee would still be entitled to the nomination.

At 771-772 (emphasis supplied).<sup>26</sup>

On the law, the supreme court held “that it is the casting of the ballots, by the legally qualified electors, unimpeded by force or fraud, which determines the result...” The supreme court continued,

The officers charged with its conduct are merely agents, whose duty it is to facilitate the electors

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<sup>26</sup> Litigation over the election results is, of necessity, usually hastily prepared, and lawyers rarely have the time to prepare a well-organized, thorough record. For example, the Louisiana Supreme Court pointed out with regard to Verda, one of the precincts involved in this case, “We find no oral testimony in regard to Verda, though in view of the confused mass of papers of which the record is composed, and the short time allowed for this examination, it may have escaped our search.” At 771.

in the *free and fair expression of their will*, and where that has been accomplished it would be unreasonable to hold, in the absence of an express provision of law to that effect, that the interest of the community shall be sacrificed, the will of the electors set at naught, and the results, as to the candidates, defeated, because, in its accomplishment, or after its accomplishment, the agents under whose direction the election had been held, have failed to follow each and *every formal direction* prescribed for their guidance.

At 772 (emphasis supplied).

Mr. Andrews argued that Mr. Blackman's nomination should not count because of a new law that added to the procedures required for conducting elections an amendment that said, "any nomination. . . shall be illegal, and the Secretary of State is prohibited from placing on the official ballot the name of any person. . .not nominated in accordance with the provisions of this act." To this, the supreme court said,

It seems to us, however, that the provision thus quoted has no bearing upon the question whether a primary election shall be avoided [sic] and annulled for the nonobservance of directory provisions of the law, when such nonobservance *in no manner affects the fact that the electors entitled so to do have, in that manner, expressed their choice of a candidate.*

At 772 (emphasis supplied).<sup>27</sup> Then, the supreme court made a statement that sums up the underlying question of whether to invalidate an election because of irregularities:

It would, perhaps, be going to an extreme to say that, if no election is to be regarded as valid unless every person having any function to discharge in connection with it shall discharge such function according to the letter of the law, there will never be a valid election, unless it be confined to a very few well-informed persons.

At 772.

The extent to which irregularities must be shown when attacking election results makes the burden of proof very difficult because of the presumption for sustaining election results. The presumption in favor of sustaining a contested election can be overcome most readily by proving that the irregularities that occurred *changed the result of the election.*

When Carl Knight lost the election for sheriff in Dorchester County, South Carolina, he filed a lawsuit against the State Board of Canvassers saying that absentee ballots that did not meet the state's technical requirements were counted anyway and that the count of the absentee ballots was interrupted despite the fact that, under state law, it should have been continuous.

The South Carolina Supreme Court said,

[T]his Court will employ every reasonable presumption in favor of sustaining a contested election and. . .mere technical irregularities or illegalities are insufficient to set aside an election unless the errors actually appear to have affected the result of the election.

*Knight v. State Board of Canvassers*, 374 S.E.2d 685, 686 (S.C. 1988).

<sup>27</sup> As was noted earlier, the distinction between mandatory and directory provisions is crucial to the resolution of election disputes and will be examined in depth in the next chapter.

Mr. Knight conceded that under this rule he would lose based on the facts in the record. Unfortunately for him, he was correct.<sup>28</sup>

The South Carolina Supreme Court essentially repeated this statement with a bit more emphasis 11 years later when, in *George v. Municipal Election Commission of the City of Charleston*, 516 S.E.2d 206, 208 (S.C. 1999), it said,

The court will employ every reasonable presumption to sustain a contested election, and will not set aside an election due to mere irregularities or illegalities *unless the result is changed or rendered doubtful*.

This Court, like many others, recognizes that perfect compliance in every instance is unlikely, and the Court is loathe to nullify an election based on minor violations of technical requirements.

(emphasis supplied).

That case involved a challenge to the results of a referendum on whether the City of Charleston should change from partisan elections to nonpartisan elections. The challenge said the election should be nullified because there was no ballot secrecy when people voted: there were no voting booths, and the ballots could not be folded before they were put in the ballot box. *George* will be discussed in detail in the next chapter. It will be surprising to see how the South Carolina Supreme Court decided this case given the premise it began with, which is stated above, and the further statements it made along this same line.

The same rule—that irregularities will not cause an election to be set aside unless they changed the result of the election—was followed by the West Virginia Supreme Court of Appeals in *Underwood v. County Commission of Kanawha County*, 349 S.E.2d 443 (W.Va. 1986). The court refused to order a recount in an election even though the election board did not follow the requirements for verifying the ballot count, and it appeared that someone tampered with the vote tabulating equipment.

Mr. Underwood and Mr. Price brought suit asking that the votes cast during the May 13, 1986 primary election in Kanawha County, West Virginia, be canvassed (reviewed) according to the requirements of state law. They claimed, correctly, that after the close of the polls the county commission, sitting as the board of canvassers, failed to meet two state law requirements that were enacted to assure that the vote was honest. First, the board of canvassers did not compare the number of ballots that were counted with the number of poll tickets (issued for each voter and retained in the precincts). This comparison was intended to show whether there were more or fewer ballots cast than were handed out to voters, *i.e.*, whether ballots had illegally been put in (stuffed) or taken out of the ballot box. Second, there was not a quorum of the canvassing board continuously present in the courthouse during a hand count of the ballots.<sup>29</sup>

Mr. Underwood had been a candidate in the election and had won. Mr. Price also had been a candidate in the election but had lost by a large margin, and he conceded to the court the relief they requested (making the board follow the correct procedures) would not change the outcome of the election. Under these circumstances, the supreme court of appeals said that,

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<sup>28</sup> The court also noted, “We find ample evidence in the record which supports the State Board’s conclusion that the absentee ballots which were set aside on election night had been secured and that no tampering had occurred.” *Knight* at 686.

<sup>29</sup> As a check of the tabulating equipment, the ballots in 5 percent of the precincts were to be randomly selected and counted by hand and then run through the tabulating equipment. If there was greater than a 1 percent discrepancy between those two counts, then all of the ballots were to be counted by hand.

because the requested relief *would not change the outcome* of either of the appellants' races, we decline to issue the writ. However, the requirements of a poll ticket audit and the presence of a quorum of the commission during the hand count shall be strictly applied in the future.

At 446 (emphasis supplied).<sup>30</sup>

But there was an indication that someone had tampered with the vote counting equipment. The ballots were cardboard cards. The votes marked on the cards were tabulated by a computer. The computer was prepared for the vote count by the use of an application deck. There was a public test of the application deck for the Kanawha County election. It had no errors. A duplicate copy of the deck was sent to the state election commission. The deck was tested several times again, both before and after the vote count and no errors were found. But errors in the application deck were found before the votes were canvassed. This meant that the application deck was determined to be errorless in seven separate tests before the errors were identified and brought to the attention of the board of canvassers. The plaintiffs claimed that this situation placed the integrity of the election in question and "raises the possibility that the deck had been tampered with after it was certified as errorless by the commission."<sup>31</sup> As to this irregularity, the supreme court said,

The integrity of the mechanism for tabulating the results of public elections is unquestionably a matter of the utmost public concern. We therefore order that the program and application decks placed with the state election commission. . . . be brought from the office of the state election commission for purposes of analysis and comparison with the decks employed in the actual count.

At 447. Then the case was remanded for further proceedings.

The West Virginia Supreme Court of Appeals' decision made it clear that the errors in the application deck did not cause any change in the outcome of the election. But there is no indication whether that court would have decided that any tampering with the application deck, if proven, sufficiently tainted the integrity of the election to have the results recounted. We can presume, however, based on the cases discussed in Chapters 4 and 5, that the court would have left the election results as they were because the tampering would not have changed the results of the election. We also can conclude that the court would have made a strong recommendation that a criminal investigation and prosecution be pursued under state law against those who tampered with the equipment.

Dan Deffebach was another plaintiff who believed that the facts in the record of his lawsuit showed that sufficient irregularities occurred to void the election. A \$10.1 million bond issue had passed by 14 votes out of 1,732 total votes in a 1981 bond election in the Chapel Hill Independent School District, Texas. Mr. Deffebach said that there was no fraud by election officials or voters, but he challenged the length of the absentee voting period, the fact that six people voted on "homemade" paper absentee ballots, and the fact that 425 voters who did not present their voter registration certificate at the polls also did not sign the required affidavit before they were allowed to vote.

The trial court found that the absentee voting period was long enough under the statute, that the homemade ballots were acceptable because they set out the propositions and gave voters an opportunity to

<sup>30</sup> The supreme court found that those statutory requirements were mandatory, not directory as the plaintiffs had suggested, because they used the word "shall." We will see in the next chapter that most often the failure to perform a mandatory function can cause an election to be voided. This consequence leads many courts to define state statutes as directory when the irregularity is challenged after it is capable of being corrected, in order to avoid voiding an election. Here the court simply concluded that the mandatory nature of the provision did not require such relief because it would not have made any difference in the results of the election.

<sup>31</sup> The errors in the application deck were corrected, and the votes in the affected races were tabulated again.

vote for or against the bond issue and that the 425 voters should have been required to make an affidavit before they voted, but that the requirement for the affidavit was directory and not mandatory.<sup>32</sup> Under these circumstances, the Texas Court of Appeals concluded,

Appellants have the burden of establishing that, because of the irregularities shown, *the true result of the election was changed*. . . We have considered each complaint presented by the appellants in their brief and conclude that they have failed to prove by a preponderance of the evidence: (1) that there were any illegal votes *sufficient to change the result* of said election; and (2) that a determination of the *true will of the majority* of the qualified voters participating in said election is impossible.

*Deffebach v. Chapel Hill Independent School District*, 650 S.W.2d 510, 513 (Tex. App. Tyler 1983) (emphasis supplied).

Mr. Deffebach lost his challenge. But note that the Texas court's statement of the rule has two prongs. The first prong says that an election challenge will not succeed unless there are enough illegal votes to change the result of the election. However, the second prong is broader and says that an election challenge can succeed if the facts show that the will of the voters cannot be determined.

#### **B. Proof that irregularities have altered the will of the voters usually will win a lawsuit challenging an election.**

The Texas court's statement of the two-part rule in *Deffebach* is similar to other courts' statements of this basic principle in election challenges. But it is difficult to prove that the will of the voters has been altered without proving how the particular irregularities changed the result of the election. Two Louisiana cases illustrate this point. First, we will look at *Valence v. Rosiere*, 675 So.2d 1138 (La. Ct. App. 1996), a case that was discussed in Chapter I. Andy Valence, the incumbent mayor of Grand Isle, Louisiana, lost his bid for reelection to Robert Rosiere by 17 votes. Mr. Valence filed an election challenge saying that there were at least 20 illegal absentee ballots cast at the election.

The trial court granted Mr. Rosiere's motion to dismiss Mr. Valence's lawsuit because he filed his petition after the deadline set by the statute, but the court of appeal applied the common law principle of due diligence to allow Mr. Valence's case to proceed. It is important to note that this was a case where the irregularities that were alleged would have made at least 19 of the 20 challenged ballots *invalid*. The irregularities were not technical matters, such as the lack of affidavits in the *Deffebach* case. Moreover, Mr. Valence had specific evidence to show that the facts he alleged were true.

The appellate court began by reciting the basic rule of how to look at the facts when a motion to dismiss is before the court: "all well pleaded allegations of fact are accepted as true and must be construed most favorably from the plaintiff's standpoint to afford him an opportunity to present his evidence at trial." At 1139. Then the appellate court set out the standard for deciding how facts about fraudulent votes would affect the results of the election.

General charges of fraud and irregularities are not sufficient to state a cause of action. . . However, "if the court finds the proven frauds and irregularities are of such a serious nature as to *deprive the voters of the free expression of their will*, it will decree the nullity of the entire election—even though the contestant might not be able to prove that he would have been [elected] but for such fraud and irregularities." . . . Generally, however, the allegations of the petition must show a sufficient number of contested votes to *change the results of the election*. . .

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<sup>32</sup> Chapter 3 has an in-depth discussion of the distinction between mandatory and directory election provisions.

At 1139 (emphasis supplied). This is the same standard as that discussed earlier in this chapter.

Then the appellate court looked at the direct proof Mr. Valence said he was prepared to offer had his lawsuit not been dismissed:

- Seven voters filled out forms showing that they did not live in the City of Grand Isle,
- One request for an absentee ballot was illegally witnessed by Mr. Rosiere, and
- 12 voters' signatures were forged.

The appellate court held that these allegations about 20 ballots, if true, “are sufficient to state a cause of action requiring a trial on the merits concerning the allegations of forgery of ballots, nonresident voting... and illegal assistance of voters by the defendant, Rosiere.” At 1141. The court then remanded the case to the trial court to conduct further hearings.

What if there were an election with widespread irregularities, as was true in *Deffebach*, but the irregularities directly affected the ballots, as was true in *Valence*?<sup>33</sup> What level of proof would a plaintiff need to void an election? This question caused serious disagreement among the justices of the Supreme Court of Louisiana in *Moreau v. Tonry*, 339 So.2d 3 (La. 1976), *appeal dismissed*, 430 U.S. 925 (1977).

Nearly 100,000 votes were cast during the 1976 Democratic Party primary election for the United States House of Representatives. The defendant, Richard Tonry, won the nomination. His opponent, James Moreau, brought suit to void the election.<sup>34</sup> The trial court found that there were 43 forged signatures on the polling place sign-in books and that there were 315 more votes on the voting machines than there were signatures on the polling place sign-in books. A Louisiana statute said that “an election may be upset only if the one contesting the election can show that ‘but for irregularities or fraud he would have been nominated...’” At 4 (emphasis supplied). The trial court refused to annul the election because, among other things, it found that the discrepancies between the number of machine votes and the number of polling place voters were minimal (315 of 100,000 is three tenths of 1%). Mr. Moreau appealed.

The court of appeal reversed the decision of the trial court, apparently agreeing with Mr. Moreau that, because the number of votes involved in the irregularities was greater than the margin of Mr. Tonry's victory, the result of the election could not be determined. In reversing the trial court, the court of appeal annulled the election and left the nominee to be named by a Democratic Party committee. Mr. Tonry appealed.

The Louisiana Supreme Court reversed the decision of the court of appeal. It made special note of the court of appeal's finding that “no inference can be made that these illegal votes were cast for Tonry.” At 4. It also noted the state law required a candidate to prove that “but for” the irregularities he or she would have won the election. Since Mr. Moreau could not prove that the illegal votes had been cast for Mr. Tonry, Mr. Moreau could not prove that “but for” the illegal votes he would have won the election. But the supreme court added that there was an alternative proof that a candidate could make in order to void an election:

[I]f the court finds the proven frauds and irregularities are of such a serious nature that the voters have been deprived of the free expression of their will, the election will be nullified.

<sup>33</sup> Remember that in *Deffebach* 425 voters who did not present their voter registration certificates at the polls also did not sign a required affidavit before they voted. Therefore, the irregularity affected a polling place procedure, but did not constitute proof that the voters were not eligible to vote, or that the ballots they cast were tainted.

<sup>34</sup> The Louisiana Supreme Court's decision does not specify Tonry's margin of victory over Moreau, nor does it give other facts about the election that usually are found in cases dealing with election disputes.

“...For this Court to render such a drastic order, there must be a clear showing that a course of fraudulent conduct was employed which effectually prevented the electors from expressing their will.” *Lewis v. Democratic Executive Committee*, 232 La. 732, 95 So.2d 292 (1957).

At 4. Then to confuse matters further, this alternative was immediately undermined by the supreme court, saying,

No case has been called to our attention (and we know of none) where an election has been upset because of serious and pervasive irregularities when the evidence falls short of proving that “but for” the irregularities, the one contesting the election would have won.

At 4. In the end, despite its acknowledgement of this standard, the supreme court sided with Mr. Tonry and allowed the election results to stand.

Is this the same standard that was used 20 years later in the Louisiana case of *Valance v. Rosiere*? There, the court said,

...“if the court finds the proven frauds and irregularities are of such a serious nature as to deprive the voters of the free expression of their will, it will decree the nullity of the entire election—even though the contestant might not be able to prove that he would have been [elected] but for such fraud and irregularities.”...Generally, however, the allegations of the petition must show a sufficient number of contested votes to change the results of the election...

At 1139. It sounds very similar. The facts are similar, too. In fact, the *Lewis* case cited by the court in the above quotation from *Moreau* also was cited by the court in *Valance* (at 1139). But the *Valance* court adhered to the line of cases that followed *Lewis*, while the *Moreau* court did not. The supreme court in *Moreau* was well aware of the line of cases that followed *Lewis*. One of the two dissents in *Moreau* said,

The applicable rule, reiterated by this Court in several decisions, is as follows:

“[I]f the Court finds the proven frauds and irregularities are of such a serious nature as to deprive the voters of the free expression of their will, it will decree that nullity of the entire election...” See *Garrison v. Connick*, La., 291 So.2d 778 (1974); *Dowling v. Orleans Parish Democratic Committee*, 235 La. 62, 102 So.2d 755 (1958); *Lewis v. Democratic Executive Committee*, 232 La. 732, 95 So.2d 292 (1957).

\* \* \*

These frauds and irregularities were both systematic and flagrant. They infected far more votes than the vote margin between the two competing candidates. This means that the voters have been deprived of the free expression of their will, because the outcome of the election cannot be determined.

At 5. All three of the cases cited by the dissent in *Moreau*—*Garrison*, *Dowling* and *Lewis*—are cited by the Supreme Court of Louisiana in reaching its decision in *Valance*.

In *Valance*, the Supreme Court of Louisiana also relied on a different statute, LSA-R.S. 18:1432(A), which

said that an election could be declared void and a new election called if it was impossible to determine the result of the election or if the result would have changed if the irregularities had not occurred. While this statute does not have the words “but for” in it, the reference to the changed election result is of the same import. Taken as a whole, this statute is similar to the standard announced, but not followed, by the court in *Moreau* where the majority decision gave great weight to the requirement that a complainant demonstrate that the irregularities cited would have changed the election result, and only lip service to the other prong of the formula: that the irregularities deprived voters of the free expression of their will.<sup>35</sup>

Thus, the *Moreau* decision is out of the mainstream of Louisiana election law. The court in *Moreau* diverges from the cases decided both before and after *Moreau* in its formulation of the standards by which to measure election irregularities. One explanation for this divergence is that the decision in *Moreau* flows from the supreme court’s characterization of the *remedy* adopted by the court of appeal in *Moreau*:

The solution adopted by the Court of Appeal is innovative, and not necessarily productive of fair elections. The candidates are removed from the reach of the lawful election machinery, even though neither has been found responsible for fraud and irregularity, and neither can be held the winner “but for” the irregular votes.

The irregularities found by the Court of Appeal are not so pervasive that the election must be nullified.

At 4-5.

Would the supreme court have decided the case differently if the court of appeal had simply ordered that a new election be held in the district instead of leaving the choice of the nominee up to the Democratic Committee? Or if it had ordered new balloting only in the precincts where the forged signatures and discrepant vote counts occurred? Perhaps, but it appears more likely that the *Moreau* decision is explained by a fairly common approach that courts take in election dispute cases: the court adopted a *standard* that allowed it to avoid overturning an election where it was not persuaded that the *facts* of the case were sufficiently compelling to provide grounds for overturning the results. This approach will be notable in the cases we will examine where, in the absence of fraud, courts routinely define election procedures as directory rather than mandatory.

This, then, is why *Moreau* is worth studying. It is not just that sometimes dissenting opinions are correct, as they seem to be in *Moreau*. The lesson of *Moreau*—especially when viewed in light of the decisions in the *Deffebach* and *Valence* cases—is that if you file a lawsuit to challenge an election, even if there is a clear line of legal authority in your state that allows elections to be overturned on facts similar to yours, your battle to show that the will of the electorate has been thwarted will be a difficult one (and your chance of winning slim) if your proof does not show that irregularities occurred that changed the result of the election. In other words, without a showing that:

- irregularities changed the result of an election,
- irregularities made the outcome of the election impossible to determine, or
- fraud took place,

a court will not be persuaded to overturn the result of the election based on the irregularities that occurred.

What, then, should we make of a claim that a new election should be ordered because the failure of elec-

<sup>35</sup> The very restrictive “but for” requirement is no longer a part of Louisiana law. See *Nugent v. Phelps*, 816 So.2d 349, 357 (La. Ct. App. 2002): “Although a party contesting an election is no longer limited to the ‘but for’ standard, we note that a party contesting an election still must show at least that because of fraud or irregularities, the outcome of the election is impossible to determine.”

tion officials to prevent long lines at the polling place and to provide close-in parking constituted irregularities that prevented voters from casting their ballots? This was the question faced by the Iowa Supreme Court in *In re Election Contest as to Watertown Special Referendum Election of October 26, 1999*, 628 N.W.2d 336 (2001), a dispute about a referendum election on whether to rezone an area in Watertown, Iowa, from residential to commercial, and whether to vacate a portion of a city street, in order to allow the Prairie Lakes Health Care System to expand its main campus.

There was one polling place used for the election in the city, which was in accordance with state law. The rezoning proposition passed by 34 votes out of 3,388, a margin of 1%, and the street closing passed by 60 votes out of 3,418, a margin of 2%. The local residents filed a lawsuit. They got affidavits from 104 people saying that they did not vote because the lines at the city's one polling place were too long. There was evidence that people had to wait between 45 and 90 minutes to vote. Some people went to the polling place a few times during the day, only to find that the wait was the same length no matter when they showed up. The polls closed at 7 p.m. but it took until 8:30 p.m. for the 400 people in line at that time to vote. The parking problem seems less dramatic: some people had to park a block and a half from the polling place.<sup>36</sup>

The contestants in *Watertown* said that the special election was not a free and fair expression of the voters because of the way it was conducted. The Iowa Supreme Court, however, disagreed in a very brief opinion saying,

The Court fails to see how long lines or inadequate parking equate to voting irregularities to the level of not being a "free and fair expression of the people." Mere inconvenience or delay in voting is not enough to overturn an election. Without proof of a violation of state or local election law, there is no showing that the trial court's findings are clearly erroneous.

It is also true that before we conduct a "but for" analysis to determine whether the election outcome may have been different had those "disinfranchised" [sic] been able to vote, Contestants [sic] must show, as a prerequisite, that voting irregularities exist...While Contestants cited numerous alleged voting irregularities in their complaint, they failed to prove such irregularities at trial.

At 339 (internal citations omitted).

The supreme court left open the possibility that circumstances could be proven that would constitute irregularities sufficient to deprive the free and fair expression of the voter's will, but it was clear that the contestants in *Watertown* did not prove them.<sup>37</sup>

The Iowa Supreme Court mentioned that a "but for" analysis would have been used in *Watertown* to measure whether the irregularities complained of changed the outcome of the election and therefore supported a decision to order that a new election be held. But we learned earlier from the Supreme Court of Louisiana's decision in *Valance* that even if the words "but for" were not used, the challenger still had to prove that the result of the election had been changed by the irregularities complained of in order for a new election to be ordered. The Connecticut Supreme Court came to the same conclusion in *Bortner v. Town of Woodbridge*, 736 A.2d 104, 113 (Conn. 1999) saying,

We conclude that [the statute] does not require a challenger, in order to secure a judicial order for a

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<sup>36</sup> There appears to have been no evidence introduced as to any problems that the long lines and parking distance caused persons with disabilities.

<sup>37</sup> The supreme court specially noted that the contestants did not prove how many potential voters left the lines without voting or how they would have voted, they did not offer evidence that anyone was turned away, and they did not make a claim that they were denied equal protection of the law or due process under the law. The supreme court also made a point of describing the manner in which dissuading people from voting might constitute voting irregularities, but stressed that no evidence of irregularities was presented or argued.

new election, to establish that, but for the irregularities that he has established as a factual matter, he would have prevailed in the election. We conclude instead that, in order for a court to overturn the results of an election and order a new election. . .the court must be persuaded that: (1) there were substantial violations of the requirements of the statute. . .and (2) as a result of those violations, the reliability of the result of the election is seriously in doubt.

Steven Bortner tried to meet this burden of proof. He had come in fifth in a race for four board of education seats on May 3, 1999. He was the only write-in candidate (the names of the other four candidates were printed on the ballot). Mr. Bortner got 56 fewer votes than the fourth-place finisher, and claimed that he would have gotten many more votes, enough, he said, so that there was “a substantial likelihood that the result of the election would have been different,” if the mechanism for people to write in votes had worked properly and allowed people to write in Mr. Bortner’s name. There were paper rolls inside the voting machines on which voters were to write the names of candidates. The paper roll was accessible through a little window on the front of the voting machines that voters had to open; they then slid back a plastic cover before being able to write a candidate’s name. The paper advanced for each new write-in vote.

Mr. Bortner focused on four voting machines, claiming that one had run out of paper, another had had a paper jam, in another the write-in mechanism had malfunctioned, and the fourth had not contained any paper at all. He also said that problems with these particular machines were brought to the attention of polling place officials, but that they did not inspect the machines throughout the day to be sure that the machines were problem-free. The trial court agreed with Mr. Bortner and ordered a new election to be conducted.

On appeal, the Connecticut Supreme Court spent a great deal of time discussing the reasons underlying the need to prove that claimed irregularities must change the result of the election in order to require a new election be held. For example, the supreme court said that

[A]n election is the paradigm of “the democratic process designed to ascertain and implement the will of the people.” . . . “[T]he purpose of the voting process is to ascertain the intent of the voters.” . . . [W]hen an individual ballot is questioned, “no voter is to be disfranchised on a doubtful construction, and statutes tending to limit the exercise of the ballot should be liberally construed in his [or her] favor.”

At III-II2 (internal citations omitted).

Much more discussion to the same effect led up to an examination of the facts that showed that some of the defects found by the trial court had occurred, some had not, and the election officials had paid attention to the malfunctions that occurred. When one machine jammed, it was taken out of service; there was no evidence that it had jammed earlier than that. Another machine was taken out of service when it was reported that it had malfunctioned, but by that time it had properly recorded 115 write-in votes for Mr. Bortner. Another machine was taken out of service less than an hour after the polls opened, having malfunctioned so that two write-in votes were lost. The fourth machine was checked by election officials at least three times during the afternoon and the write-in mechanism was found to be working properly each time.

On balance, the supreme court concluded,

[T]he undisputed evidence regarding all of the machines in question was that they registered total numbers of write-in votes that were consistent with the numbers registered on the machines that were never questioned. There was no basis, therefore, for an inference that these particular malfunctions were a surrogate for other, unidentified malfunctions of the process of write-in votes for the plaintiff, either on the machines in question or on the other machines in use during the election. . . [W]e conclude that [the evidence] falls short of establishing substantial mistakes in the count of the votes in the election.

We also conclude that even if we were to regard these mistakes in the count as substantial, the evidence falls short of establishing that those mistakes rendered the reliability of the result of the election, as reported by the election officials, seriously in doubt.

At 123.

One year later, in *In re Gray-Sadler*, 753 A.2d 1101 (N.J. 2000), the same kind of machines were involved, with a very different result. Kati Gray-Sadler challenged the refusal to count 64 write-in ballots when she lost the November 2, 1999 election for Mayor of Chesilhurst Borough, New Jersey, by 20 votes, 172 to 152. Two other write-in candidates, John Sturgis and Edward Geiger, who ran for borough council lost the election by 31 and 30 votes, respectively. In this election, the write-in paper advance mechanism worked well. But 64 of the voters who tried to write in Ms. Gray-Sadler's name wrote the name on the wrong place on the paper. So did at least 19 people who tried to write in John Sturgis's name, and 25 people who tried to write in Edward Geiger's name.

The paper for writing a candidate's name had specific spaces for each office on the ballot. The voters were supposed to write a candidate's name in the space for the office for which the candidate was running. Of the 64 write-in votes that were not counted, 49 were written in by voters in blank spaces that did not specify any office: 15 of the votes were for Ms. Gray-Sadler, 19 were for Mr. Sturgis and 15 were for Mr. Geiger. Another 15 votes were written in spaces for offices other than the ones for which the write-in candidates were running: two votes for Ms. Gray-Sadler were written in spaces for candidates for the general assembly, and six votes for her were written in spaces for the borough council.<sup>38</sup> There were written instructions on how to operate the write-in mechanism posted inside of the voting machines, but there were no mechanical models or demonstration machines available for the voters as was allowed by state law.

The courts in this case focused on the instructions for writing in candidates' names. The trial court decided that the instructions were so confusing that, in the absence of a demonstration machine, the confusing instructions constituted irregularities that deprived voters of the right to cast their ballots for the candidates of their choice. The court voided the election results and ordered a special election to be held. The appellate court reversed the trial court. Ms. Gray-Sadler, Mr. Sturgis and Mr. Geiger appealed to the New Jersey Supreme Court.

The New Jersey Supreme Court said,

A citizen's constitutional right to vote for the candidate of his or her choice necessarily includes the corollary right to have that vote counted at full value without dilution or discount. The principle also encompasses "the right of all qualified electors to vote for [a write-in candidate] by such means." To preserve those rights, our state election laws are designed to deter fraud, safeguard the secrecy of the ballot, and prevent disenfranchisement of qualified voters. In furtherance of those goals, we have held that it is our duty to construe election laws liberally.

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<sup>38</sup> The New Jersey Supreme Court's opinion does not say how many votes Mr. Sturgis and Mr. Geiger got, or who got the other seven votes that were written in spaces for the wrong offices.

At II05 (internal citations omitted).<sup>39</sup>

The first key to the supreme court's decision in *Gray-Sadler* was its decision that a voter's difficulty in casting a ballot could be tantamount to a denial of access to the polls, saying that situations where "qualified voters are denied access to the polls" are included under a state law that allows voters to challenge an election when "legal votes [have been] rejected at the polls sufficient to change the result."

Voters need not be physically barred from voting to have their votes rejected, but may instead show that, through no fault of their own, they were prohibited from voting for a specific candidate by some irregularity in the voting procedures. The essential question is whether voters were denied the opportunity to vote for a candidate of their choice.

...In cases involving invalidated write-in votes, our courts have distinguished errors due to extrinsic problems from errors caused by a voter's own neglect...[R]igid application of technical rules should not prevent otherwise valid write-in votes from being counted.

At II06 (internal citations omitted).

The supreme court then reviewed a number of facts that showed that the voters knew exactly what they were doing when they tried to vote for the three write-in candidates: it was a small town where the write-in candidates had campaigned vigorously together and sent mailings to all registered voters, some voters brought to the polls stickers with the candidates' names on them and tried to put them in the proper place on the ballot, and many of the voided votes were cast in groups of three for the three write-in candidates.

The supreme court spent an equal amount of time describing how the instructions were difficult to understand, and that state law specified steps that election officials could have taken to help voters understand how to cast write-in ballots—instructing voters on the use of the voting machines, providing a mechanical model, calling voters' attention to a diagram on the face of the machines, providing information outside of the voting booths—but that the officials did not take those steps. In comparison, the instructions for voting for candidates whose names were printed on the ballot were clear, legible and illustrated by two separate diagrams; no mention of how to cast a write-in ballot was made on those instructions. The instructions on the sample ballots were even more confusing because they did not say that the machines had windows for casting write-in ballots.

Under these circumstances, the supreme court said,

Voters seeing conflicting and incomplete instructions for the first time on entering the booths were understandably confused, and their confusion is attributable to defects outside of their control.

At II07.

This case is readily distinguishable from other cases in which voters' failure to comply with specific procedural instructions invalidated their votes. In those other cases, voters were clearly and

<sup>39</sup> Other cases have more closely considered the question of whether there is a right to cast a write-in ballot in elections, and if so, the circumstances under which that right can be exercised. That discussion is beyond the scope of this book, but you should be aware that there is serious disagreement with the New Jersey Supreme Court's view that there is an unbridled right to cast a write-in ballot. See, e.g., *Burdick v. Takushi*, 504 U.S. 428 (1992).

unambiguously instructed to punch or mark the ballot in a designated box next to the candidate's name and warned that if the marking was not made, the ballot would not be counted. . . More analogous are cases that discuss the provision of defective voting machines. . . In the end, qualified voters have been disenfranchised.

At II08-II09 (internal citation omitted).

Having found that the confusing instructions constituted irregularities that deprived voters wanting to cast write-in ballots of their right to vote, the supreme court focused on "whether the 'rejected' votes were sufficient to change the result."

Simple deviance from statutory election procedures, absent fraud or malconduct, will not vitiate an election unless those contesting it can show that as a result of irregularities "the free expression of the popular will in all human likelihood has been thwarted." . . . Only when those irregularities "are such that the court cannot with reasonable certainty determine who received the majority of the legal vote," can a court set aside an election. . .

At II09.

In viewing the evidence in the case, the supreme court reached another key juncture in its reasoning when it said, "The standard we apply is one of reasonable certainty as opposed to absolute certitude." At III0. The evidence showed that there were enough write-in votes for Ms. Gray-Sadler to make her the winner of the mayoral election if they were counted. The irregularities that affected those ballots, therefore, changed the result of the election. But the evidence did not show that there were enough rejected write-in votes to have made Mr. Sturgis and Mr. Geiger winners. Under the analysis applied by the New Jersey Supreme Court, that amount of proof was not required.

The supreme court noted that 83 of the voters did not cast a ballot for mayor, and 215 voters did not cast a ballot for the council seats.

Although some of those voters may have simply decided not to vote for those offices, there is a strong possibility that enough of those "missing votes" were not cast because of the confusing. . . instructions.

At III0. This conclusion was bolstered by the testimony: one witness said that she did not vote because the instructions were too confusing. Other witnesses testified about how difficult it was to cast write-in ballots, although they were able to do so. Another witness left the voting machine booth to ask an election official to explain the write-in procedure, as a warning on the instructions directed, and then lost her right to vote when the official went into the booth and pulled the machine's lever to enter the voter's vote before she was finished voting.<sup>40</sup> In sum, the supreme court said,

Because Sturgis and Geiger would have lost by about only ten votes if the voided write-in votes were counted, only a small number of the "missing votes" would have changed the election. Accordingly, we conclude that Sturgis and Geiger also meet the statutory requirement for successfully contesting the results of the council election.

At III0.

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<sup>40</sup> A state law prohibited voters from reentering a voting booth once the voter left and said that after a voter left the booth his or her vote was cast and could not be changed.

The supreme court then ordered a special election to be held in September 2000 in Chesilhurst for the offices of mayor and borough council.

The cases in this section of the book illustrate how courts use three basic concepts of election dispute resolution—the will of the voter, ballot irregularities and altering the result of the election—to deal with the facts in the cases before the courts. Although these concepts are applied from case to case and from state to state, the outcomes of the cases are not wholly predictable. Sometimes, as in *Gray-Sadler*, a court will make a surprising set of inferences to reach a result even though the concepts would seem to require a different conclusion.

Later on, in Chapter 5, we ask whether a court that stretches the law to remedy proven irregularities could make a decision based on subjective impressions. This is always a danger when a court uses its equity powers to right a wrong, but the legal system has built-in procedures for dealing with overreaching. When a lower court oversteps the bounds of its equity power, the corrective action comes in the appeal process. When a state supreme court seems to overstep those bounds, the corrective action comes in later decisions that overrule the precedent or restrict it to the particular facts of that case.

Peter Murphy was the victim of the latter approach in *In re Ocean County Com'r of Registration for a Recheck of the Voting Machines for the May 11, 2004, Municipal Elections*, 879 A.2d 1174 (N.J. 2005), a New Jersey case that came after *Gray-Sadler* and also involved a write-in ballot that was not counted. *Ocean County* limits *Gray-Sadler* to its facts while applying the same principle—that irregularities must change the result of the election before an election will be nullified.

At a May 11, 2004 election in the Township of Long Beach, New Jersey, there were six candidates on the ballot for three city council seats. Two of the candidates won outright, but there was a tie for the third seat between Ralph Bayard and Peter Murphy. That is, there was a tie in the votes cast by voters who marked the printed ballot. However,

- there were three absentee ballots that had been postmarked before the May 11 election, but were rejected because they were not received until May 12, the day after the election; the absentee ballots had not been opened and it was not known for whom they were voted;
- there were five write-in votes, four of which were cast for people whose names were not on the ballot, and one of which was cast for Mr. Murphy; the vote for Mr. Murphy was disallowed because his name was printed on the machine ballot;
- there were seven provisional ballots (ballots that are cast by people whose qualifications were challenged at the polls); one was disallowed because the voter had moved out of town, and the remaining six were counted.

When all of the ballots were tallied, Mr. Bayard won by one vote and was sworn into office. Mr. Murphy challenged all of the decisions about these ballots, and lost. On appeal, the New Jersey Supreme Court began by saying,

A challenger has the burden of proving that one or more legal votes were rejected, and that the number of improperly rejected votes was sufficient to change the result of the election. The challenger is not required to prove that the rejected votes were cast for him or her.

At 1178.

Then the supreme court rejected Mr. Murphy's claim that the absentee ballots should have been accepted even though they were received after the deadline required by New Jersey law.

...A clear purpose of strict adherence to the statutory cut-off for counting absentee ballots, as with other rules for accepting absentee ballots, is to deter fraud and maintain "the integrity of the elective process."

...The statute is clear on its face; its rationale is plain, and the means adopted to secure its purpose as [sic] reasonable. The fact that other methods, deadlines, or rules arguably could have been enacted to address the same concerns or to accomplish the same purpose is not a proper consideration for this court.

At 1179-1180 (internal citations omitted).

Another of Mr. Murphy's arguments, that the late absentee ballots might actually have been delivered to the board of elections before the polls closed on May 11 and just sat on someone's desk, was dismissed as unsupported speculation.

More serious consideration was given to Mr. Murphy's argument that the write-in ballot cast for him should have been counted for him and not rejected. A state statute said that no write-in ballot "shall be voted for any person for any office whose name appears on the machine as a nominated candidate for that office. . . .any [write-in] ballot so voted shall not be counted." At 1180. But Mr. Murphy argued that there was not a sufficient warning to voters on the ballot instructions that their vote would be rejected if they wrote in the name of a candidate whose name was on the ballot. This argument sounds very much like the arguments that won the day in *Gray-Sadler*, which had been decided by the New Jersey Supreme Court five years earlier, but it did not help Mr. Murphy.

The supreme court first quoted the language set out above from *Gray-Sadler* that recognized that there was a constitutional right to vote a write-in ballot, and that the state election laws were designed to prevent disenfranchisement of qualified voters. Then the supreme court distinguished the situation of the write-in candidates in *Gray-Sadler* from Mr. Murphy's position as a candidate on the ballot.

The first significant difference is that the three challengers in [*Gray-Sadler*] were write-in candidates whose names did not appear on the printed ballot, and who had campaigned vigorously against the incumbents for mayor and for two council positions.

...Because the write-in candidates' names were not on the ballot in that case, there was no risk that counting a write-in vote would result in double-counting any one voter's vote. And that is the precise risk implicitly addressed by [the state statute involved] and explicitly addressed by [a state law] which provides that the statutory requirements for "[e]very electronic voting system, consisting of a voting device in combination with automatic tabulating equipment, . . . shall [be designed to] . . .[p]revent the voter from voting for the same person more than once for the same office."

At 1182.

Next the supreme court distinguished the plight of the voters in *Gray-Sadler*, who were faced with confusing instructions for casting their ballots for the write-in candidates, from the ease with which the voters could vote for Mr. Murphy by just marking the ballot.

The Court in *Gray-Sadler* distinguished between voter carelessness and circumstances beyond the voter's control.

Here there was no problem “beyond the voter[’s] control.”

It is not too much to expect that a voter would notice that his candidate's name appears as a choice on the ballot and that there is a clearly prescribed place on the ballot for expressing that choice. . . Given those facts, and recognizing that we cannot know for certain whether the same voter also cast a proper vote for Murphy and if so, whether it was counted, we see no basis for undoing the certification of the election results and ordering a run-off election.

At 1182-1183.

In the end, Mr. Murphy lost all of his challenges as well as the election. As was true of the contestants in *Watertown*, Mr. Murphy attempted to prove that the circumstances he complained about could have changed the result of the election, but neither the New Jersey Supreme Court nor the Iowa Supreme Court seriously addressed that question because the plaintiffs were unable to prove that an irregularity existed that violated the election laws.

### C. Harassment and intimidation do not materially affect the election unless they change its outcome.

State laws make it illegal to interfere with voters at the polls.<sup>41</sup> These laws allow law enforcement officials to arrest and prosecute people who harass or interfere with people at the polls. But what effect does the interference have on the validity of an election? The answer is none, unless the interference changes the results of the election or makes it impossible to determine the will of the electorate.

Take, for instance, the case of *Blocker v. City of Roosevelt City*, 549 So.2d 90 (Ala. 1989). The case involved a 1988 election on the seemingly prosaic matter of whether people in Roosevelt City wanted to be annexed to the City of Birmingham, Alabama. It turned out that the election was anything but routine. The annexation carried by a vote of 718 to 404, but ten days later Clyde Blocker, Jr., and some other Roosevelt City voters filed an election contest claiming that voters were harassed and intimidated by employees of the Jefferson County sheriff's department and others to persuade the voters to vote in favor of the annexation.

Mr. Blocker and the other plaintiffs, presumably aware of their burden of proof, said that the annexation would have been defeated if the harassed voters' votes were subtracted, and asked that the annexation election be declared illegal and void. In other words, they claimed that the irregularities would have changed the result of the election.

<sup>41</sup> See, e.g., the laws listed state by state in Barry H. Weinberg and Lyn Utrecht, *Problems in America's Polling Places: How They Can Be Stopped*, 11 Temp. Pol. & Civ. Rts. L. Rev., 401, 479 app. G.

In Alabama, a statute codified the rule that a person challenging an election has the burden of proving that the irregularities changed the result of the election.<sup>42</sup> The Supreme Court of Alabama acknowledged the words of the statute, and then concluded that harassment and intimidation of voters will not invalidate an election if the challenger does not carry his or her burden of proving that the harassment and intimidation changed the election result. The Alabama Supreme Court said,

The annulment of an election, under § 11-46-71, requires either proof of illegal votes, proof of rejected legal votes, or proof of the failure of the contestee to receive the requisite number of legal votes. Moreover, errors and irregularities of election officers that are shown not to have affected the election result will not be considered in an election contest. *Threats, violence, or disturbances not materially affecting the result should not invalidate an election.*

The trial court, without making specific findings of fact, denied the appellants' contest of the annexation election. The annexation carried, with 718 votes cast in favor and 404 cast against. We cannot say that the trial court's decision was plainly and palpably wrong; the judgment is affirmed.

At 91-92 (internal citation omitted) (emphasis supplied).

Here, again, the plaintiff had to show that the number of illegal ballots that were counted was greater than the margin of victory. In other words, the plaintiff had to show that particular illegal ballots were included in a particular vote total. Not surprisingly, the Alabama Supreme Court affirmed the judgment of the trial court, and Mr. Blocker and his co-plaintiffs lost.

Similar election-day problems were encountered in neighboring Mississippi. *Rizzo v. Bizzell*, 530 So.2d 121 (Miss. 1988), demonstrates the need for evidence that violations of the election law in and around the polling places materially affect the election. In fact, it is far more difficult to show that the results of the election or the will of the electorate were affected by actions in or near the polling places than by actions that might invalidate the ballots. The reluctance of courts to overturn elections (which must then be held again) because of illegal activity in the vicinity of the polls comes through clearly in *Rizzo*.

In the August 27, 1987 primary run-off election between D. P. Rizzo and Lee C. Bizzell for the Democratic Party nomination to run for the District 2 Supervisor (county commissioner) seat in Bolivar County, Mississippi, Mr. Bizzell won by 178 votes out of 2,810 total votes cast. The county seat is the

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<sup>42</sup> All states have laws that regulate the election process, and many of those laws define the point at which irregularities will cause an election result to be altered. Alabama's law said,

No misconduct, fraud or corruption on the part of the election officers, the marker, the municipal governing body or any other person, nor any offers to bribe, bribery, intimidation or other misconduct which prevented a fair, free and full exercise of the elective franchise can annul or set aside any municipal election unless the person declared elected and whose election is contested shall be shown not to have received the requisite number of legal votes for election to the office for which he was a candidate thereby, nor must any election contested under the provisions of this article be annulled or set aside because of illegal votes given to the person whose election is contested unless it appears that the number of illegal votes given to such person, if taken from him, would reduce the number of votes for election. No election shall be annulled or set aside because of the rejection of legal votes unless it appears that such legal votes, if given to the person intended, would increase the number of his legal votes to or above the requisite number of votes for election.

Ala.Code 1975, § 11-46-71. At 91. This statute is in addition to the Alabama law that allowed election challenges, similar to the laws that were discussed in Chapter I. The Alabama statute allowing election challenges specified, as grounds for the challenge,

- (1) Misconduct, fraud or corruption on the part of any election official, any marker, the municipal governing body or any other person;
- (2) The person whose election to office is contested was not eligible thereto at the time of such election;
- (3) Illegal votes;
- (4) The rejection of legal votes; or
- (5) Offers to bribe, bribery, intimidation or other misconduct calculated to prevent a fair, free and full exercise of the elective franchise.

Ala.Code 1975 § 11-46-69. At 91.

City of Cleveland. Mr. Rizzo sued to have the election rerun in the Central Cleveland Precinct and the East Central Cleveland Precinct because of violations of the election code in and around the polls.<sup>43</sup>

At the Central Cleveland Precinct, Mr. Bizzell's sister-in-law, Virginia Dickerson, violated the 150-foot limit on campaigning around the polling place, according to the findings of the special judge. In fact, other buildings were so close to the polling place building that everyone who campaigned near the poll had to violate the 150-foot limit. But Mrs. Dickerson did so more than the others, and for six hours she crossed the street to campaign on behalf of Mr. Bizzell at the polling place. Finally, an election official told her to stay on the other side of the street, and she did.

Matters were much more unsettled at the East Central Cleveland Precinct, where 355 people voted in the run-off election—243 for Mr. Rizzo and 112 for Mr. Bizzell. Mr. Bizzell had hired a man named Beverly Perkins as a campaign worker and designated him as a poll watcher at the East Central Cleveland Precinct. During the morning of election day, Willie Earl Griffin, a supporter of Mr. Rizzo, swore out a warrant against Mr. Perkins for disturbing the peace. Around mid-morning, the police arrested Mr. Perkins, but he was released and returned to the East Central Cleveland polling place to continue his poll watching. As a part of his poll watching, Mr. Perkins—according to the findings of the special judge—violated the restriction on campaigning within 150 feet of the polling place, harassed and annoyed people and otherwise made himself obnoxious, and discouraged Mr. Rizzo's supporters by telling them that the election “had already been wrapped up.” At 123. The judge found conflicting evidence as to whether Mr. Perkins accompanied any of those people into the voting booth.

Mr. Rizzo's witnesses testified that the bailiff (in charge of keeping the peace in the poll) refused to allow voters assistance in casting their ballots, even though assistance was to be allowed to voters who were blind, disabled or illiterate. The special judge found denial of assistance occurred at least once, although Mr. Bizzell's witnesses testified to the contrary. The bailiff and the poll manager had been appointed to their positions in the polling place by a Bizzell supporter on the Democratic executive committee who had been a Rizzo supporter but changed allegiances after Mr. Rizzo, who had been a county supervisor, fired him from his county job. However, there was no question that Mr. Bizzell came into the polling place and gave the poll manager \$20—he said it was for refreshments and that he later got the money back through a third-party.<sup>44</sup>

As for the 150-foot rule, the Mississippi Supreme Court focused on the part of the statute that said the votes in a precinct may be thrown out if the failure to comply with the requirement makes it “impossible to arrive at the will of the voters at such precinct. . . unless it be made to appear with reasonable certainty that the irregularities were not deliberately permitted or engaged in by the manager at that box.” The supreme court said,

At the central Cleveland precinct no one, including Rizzo's supporters, could comply with the 150-foot rule. The testimony was that Ms. Dickerson did not attempt to intimidate or harass anyone, and she did move back across the street and remained there after being instructed to do so by a polling official. There was no evidence that Ms. Dickerson's actions were engaged in or permitted by the election officials, or that Bizzell authorized or knew of Ms. Dickerson's violations.

<sup>43</sup> Mr. Rizzo's complaint was heard by a special judge and by the five-member county election commission. The judge rejected Mr. Rizzo's claims, but the election commission decided that new elections should be held in both precincts. Mr. Rizzo appealed the judge's decision to the Mississippi Supreme Court.

<sup>44</sup> The county election commissioners found that Mr. Perkins intentionally violated the laws to advance Mr. Bizzell's candidacy, that the two poll managers violated the secrecy of the ballot, that a number of voters who needed assistance were denied assistance from a person of their choice, and that new elections should be held in both precincts. The commissioner who cast the deciding vote regarding both precincts was a Rizzo supporter who helped Mr. Rizzo organize his campaign.

At 127. The supreme court agreed with the special judge that this violation was technical and that the will of the electorate at the precinct could be determined. So Mr. Rizzo lost on that claim.

As for the East Central Precinct, the Mississippi Supreme Court found that, “In addition to violating the 150-foot rule, the evidence of Perkins’ conduct suggests possible criminal violations of election laws prohibiting disturbing an election...and intimidating electors to prevent voting...”

We might agree that discarding the east central Cleveland precinct votes is appropriate, but this does not automatically mean a new election must follow. The special judge did find that even if the results were thrown out, it was still possible to ascertain the will of the electorate.

...[I]f the irregularities are due to fraud or willful violations of the election procedures, this Court will not hesitate to order a new election, even though the percentage of illegal votes is small.

The scope of the violations and the ratio of illegal votes are significant, because even in the absence of fraud, the disenfranchisement of a significant number of votes will cast enough doubt on the results of an election to warrant voiding it. As a rule [drawing on Mississippi precedent], if more than thirty percent of total votes have been disqualified, a special election will be required...

On the other hand, when the percentage of illegal votes is smaller, even though the winning margin is less than the number of illegal votes, a special election may not be required...

[Here] it is apparent that a new election is unnecessary. First, it is clear that by discarding the illegal votes *the outcome is unchanged*, for without any votes from the precinct Bizzell won the election. *There was no fraud* practiced and the ratio of illegal votes to total votes, discarding all 355 votes at the east central Cleveland precinct, is 355 to 2817, or slightly more than 12%. *The nature of the violations, while serious, cannot totally control the disposition of this case, for we must balance the public interest with that of the successful contestant.*

At 127-128 (internal citations omitted) (emphasis supplied).

The Mississippi Supreme Court then quoted from *Noxubee County Democratic Committee v. Russell*, 443 So.2d 1191, 1197 (Miss. 1983), the case it primarily followed in reaching its decision:

[W]e recognize competing interests which must be weighed and balanced. While the voters are not parties to this contest, *their interests are paramount. Special elections are a great expense for the county and its taxpayers.* Beyond that, the turnout for a special election is never as great as when there are a number of candidates on the slate. By contrast, we feel that *the rights of the individual candidates cannot be allowed to overshadow the public good.*

At 128-129 (emphasis in the original).

Perhaps most persuasive, however, was the Mississippi Supreme Court’s view that conducting a new election in the East Central Precinct would not alter the outcome of the election. The supreme court noted that Mr. Rizzo had won the East Central Cleveland Precinct primary run-off by a two-to-one margin (243 votes to 112), that Mr. Rizzo had also won the precinct’s first-round primary by a two-to-one mar-

gin, and that Mr. Rizzo would need to overcome the county-wide 178-vote lead of Mr. Bizzell to change the outcome of the election. The court concluded,

Thus, unless Bizzell's supporters would totally abstain from voting, Rizzo would likely need an increase in turnout of roughly 50% at a special election just to have a chance to obtain the needed 178 additional votes. There was virtually no evidence implying that qualified electors would turn out in any greater numbers, nor was there any real evidence that voters were denied or prevented from voting by Perkins. Thus, little evidence suggested turnout might improve at all, much less by a large percentage.

Under the circumstances of this case, the special judge correctly determined that the will of the voters could be ascertained and a new election was unnecessary.

At 129. And thus Mr. Rizzo lost his appeal and the election.

#### **D. Inferences about irregularities can be drawn from facts but not from other inferences.**

The case of *Mirlisena v. Fellerhoff*, 463 N.E.2d 115 (Ohio 1984), concerned the 1983 race for the city council in Cincinnati, Ohio. After a recount, Sally Fellerhoff beat John Mirlisena by 62 votes out of 76,592 total votes, or .008% of the vote. Mr. Mirlisena sued to contest the results of the election, alleging a number of irregularities.

This case is a wonderful example of the way some people who are caught up in an election believe that their conclusions are based on facts, when they are not based on facts at all. Instead, their view of their situation leads them to believe that inferences they make in their own favor are tantamount to facts. But inferences are only inferences and must be recognized for what they are, especially if you are a plaintiff attempting to win a lawsuit challenging an election. The court in *Mirlisena* illustrates this point to great effect.

In its opinion, the court in *Mirlisena* said that its options were to decide:

1. Fellerhoff was elected, or
2. Mirlisena was elected, or
3. The election resulted in a tie, or
4. Neither Fellerhoff nor Mirlisena was elected and the election should be set aside.

At 116. Then the court set out the basic principles it would follow to reach a decision:

[A]ny irregularities complained of are mooted unless they are significant enough to have rendered the results of the election uncertain, i.e., to have changed the results of the election.

Although it is generally necessary for the contestor in an election contest to prove that the irregularities would have changed the result of the election, it is not always necessary to show the precise number of irregularities:

“If...the irregularities are so widespread and general and of so flagrant a character as to raise a doubt as to how the election would have resulted had they not occurred, they are deemed to be fatal and will warrant the rejection of the entire vote of the election district.”

At 117 (internal citation omitted). Thus, the court set out the core principles we discussed earlier: the result of the election can be successfully challenged by evidence that the irregularities could have changed the result of an election<sup>45</sup> or that irregular procedures were so flagrant and widespread as to raise doubt as to the entire election.

The court's treatment of the proof that was offered on each of the irregularities in *Mirlisena* gives an especially clear picture of the task a litigant has in trying to prove directly, without piling inference upon inference, that violations occurred *and* materially affected the election.<sup>46</sup> In each instance, the court describes the facts that Mr. Mirlisena claims constitute widespread irregularities and then enumerates the assumptions that underlie his claims. For the reader, it is almost like a game of trying to find the hidden clues among the forest of facts.

On election day, some people who came to the polls with their voter registration application receipts were not allowed to vote because their names were not on the voter registration cards or the signature lists at the polling places. The voter registration application receipt is a portion of the voter registration card that was torn off by the registrar at the time the voter registration card was filled out, and given to the applicant. The remaining large portion of the card became the official registration card, called the "buff card," after the information was verified by the board of election. Voter registration was conducted not only in the voter registrar's office, but also by more than 4,000 volunteer registrars (as was allowed under Ohio law).

Mr. Mirlisena claimed that the volunteer registrars did not turn in many applications for registration, which is why there were no buff cards at the polls for many people who showed up with their voter registration application receipts. He said that there were enough of those disenfranchised voters to invalidate the election. Moreover, he said that the volunteer registrars were agents of the board of elections, and therefore the disenfranchisement of those voters was the fault of the board of elections. In response, the court said that it did not even have to reach the question of whether the volunteers were agents of the board of elections because, even if they were,

[N]umerous inferences must be made before the board of elections can be held to have erred...

1. That the receipt was furnished the voter by a volunteer registrar;
2. That the buff card was not turned in by the volunteer registrar;
3. That, if the buff card was turned in, the applicant was qualified for registration;
4. That the application was made before the deadline;
5. That the voter presented himself to vote at the proper polling place;
6. That the voter did not, in fact, vote somewhere else;
7. That the person with the receipt was the person to whom it was originally given; and
8. That the receipt was obtained for the current election.

A simple review of the eight inferences just delineated quickly makes it apparent that inference upon inference upon inference must be made to justify petitioner's position. This simply cannot be done.

...[T]he court finds that petitioner has not proven his allegations pertaining to the alleged irregularities just discussed.

At 120.

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<sup>45</sup> Here, illegally preventing 62 people from voting in an election that was decided by 62 votes.

<sup>46</sup> Mr. Mirlisena's claim that a polling place was moved, without complying with the applicable statute, to a place on a hill that was inconvenient to many voters will be discussed in Chapter 6.

Mr. Mirlisena next claimed that people who came to the polls with notice postcards were not allowed to vote because their names were not on the voter registration cards or the signature lists at the polling places. It appears from the court's opinion that notice postcards are mailed to new registrants to provide notice of their voter registration.<sup>47</sup> Polling place officials testified that, when they talked to would-be voters at the polls, they saw that the people had brought notice postcards with them, but did not check the postcards for the names, addresses or precinct numbers that were on them, or the years of the postcards; in one precinct about 12 postcards were checked to determine that the voter was in the correct precinct, but no record was made of the voters' names or addresses, or the years on the cards.

The court concluded,

This situation is closely allied to the situation involving the voter registration application receipts, to wit, there is no affirmative showing of irregularity, and too many inferences have to be made. Here, the inferences would involve, in any particular case, most or all of the following:

1. That the person bringing in the postcard was the person who received it;
2. That the card was for the precinct in question;
3. That the card pertained to the current election;
4. That the voter had not changed his address;
5. That the card was the most current one;
6. That the card was not in error; and
7. That the person did not in fact vote.

Again, the lack of affirmative evidence prevents the court from reducing the inferences or choosing among them.

At 121.

It appears that Mr. Mirlisena was able to prove that the names of some newly registered voters, who should have been sent notice postcards, were not on the computer lists of people to whom notice postcards were sent. Mr. Mirlisena claimed there were over 60 of these people; Ms. Fellerhoff said that there could have been 29 of these people. Neither of them could be more definite because some of the computer notice lists had been destroyed by the election officials after the election. The court did not think the difference in the numbers was controlling, because, again, the court found that the conclusion—that those voters had been disenfranchised—would have to be based on an unacceptable series of assumptions.

Although the board of elections may well be faulted for not preserving in their entirety these obviously important lists, petitioner has again failed to present affirmative evidence of irregularity sufficient to allow the court to do more than speculate among possible inferences. Here the possible inferences are:

1. The voters were not notified;
2. The voters were notified but the notice lists were lost or destroyed;
3. The voters didn't vote because they didn't choose to do so, even after notice or with full knowledge of the location of the polling places; and
4. The voters were, in some cases, notified by an earlier mailing.

<sup>47</sup> Since 1995, notice of voter registration has been required to be mailed to new registrants by the National Voter Registration Act, 42 U.S.C. § 1973gg-6(a)(2). In addition, for each election, many counties mail to registered voters notice of their polling place location.

In this case, the failure of affirmative evidence is glaring and unnecessary. All names and addresses were known, but not one of the allegedly disenfranchised voters was subpoenaed to court by petitioner. In view of the presumption in favor of regularity in election matters. . . petitioner has failed to demonstrate irregularity affirmatively on this point.

At I21.

Mr. Mirlisena also tried to show that the computer notification list was incorrect by introducing evidence that, when a community group used the list to send mail to the people at the addresses listed, 130 envelopes were returned by the post office as undeliverable. To this claim the court responded,

Certainly this mailing raises the possibility that the notification list was incorrect. However, it does not affirmatively establish that the board of election's mailing was equally unsuccessful; or that the addresses were in fact incorrect; or that the voters had not moved. The burden of proof is on the petitioner, and suspicion or possibility does not satisfy this burden.

At I21-I22.

In two instances, the court found that Mr. Mirlisena had proven that irregularities occurred and had benefited Ms. Fellerhoff. In one precinct, a polling place official erroneously told a voter that he had to vote for nine city council candidates, rather than correctly telling the voter that he should vote for not more than nine (an instruction that was written on the ballot). The court deducted that vote from Ms. Fellerhoff's 62-vote margin. In another precinct, Mr. Mirlisena claimed there were irregularities that prevented 20 specific voters from receiving their notifications that they could vote. The court found that three of them voted, four of them were on the notification list, and one of them got two notices. Then, apparently because it made no difference to the outcome of the case, the court decided that the remaining 12 should be deleted from Ms. Fellerhoff's vote total. (There is no further explanation for this odd aspect of the decision in the court's opinion.)<sup>48</sup>

Then the court summarized its opinion.

Although it is theoretically possible that the court might infer that sixty-two or more voters were disenfranchised from a showing of a lesser number of disenfranchisements, the inference would have to be based on a solid, affirmative showing of patterns of irregularities. In this case, a total of approximately thirteen voters have been deemed by the court, without deciding the issue, as disenfranchised. Even in the case of these thirteen people, persuasive arguments can be made against disenfranchisement.

Petitioner concedes that he has not proven disenfranchisement of sixty-two or more specifically named voters. . . *Every reasonable inference is required in law to be made in favor of the validity of an election.* These inferences have simply not been met or overcome by petitioner.

At I22 (emphasis supplied).

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<sup>48</sup> The court also decided that there was no requirement for the polling place officials to contact the board of elections regarding the people who came to the polls with voter application receipts or notice postcards but had no buff cards, and for that reason were not allowed to vote. Contacting the board of elections usually is a good idea because the board may be able to determine that people whose names are not listed on the precinct voter books are, in fact, validly registered voters and should be allowed to vote.

Mr. Mirlisena probably could have won his lawsuit if he would have put into the record evidence that more than 62 specific eligible registered voters were unable to vote. He would have been assured of winning if he had also proved that those voters would have voted for him (unless Ms. Fellerhoff provided evidence of registered voters who would have voted for her but were not allowed to do so). Mr. Mirlisena also could have won his lawsuit if he could have put into the record evidence showing that more than 62 specific ballots were cast illegally for Ms. Fellerhoff or evidence that irregularities were so widespread that the voters' will was impossible to discern. The violations would have materially affected the election results, and the evidence would have overcome the assumption that the election results should stand.

By way of contrast, the kind of proof that Mr. Mirlisena needed to win was proffered by the plaintiff in *Valence v. Rosiere*, 675 So.2d 1138 (La. Ct. App. 1996), a case that was discussed earlier in Chapters 1 and 2.

Andy Valence had lost by 17 votes to Robert Rosiere for the office of mayor of Grand Isle, Louisiana. Mr. Valence sufficiently identified 20 votes that he claimed were illegal. The case had been dismissed by the trial court on the ground that Mr. Valence filed his lawsuit too late under the statute that governed these kinds of filings. The Louisiana Court of Appeal reversed that decision and sent the case back to the trial court because Mr. Valence had shown due diligence in filing his lawsuit as soon as he found out the facts that showed Mr. Rosiere's victory was based on fraudulent ballots.

The court of appeal in *Valence* did not apply the kind of serial assumptions that were denigrated in *Mirlisena*. Instead, the court of appeal made one assumption—that Mr. Valence's allegations were true—in order to determine whether Mr. Valence should be given the *opportunity* to prove the truth of the allegations. If the evidence that Mr. Valence later put forward at the trial on the merits of his claims turned out to be based on the same kinds of assumptions that were put forward by Mr. Mirlisena, Mr. Valence's claims would have been destined to meet the same fate as did Mr. Mirlisena's.

Nor were assumptions accepted as a sufficient basis to prove that irregularities occurred in voting machines in *Bortner v. Town of Woodbridge*, which was discussed earlier in this chapter. Mr. Bortner, a write-in candidate who had come in fifth in a May 3, 1999 race for four board of education seats, claimed that he would have gotten many more votes, enough, he said, so that the result of the election likely would have been different if the paper rolls in the voting machines had advanced properly and otherwise allowed people to write in Mr. Bortner's name. The Connecticut Supreme Court concluded there was no basis for making the inference that because some voting machines malfunctioned, there also were malfunctions in other machines that were used during the election.

A court did, however, draw inferences from the facts in *In re Gray-Sadler*, which also was discussed earlier in this chapter, where Kati Gray-Sadler challenged the refusal to count 64 write-in ballots when she lost the election for Mayor of Chesilhurst Borough by 20 votes, 172 to 152. John Sturgis and Edward Geiger, who also were write-in candidates, ran for seats on the borough council and lost the election by 31 and 30 votes, respectively.

The New Jersey Supreme Court determined that there were enough write-in ballots that, had they been counted, they would have made Ms. Gray-Sadler the winner in the mayoral race. The same was not true, however, for Mr. Sturgis and Mr. Geiger. The irregularities claimed by them could not have changed the result of the election even if they proved that the irregularities happened. Yet the supreme court concluded that they likely had been deprived of other, additional votes that they should have had.

The New Jersey Supreme Court found that a number of facts in the case were important, including testimony indicating that voters may have been dissuaded from voting because of confusing instructions for casting write-in ballots, the relatively large number of undervotes in the races for mayor and council seats, *i.e.*, “missing votes,”<sup>49</sup> and the fact that the mayoral race would have been won by Ms. Gray-Sadler had the rejected ballots been counted. These facts led the supreme court to conclude that there was a strong possibility that enough of those “missing votes” were caused by the confusing instructions. This assumption led to another: that because Sturgis and Geiger would have lost by about ten votes if the known number of voided write-in votes were counted, only a small number of additional “missing votes” (about which no hard evidence existed) would have changed the election.

Based on these assumptions, the supreme court concluded that Sturgis and Geiger met the statutory requirement for successfully contesting the results of the council election, saying, “The standard we apply is one of reasonable certainty as opposed to absolute certitude.” At 1110.

*Gray-Sadler* is an unusual decision. It is unclear why the New Jersey Supreme Court deviated from the general rule that courts will not draw inferences about irregularities from other inferences. The lesson to be learned is that courts sometimes will enunciate standards in unusual ways to avoid what they perceive as an injustice in a particular case.

#### **E. Voters can be required to disclose how they voted on an illegal ballot.**

In some instances, the task of matching an illegal ballot to a particular candidate is difficult, and in many instances it cannot be done. This occurs, for example, when an ineligible voter casts a ballot that is deposited in the ballot box with all of the rest of the ballots. This was the situation in *Boardman v. Esteve*, 323 So.2d 259 (Fla. 1975), where Henry Esteve claimed that 1,450 invalid absentee ballots had been commingled with the 1,939 valid absentee ballots and argued that therefore all absentee ballots should be thrown out (if this was done, he would win the election). The trial court disagreed with Mr. Esteve, as did the Florida Supreme Court, which found that Mr. Esteve did not carry his burden of proving that all 1,450 ballots had been irregularly cast.

However, in other circumstances, this burden can be met without too much trouble, such as when a ballot has distinguishing marks and the voter can identify which ballot is his or hers. In such cases, the problem is often that—due to rules guaranteeing the secrecy of the ballot—voters are not allowed to publicly identify their own ballots.

This was the situation faced by the trial court in the case discussed in Chapter I when Joseph Zupsic and Delores Laughlin ran for election to the office of state judge in Beaver County, Pennsylvania, on November 2, 1993. *In re General Election for District Justice*, 670 A.2d 629 (Pa. 1996), and *after remand*, 695 A.2d 476 (1997). When the votes were counted, Mr. Zupsic won a 36-vote victory over Ms. Laughlin, but a recount over a month later showed that Ms. Laughlin won by 42 votes.

Between the two counts, the ballots were taken to the Beaver County courthouse in 156 ballot boxes, each with a red numbered seal put on at each of the precincts. Each ballot box was locked with an identical padlock, and each padlock could be opened with one of 160 to 170 keys. At the courthouse, election officials unlocked the ballot boxes, broke the seals and ran the ballots through the tabulating machines. Then the ballots were put back in the ballot boxes, the boxes were locked with the padlocks,

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<sup>49</sup> “Missing votes” means that voters did not cast votes for some offices, so that there were fewer votes cast for those offices than the total number of voters.

resealed and locked in the tabulation room to which three people had keys. The results of later recounts were substantially the same as the first recount.

More than two months after the election, Mr. Zupsic filed an election contest. The trial court found that sometime between November 2 and January 5, somebody opened the ballot boxes and marked enough ballots to change the election result in Ms. Laughlin's favor. Ballots that had been marked for Mr. Zupsic were later marked for Ms. Laughlin as well, causing those ballots to be "overvoted" and rejected (because they had more than one candidate marked for an office for which only one person was to be elected), giving Mr. Zupsic fewer votes than he had initially. Conversely, ballots that originally had no vote for a candidate in the judge's contest ("undervoted") later were marked for Ms. Laughlin, giving her more votes than she had initially.

Most of the differences between the first vote count and the recounts came from five precincts and existed only in the Zupsic-Laughlin contest (votes for candidates in other contests were unchanged). The trial court found that there was no way to determine exactly how many ballots were altered, but it allowed into evidence testimony from five voters who said they could identify which of the ballots were theirs, because those voters had put their own names on the ballots as write-in candidates for various offices. Each of the five ballots had a vote marked for Ms. Laughlin, and each of the voters said he or she did not put it there. Ms. Laughlin lost the case and appealed the decision.

On appeal, one of Ms. Laughlin's arguments was that the trial court was wrong to admit the testimony of the five voters because a voter may not waive his or her right to the secrecy of the ballot. The Supreme Court of Pennsylvania reviewed the sound public policy reasons for maintaining the secrecy of the ballot and for refusing to "abandon the keystone of our democracy—the secrecy of the ballot, on the pretense of discovering an error in the return." 670 A.2d at 639, quoting Judge Woodside in *Thomas A. Crowley Election Contest*, 57 Dauphin Co. Rep. 120 (Pa. 1945). But the supreme court then quoted Judge Woodside further to say, "...[W]e are not prepared to state nor called upon to say that there are no circumstances under which a legal voter will be permitted to take the witness stand on his own circumstances and testify how he voted..." 670 A.2d at 639. However, in the *Crowley* case, Judge Woodside concluded that where there was no fraud and one could determine what the vote was from the ballots themselves, oral testimony by the voter as to how he or she voted should not be accepted.

The Pennsylvania Supreme Court then noted that Mr. Zupsic's case involved a finding that fraud occurred in some of the ballots and determined that those five voters' testimony as to the content of their ballots was properly allowed into evidence:

We agree with the lower court that, under the unusual circumstances of this case, the sanctity of the ballot is not best preserved by secrecy, but instead by allowing those whose legitimate votes were altered through no fault of their own to testify, if they so choose, regarding how they originally voted. Therefore, we hold that, under these limited circumstances, where a vote has been properly cast but subsequently altered through no fault of the voter, the voter should be allowed to *voluntarily* appear and testify regarding how he or she originally voted.

670 A.2d at 639.

When the ballot is illegal because of the voter's action, however, the courts are less reluctant to have them testify about how they voted. This is what happened in *Green v. Reyes*, 836 S.W.2d 203 (Tex. App. Houston 1992), where Ben Reyes (a Houston, Texas, city councilman) challenged the apparent nomination,

by 186 votes, of Raymond Eugene Green (a state senator from the Houston area) as the Democratic candidate for the United States House of Representatives in a run-off primary election for the 29th Congressional District in Texas.<sup>50</sup>

The Democratic and Republican primary elections had been held on March 10, 1992, but none of the candidates in the Democratic primary election got a majority of the votes. So a primary run-off election between the two top vote-getters in the Democratic primary, Mr. Reyes and Mr. Green, was held on April 14, 1992. Texas law prohibited people who had voted in one party's primary election from voting in another party's run-off election. For example, those who had voted in the March 10 Republican primary were prohibited from voting in the April 14 Democratic primary run-off. The votes of such cross-party voters would be void.

After Mr. Green's narrow victory, Mr. Reyes hired an accounting firm to compare the names, voter registration numbers and precinct numbers of people who voted in the March 10 and April 14 elections. Based on the results of that comparison, Mr. Reyes submitted to the court a list of 429 people whom he claimed had voted in both the Republican primary and the Democratic run-off elections. In order to win his case, Mr. Reyes had to prove that (1) enough illegal votes were cast for Mr. Green to overcome Mr. Green's 186-vote margin of victory and (2) Mr. Reyes received a majority of legal votes in the run-off election.

Mr. Reyes called as witnesses 313 of the 429 voters to compel them to testify how they voted in the run-off election. The trial court found that there were 220 illegal votes for Mr. Green, 75 illegal votes for Mr. Reyes and 8 votes that were not illegal. This left Mr. Green with a 41-vote victory margin. But the trial court also found that there were 126 crossover voters whose votes could not be determined because, when they testified, they could not remember for whom they voted (10 of the 313 who testified), or they did not testify for various reasons. Both candidates put expert witnesses on the stand to testify to the probability that the majority of the unascertained illegal ballots were cast for the candidate's opponent. The trial court concluded that the true outcome of the run-off election could not be ascertained.

On appeal, Mr. Green argued that the trial court's reading of the state law would result in voiding any close election because the existence of some illegal votes would taint the election. The appeals court disagreed, citing the state statutes that dealt with illegal votes. The statutes said that, first, illegal votes should be subtracted from the totals of the candidates who received them. If there was a clear winner after the illegal votes were subtracted, then that candidate was elected. If, after that subtraction, there were still illegal votes outstanding that could not be subtracted from a candidate's total—because it could not be determined which candidate got the illegal votes—then the election was to be declared void if there were more *undetermined* illegal votes than the *margin* of victory in the election. In response to Mr. Green's argument, the appeals court said that the law was not about close elections, but rather the law

merely seeks to insure that the final election canvass is a clear reflection of the *legal* votes cast. . . [The statute] only comes into play where there were *illegal* votes cast which upon reasonable inquiry at an election contest cannot be attributed to either the contestant or contestee.

At 210 (emphasis in the original).<sup>51</sup>

The appeals court recognized that the trial judge, in attempting to promptly determine the results of the election, required the illegal voters to reveal how they voted. Many of those voters were upset and angry because generally voters have a constitutional right to the secrecy of their ballot.<sup>52</sup> The appeals court

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<sup>50</sup> Mr. Green got 15,858 votes, and Mr. Reyes got 15,672 votes.

<sup>51</sup> We will focus on this aspect of *Green v. Reyes* again in Chapter 6, Section A.

<sup>52</sup> The trial court gave the voters immunity from prosecution regarding their testimony about their illegal votes.

decided that the trial judge acted correctly, saying, “the trial court properly advised the voters that this protection does not extend to voters who have cast illegal ballots.” At 205. In other words, the principle of secrecy of the ballot applies to legally cast ballots, but not to illegally cast ballots; if a ballot is not legally cast it is just a piece of paper that does not have the status of a ballot and deserves no protection from the law when a court is attempting to determine the legal results of an election. The appeals court affirmed the trial court’s decision voiding the election and ordering a new election.

**F. Summary: The election results stand unless materially affected by violations.**

- In election challenges, the plaintiff has the burden of proof and must prove his or her case by a preponderance of the evidence.
- The plaintiff must prove that the actions complained of constituted irregularities under the applicable election laws.
- A successful election challenge must offer direct proof of the irregularities alleged and can not substantiate its claims by building inference upon inference.
- To win an election challenge, the plaintiff usually must prove that the number of votes affected by irregularities was sufficient to change the result of the election.
- Threats, violence or disturbances that do not materially affect the election results do not invalidate an election.
- The law’s strong presumption of regularity on the part of officials and official actions must be overcome if the contestant is to get a court to adopt his or her position about the facts.
  - o The contestant can overcome the presumption most readily by proving that the irregularities that occurred changed the result of the election.
  - o An election challenge also can succeed if the contestant presents facts showing that serious fraud and irregularities deprived the voters of the free expression of their will.
- The principle of secrecy of the ballot applies to legally cast ballots but not to illegally cast ballots. An illegally cast ballot is just a piece of paper that deserves no protection from the law.



## CHAPTER 3

### Strict Compliance is Required With Mandatory Procedures but not With Directory Procedures

So far there have been two basic requirements set out for winning an election challenge. A person challenging an election:

1. Must follow the procedures in the law when filing the challenge (Chapter 1) and
2. Has the burden of proving that irregularities changed the result of the election or rendered it impossible to determine the outcome of the election (Chapter 2).

Added to these two requirements is a third. In order to win an election challenge, a person:

3. Must prove that irregularities involved procedures that were mandatory, not just directory.

#### A. The mandatory/directory analysis is used widely in resolving election dispute cases.

In talking about the resolution of election disputes, the words “mandatory” and “directory” are applied to election procedures that are set out in state statutes. We know that in resolving election disputes the facts are examined in the light of the legal requirements in state election statutes. A key part of this process is a determination of whether a state election statute is mandatory or directory:

- If a statute is *mandatory*, and the election procedures set out in the statute were not followed, the actions that were taken are *invalid*.
- If a statute is *directory*, and the election procedures set out in the statute were not followed, the actions that were taken are *not invalid*.

Let’s assume that the plaintiff has proven that irregularities occurred in the election. What is the impact of such proof? Did those irregularities *invalidate* the ballots or election results that were challenged? In most instances, the answer will depend on whether the irregularities violated a mandatory or a directory statute. If the statute is mandatory, it *must* be followed and the irregularities will cause the challenged procedures to be invalid. If the statute is directory, it *should* be followed but the irregularities will not cause the challenged procedures to be invalid.

It is not easy to determine whether a statute is mandatory or directory. Even if a statute specifically sets out the election procedures that must be followed, defines exactly how those election procedures must be followed and states precisely who must perform those election procedures, the failure to follow those election procedures often is not enough to sustain an election challenge. Moreover, the distinction between mandatory and directory election provisions often is based on whether the irregularity is called

into question while the procedure still can be corrected (when the provision is considered mandatory) or when it is too late to correct the procedure (when the provision is considered directory). This basis for the distinction between mandatory and directory provisions is commonly, although imprecisely, couched in terms of whether the irregularity occurred before or after the *election*.

Thus, in common usage most election procedures that are said to be mandatory before an election are often considered to be directory once the election is over. The liberal construction of election statutes that makes them directory after an election, even if they were mandatory before the election, flows from the equity powers of the courts and allows for an equitable result in situations where things go wrong but the error does not critically affect the election.

The extraordinary controlling impact of the mandatory/directory analysis was alluded to in several places earlier in this book. In our discussion of *Logic v. City of South Milwaukee Board of Canvassers*, 689 N.W.2d 692 (Wis. Ct. App., 2004), in Chapter I, we said,

The appeals court then examined Mr. Logic's argument that the statute requiring service of the notice of appeal should be interpreted, like most election laws, to be *directory* not *mandatory* in order to preserve the *will of the electorate*.

And the appeals court went further and said that even if the will of the electorate was involved in this case, the *failure to serve notice was fundamental* and therefore it was basic to the appeal process. So the requirement that other candidates be served with notice of the appeal would be *mandatory*, not *directory*.

In the discussion of *Deffebach v. Chapel Hill Independent School District*, 650 S.W.2d 510 (Tex. App. Tyler 1983), in Chapter 2, we noted that,

The trial court found that the absentee voting period was long enough under the statute, that the homemade ballots were acceptable because they set out the propositions and gave voters an opportunity to vote for or against the bond issue and that the 425 voters should have been required to make an affidavit before they voted, but that the requirement for the affidavit was *directory* and not *mandatory*.

And in the discussion of *Moreau v. Tonry*, 339 So.2d 3 (La. 1976), *appeal dismissed*, 430 U.S. 925 (1977), also in Chapter 2, we said,

...it appears more likely that the *Moreau* decision is explained by a fairly common approach that courts take in election dispute cases: the court adopted a *standard* that allowed it to avoid overturning an election where it was not persuaded that the *facts* of the case were sufficiently compelling to provide grounds for overturning the results. This approach will be notable in the cases we will examine where, in the absence of fraud, courts routinely define election procedures as *directory* rather than *mandatory*.<sup>53</sup>

The mandatory/directory analysis in this book will begin with a discussion of three leading cases that focus, respectively, on the plights of Henry Esteva, Gus Beckstrom and Rosemary Mulligan. All of them lost their election challenges because the courts decided that the irregularities involved in their elections

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<sup>53</sup> A traditional standard was applied in a nontraditional way to achieve a particular result in *In re Gray-Sadler* 753 A.2d 1101, 164 N.J. 468 (N.J. 2000), where the New Jersey Supreme Court made inferences from inferences and then concluded that confusing ballot write-in instructions probably misled enough voters to make two candidates' margin of loss so small that an election had to be rerun. *Gray-Sadler* was discussed in Chapter 2.

violated statutes that were directory, not mandatory. In the process, those courts described the fundamental nature of the principles underlying their analysis and illustrated how those principles applied to the particular facts of those cases. The analysis of these three leading cases will be followed by a discussion of how the mandatory/directory analysis affects four kinds of statutes:

- statutes that require officials to initial ballots,
- statutes on handling ballots,
- statutes on candidate qualification procedures, and
- statutes on the secrecy of the ballot.

#### B. Leading case I: The facts of *Boardman v. Esteva*.

Absolute strict compliance, even with mandatory provisions in every case...could reach absurd proportions.

Strict compliance is not some sacred formula nothing short of which can guarantee the purity of the ballot.

These statements were made by the Supreme Court of Florida in the case of *Boardman v. Esteva*, 323 So.2d 259, 265, 267 (Fla. 1975).

In Chapter 2, the *Boardman* case was used as an example of a challenger's need to satisfy the burden of proving his or her claim. Edward F. Boardman had been declared the winner over Henry Esteva for a Florida state judgeship in 1972 on the basis of the 3,389 absentee votes cast. Mr. Esteva had received 404 more votes as recorded on the voting machines, but Mr. Boardman got 653 more absentee votes and won by 249 votes.

Mr. Esteva said that there were irregularities in 1,450 absentee ballots, and since the invalid absentee ballots had been commingled with the valid absentee ballots, nobody could tell which was which. As a result, Mr. Esteva argued, all absentee ballots should be discounted, and he should win the election because he got the majority of the votes cast on the voting machines. These votes, he said, were the only reliable ones cast.

The trial court disagreed. It found that many absentee ballots had irregularities, but only 88 were *illegal*. Of the 88 absentee ballots the trial court considered to be illegal, 13 had absentee ballot applications that were not signed by the voter, 17 had return envelopes that were not signed across the flap, 39 lacked an official title for the subscribing witness, and 19 were submitted by voters whose names were not on the voting rolls.

The first-level state appellate court ruled in Mr. Esteva's favor. The appellate court agreed that the 88 ballots were illegal and found that other irregularities proven by Mr. Esteva made additional ballots illegal. These additional irregularities included instances where the reason for voting absentee was not set out on the ballot application or on the return envelope, where there was no attesting witness's address or the identification of the witness was vague, where there was no post office cancellation stamp, where the election officials did not record the voters' oath, and where the return envelopes had been either lost or destroyed by the county canvassing boards.<sup>54</sup>

<sup>54</sup> There were 429 ballots for which the return envelopes had been lost or destroyed by the county canvassing boards. The return envelopes contained the absentee voters' affidavits that set out information about the voters required by state law, including the reason the voters satisfied the state law allowing them to vote absentee. Sharp-eyed readers will remember that 429 also was the number of people who voted in both the Republican Party primary election and the Democratic Party run-off election in *Green v. Reyes* discussed in Chapter 2. I have no explanation for the popularity of this number and can only marvel at the coincidence.

Mr. Boardman then appealed to the Florida Supreme Court. There was no disagreement about whether the irregularities happened—they did—or about whether they actually were irregularities (meaning departures from state requirements)—they were. The supreme court had to decide which of the two lower courts, the trial court or the appellate court, was correct in its assessment of whether the irregularities that were proven made the ballots illegal.

The Florida Supreme Court agreed with the trial court, not the appellate court. The supreme court's analysis of the underlying issues provides a wonderful recitation of the reasons courts make the distinction between mandatory and directory statutory language in election challenges.

To begin, the court announced the issue: "At issue is whether the absentee voting law requires absolute strict compliance with all its provisions, or whether substantial compliance is sufficient to give validity to the ballot." At 262. Then the court defined its approach to the facts and law of this case in broad terms.

We first take note that the real parties in interest here, not in the legal sense but in realistic terms, are the voters. They are possessed of the ultimate interest and it is they whom we must give primary consideration. The contestants have direct interests certainly, but the office they seek is one of high public service and of utmost importance to the people, thus subordinating their interests to that of the people. . . . By refusing to recognize an otherwise valid exercise of the right to a citizen to vote for the sake of sacred, unyielding adherence to statutory scripture, we would in effect nullify that right.

At 263.

*B.1. Procedural violations will not defeat the will of the electorate.*

The Florida Supreme Court made very clear what was *not* involved in the case: "Notably existent in this dispute is the complete absence of any allegation of fraud, gross negligence or even the hint of intentional wrongdoing." And then the court set out the idea that serves as the foundation upon which the remainder of its remarkable decision is based. It noted that if the voters who cast absentee ballots in the election were "*qualified, registered electors, who were otherwise entitled to vote absentee, notwithstanding the alleged defects,*" then a majority of the voters in the judicial district wanted Mr. Boardman to win. At 263 (emphasis supplied).

This approach to the facts is crucial to understanding the way that the courts—all courts, not just the Florida courts—read the statutes that govern elections. This approach proceeds from the definition of "the electorate" as the legitimate voters who cast ballots in a particular election. The principle that evolves from this approach, therefore, is *if* the voters are legitimate voters, *then* any decision that their ballots should not be counted will change the will of the electorate. This is the fundamental principle underlying the approach of the courts to statutory interpretation in election dispute resolution.

In *Boardman*, the supreme court also made clear the corollary of this principle: that there is no legitimately expressed will of the electorate if the ballots are not legitimate and the election has been tainted.<sup>55</sup>

This must not be overlooked. If we are to countenance [sic] a different result, one contrary to the apparent will of the people, then we must do so on the basis that the sanctity of the ballot and the integrity of the election were not maintained, and not merely on the theory that the absentee ballots cast were in technical violation of the law.

At 263.

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<sup>55</sup> Note the similarity of this statement to the result in *Green v. Reyes*, 836 S.W.2d 203 (Tex. App. Houston 1992), discussed in Chapter 2.

The Florida Supreme Court then reviewed the law as it stood prior to the *Boardman* decision and the public policy reasons for allowing people who could not get to their polling place on election day to cast a ballot absentee. Then the Florida Supreme Court said,

In developing a rule regarding how far irregularities in absentee ballots will affect the result of the election, a *fundamental inquiry should be whether or not the irregularity complained of has prevented a full, fair and free expression of the public will*. Unless the absentee voting laws which have been violated in the casting of the vote *expressly declared* that the particular act is essential to the validity of the ballot, or that its omission will cause the ballot not to be counted, the statute should be treated as *directory, not mandatory*, provided such irregularity is not calculated to affect the integrity of the ballot or election.

At 265 (emphasis supplied).

Mandatory procedures in a statute *must* be followed. If mandatory procedures in a statute are not followed, the act allowed by the statute, such as casting a ballot, is void. Directory procedures in a statute *should* be followed. If directory procedures in a statute are not followed, the act allowed by the statute is not void.<sup>56</sup> Accordingly, the statement of the Florida Supreme Court in *Boardman* is an extremely broad and concise statement of when a court will follow a legislative dictate and when it will not.

The impact of this statement on Mr. Esteva's burden of proof illustrates the decisive practical effect it has in cases challenging elections. The Florida Supreme Court said that technical irregularities committed by election officials were incapable of outweighing the peoples' right to a free and fair expression of their will *if* the voters are qualified voters. So Mr. Esteva, having proven that the irregularities happened, now had to show that the voters themselves were *not eligible* to cast their absentee ballots, not just that their ballots were not cast according to the rules.<sup>57</sup>

Mr. Esteva was left with what looked like an impossible burden of proof. And it was. When the Florida Supreme Court reviewed the facts that bore on the question of whether the voters were legitimate voters, it found that the counties involved were small, where the election officials personally knew many of the voters who cast the ballots that were found to have irregularities. The supreme court found that other voters, whose ballots also were found to have irregularities, filled out their applications for absentee ballots and then voted the ballots while they were in the election officials' office, and that the election officials knew many of those voters.

One can see the direction in which the supreme court was going. The election officials knew the voters. Therefore, the election officials knew that the voters satisfied the requirements for absentee voting. Therefore, the officials did not err in allowing those people to vote by absentee ballots. Therefore, the ballots were not invalid and should have been counted. Under these circumstances, Mr. Esteva had not shouldered his burden of proof—he had not overcome the presumption that the election officials' actions were correct.<sup>58</sup>

<sup>56</sup> The failure to void an act that was taken incorrectly does not mean that people can violate directory statutes with impunity. A violation of a directory statute simply means that the election result will not be overturned. That violation, however, can result in corrective action or punishment imposed on the person who failed to correctly follow the direction, ranging from a job-related reprimand, retraining or disciplinary proceeding to criminal prosecution.

<sup>57</sup> The statute containing the absentee balloting requirements did not say that the failure to strictly adhere to the procedures would cause a ballot to be invalid, void or illegal.

<sup>58</sup> The string of presumptions in *Boardman* seem perilously close to the string of inferences that *Mirlisena v. Fellerhoff*, 463 N.E.2d 115 (Ohio 1984), taught us courts were not supposed to make. The difference is that the Florida Supreme Court's conclusions in *Boardman* are based on the principle that officials' actions are presumed to be valid, and those presumptions can only be overcome by specific proof. The plaintiff in *Mirlisena* tried to overcome those presumptions based on a series of inferences upon inferences rather than specific evidence. *Boardman* and *Mirlisena* both illustrate once again that meeting a plaintiff's burden of proof in election dispute cases is very difficult.

The following statement was quoted in the discussion of *Boardman* in Chapter I.

As to the actual validity of the ballots whose return envelopes are missing, we first point out that as a general rule election officials are presumed to perform their duties in a proper and lawful manner in the absence of a sufficient showing to the contrary. . . .and also there is a presumption that returns certified by election officials are presumed to be correct. . . .The burden is clearly on the contestor to establish that the ballots have been irregularly cast. . . .There is nothing in the record to indicate that the absentee ballots in question were not cast by qualified registered voters who were entitled to vote absentee, therefore, the presumption of the correctness of the election officials' returns stands.

At 268.

The finishing touch in this analysis was the Florida Supreme Court's conclusion that errors by election officials, while resulting in irregular ballots, do not deprive a voter of his or her vote.

When the voters have done all that the statute has required them to do, they will not be disfranchised solely on the basis of the failure of the election officials to observe *directory* statutory instructions.

At 268 (emphasis supplied). Note that this conclusion depends totally on the earlier part of the decision where the supreme court defined the irregularities committed by the election officials as being *directory*, not *mandatory*.

What the Florida Supreme Court said in *Boardman* about irregularities in absentee ballots holds true with regard to all irregularities in the election process. In fact, a case that the Florida Supreme Court relied upon heavily in *Boardman* was *Wilson v. Revels*, 61 So.2d 491 (Fla. 1952), which involved ballots cast on voting machines, not absentee ballots. The court in *Boardman* said,

Although we recognize that we were dealing primarily with regular machine votes in *Wilson*, it would be stretching the law to unreasonable lengths to conclude that the result should be different in this case simply because we are dealing with absentee ballots.

At 267.

The court ended its opinion this way:

In summary, we hold that the primary consideration in an election contest is whether the will of the people has been effected. In determining the effect of irregularities on the validity of [sic] absentee ballots case, the following factors shall be considered:

- (a) the presence or absence of fraud, gross negligence, or intentional wrongdoing;
- (b) whether there has been substantial compliance with the essential requirements of the absentee voting law;
- (c) whether the irregularities complained of adversely affect the sanctity of the ballot and the integrity of the election.

The underlying concern of the election officials in making the initial determination as to the validity of the absentee ballots is whether they were cast by qualified, registered voters, who were entitled

to vote absentee and who did so in a proper manner. The substantial compliance test used by the trial judge comports with our conclusion that strict compliance with the statutory requirements for absentee balloting is not required to validate the ballots.

At 269-270.

### C. Leading case II: The facts of *Beckstrom v. Volusia County*.

Twenty-three years after *Boardman* came *Beckstrom v. Volusia County*, 707 So.2d 720 (Fla. 1998), where the Florida Supreme Court again had to determine which candidate won an election based on the absentee ballots. This time it was an election for Volusia County Sheriff. Gus Beckstrom lost by 2,890 votes, or 1.8% of the 156,914 total votes cast, to the incumbent sheriff, Robert L. Vogel. There were well over 8,963 absentee ballots cast.<sup>59</sup> Mr. Beckstrom filed a lawsuit claiming that there was fraud in the ballot count by the Volusia County Canvassing Board.

The trial court judge was plainly disturbed by the breadth of the *Boardman* decision. He found that the canvassing board acted with gross negligence during the ballot count. But, he said, under *Boardman*, courts must condone a “certain level of incompetence” by election officials that is just short of being intolerable. He also found that the canvassing board’s irregularities irreparably harmed the sanctity and integrity of the election process, and that the *Boardman* decision had become a “license for lawlessness by election officials.” But he found that the canvassing board had not committed fraud; that “there was a full and fair expression of the will of the people,” which was not affected by the canvassing board’s negligence; that there was enough compliance with absentee ballot laws to make the ballots legal; and that there was an accurate count of the absentee vote.

The actions of the canvassing board that so upset the trial judge were many, but the primary error involved using a black felt-tip pen to mark over the voters’ marks on 6,500 absentee ballots. The absentee ballots were cardboard rectangles on which the voter was instructed to mark his or her choice using a number 2 pencil. To count the ballots, the county fed them through a machine that read the marks. The instructions that came with the machines said that if the machine could not read the marks on a ballot the officials were to mark a new ballot exactly the same way as the unreadable ballot was marked, and then feed the newly marked ballot through the machine. That way, the original ballot would be preserved for examination and, if necessary, a later hand count. The Volusia County Canvassing Board, instead, took a black felt-tip marker and marked over the voters’ marks on the *original* absentee ballot, obscuring the voters’ original marks. The board members then fed the marked-over ballots through the machine to be read. They did this 6,500 times.

Other alleged errors included:

- accepting 1,463 absentee ballots that did not have the required voter’s signature or the required address of the person who witnessed the absentee voting,
- absentee ballots that were not accounted for,
- absentee ballots that were left unattended in the election superintendent’s office,
- absentee ballots that were opened by deputy sheriffs and other people who were not members of the canvassing board, without a canvassing board member present, and
- absentee ballots that were opened behind locked doors.

<sup>59</sup> The total number of absentee ballots is not stated in the *Beckstrom* decision. In the decision, the Florida Supreme Court notes various categories of absentee ballots that were challenged by Mr. Beckstrom, comprising 6,500, 1,000 and 1,463 absentee ballots. These ballots total 8,963. This means that there would have been well over that number of absentee ballots cast, assuming that Mr. Beckstrom did not challenge all of the absentee ballots.

The trial court invalidated 885 ballots that it found had no voter or witness signature or that had no address for the witness. This ruling narrowed incumbent sheriff Vogel's margin of victory to 2,005 votes.

Mr. Beckstrom appealed to an intermediary court, which certified the case to the Florida Supreme Court saying, "This Court has found no case wherein the trial court has made a finding of gross negligence by a Canvassing Board and many technical violations of [the law] by the supervisor of elections, yet validated the election." At 724.

*C.1. Election officials' gross negligence can void the election*

The Florida Supreme Court first affirmed the trial court's ruling that the 885 absentee ballots without signatures or addresses were illegal and thus invalid, and the trial court's conclusion that there was an accurate count of the absentee ballots. These rulings were affirmed on the ground that the trial court did not abuse its discretion.<sup>60</sup> The supreme court then reviewed the *Boardman* decision, quoting large portions of it, and proceeded to discuss the extent to which gross negligence by election officials will invalidate an election.

The supreme court said,

We set forth in *Boardman* the following factors to be considered in determining the effect of absentee ballot irregularities:

- (a) the presence or absence of fraud, *gross negligence*, or intentional wrongdoing. . .

At 725. The emphasis on the words "gross negligence" is the court's.

The supreme court took several steps to define "gross negligence," but their effort boils down to a question of whether the will of the voters can be shown by the facts of a case. *If the will of the voters can be shown by the facts, and the election officials' wrongdoing is unintentional, then the results of the election will stand.* To get to this result, first the supreme court contrasted two situations:

- where there were substantial irregularities and the will of the voters could not be determined, and
- where there were substantial irregularities and the will of the voters could be determined.

...[I]f a court finds substantial noncompliance with statutory election procedures and also makes a factual determination that reasonable doubt exists as to whether a certified election expressed the *will of the voters*, then the court in an election contest...is to void the contested election even in the absence of fraud or intentional wrongdoing.

...[T]he essence of our *Boardman* decision is that a trial court's factual determination that a contested certified election reliably reflects the *will of the voters* outweighs the court's determination of unintentional wrongdoing by election officials in order to allow the real parties in interest—the voters—to prevail.

At 724 (emphasis supplied).

Then, to distinguish "unintentional wrongdoing" from situations involving intentional wrongdoing, including fraud, the supreme court said,

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<sup>60</sup> This manner of proceeding on review is discussed in Chapter 6.

...By unintentional wrongdoing, we mean noncompliance with statutorily mandated election procedures in situations in which the noncompliance results from incompetence, lack of care, or, as we find occurred in this election, the election officials' erroneous understanding of the statutory requirements. In sum, we hold that even in a situation in which a trial court finds substantial noncompliance caused by unintentional wrongdoing as we have defined it, the court is to void the election *only* if it finds that the substantial noncompliance resulted in doubt as to whether a certified election reflected the *will of the voters*.

At 725 (emphasis in the original).

And finally, the supreme court defined the term "gross negligence":

...[T]he term gross negligence as used in *Boardman* is not, as in a tort action, a measurement of the degree of care by election officials. Rather, in this context, gross negligence means negligence that is so pervasive that it thwarts the *will of the people*.

At 725 (emphasis supplied). Thus, *gross negligence is action comparable to fraud and intentional wrongdoing that can void the result of an election. Gross negligence occurs when substantial noncompliance with statutory directions by election officials prevents the expression of the will of the voters.*

#### C.2. Procedural requirements are directory after the election

Note that the concept of the *will of the electorate* has broadened considerably from its use in *Boardman*. There, it was used to allow most of the absentee votes to be counted because the voters were found to be qualified, legitimate voters, even though many of the 1,450 challenged ballots that election officials accepted had technical errors. In *Beckstrom*, the concept of the will of the electorate was used to accept nearly four and a half times as many absentee ballots where election officials had obliterated all original evidence of the voters' choice of candidate. This was the result because there was no proof that the election officials did not accurately mark-over the 6,500 absentee ballots, nor was there fraud in over-marking the ballots.

In essence, the Florida Supreme Court decided that the directions in the state statutes on how absentee ballots are to be executed, and how to treat absentee ballots where the voters' markings are not read by the tabulating machines, were directory after the election was over. These same directions, however, would have been held to be mandatory if the election officials' actions were challenged *before* the vote count, *i.e.*, *when there still was a chance to correct those actions*. It is whether or not the irregularity still can be corrected that determines whether words in a statute regulating the actions of election officials are to be read as mandatory or directory (in the absence of a specific statement that a particular action or lack of action would render a ballot invalid).<sup>61</sup>

This does not mean that after an action no longer can be corrected, when the election is over, election officials can violate the law with impunity. The Florida Supreme Court was very specific on this point in the *Beckstrom* decision.

We expressly state that our decision in *Boardman* is not to be read as condoning anything less than strict adherence by election officials to the statutorily mandated election procedures...Neither *Boardman* nor this case concerns potential sanctions for election officials who fail to faithfully perform their duties. It is for the legislature to specify what sanction would be available for enforcement against election officials who fail to faithfully perform their duties.

<sup>61</sup> Recall that earlier we said that this basis for the distinction between mandatory and directory provisions is commonly, although imprecisely, couched in terms of whether the irregularity occurred before or after the election. And that often in common usage most election procedures that are said to be mandatory before an election are considered to be directory once the election is over.

At 725-726.<sup>62</sup>

This case, therefore, is a good example of the push and pull between the legislative and judicial branches of government in the United States. Here, the state legislature set out the exact procedures that election officials were to follow. There is no issue in either of these two cases that the statutes were vague about what actions the election officials should take with respect to absentee ballots. Rather, it is clear what the statutes required, and it is clear that the officials did not do what the statutes said. Thus, the legislature well may have thought it had done all it needed to do to make election officials ensure that absentee ballots are cast only according to the rules and under the circumstances that the legislature set out.

But the court used its equitable powers to look to the *result* of applying the statutory requirements. The court found that the ballots of legitimate, registered voters would be disqualified if the legislature's requirements were given mandatory effect. And there was no legislative statement that those ballots should be disqualified if the legislature's requirements were not followed.

So the court adopted an analysis that divorced the unintentional mistakes of the election officials from the effect of those actions on the ballot. This approach allowed the court to examine whether the *effect* of the election officials' actions made the ballots *illegal*. The court defined illegality in terms of:

- a) whether the voters were qualified to cast the ballot, and
- b) whether the vote on the ballot could be determined.

When these two factors were found in the affirmative, the ballots, taken together, reflected the will of the people. The will of the people could only be defeated by evidence of fraud or some other condition that tainted the fundamental character of election, or by a statute that specifically says the votes are invalid and cannot be counted. Otherwise, the ballots should be considered to be valid, and should be counted. The actions of the election officials, on the other hand, can be addressed on their own, in a later proceeding.

Thus, the Florida Supreme Court concluded that,

We approve the trial court's findings in respect to fraud. We construe the trial court's finding of gross negligence in this instance to be a measurement of the culpability of the election officials but not a finding that the election failed to express the will of the voters. Therefore, we conclude that the trial court was within its discretion in determining from the evidence that the election was a "full and fair expression of the will of the people. Vogel won it."

At 727.

C.3. *Courts interpret laws to allow the expression of voters' intent*

The principles of *Boardman* and *Beckstrom* affect challenges to the election of federal officials too. Among their progeny is *Jacobs v. Seminole County Canvassing Board*, 773 So.2d 519 (Fla. 2000), a contest of the November 7, 2000 United States Presidential election.

The facts were not in dispute. State law required that a voter's request for an absentee ballot carry (among other things) the voter's registration number as shown on his or her registration identification

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<sup>62</sup> The Florida Supreme Court was equally adamant in *Jacobs v. Seminole County Canvassing Board*, 773 So.2d 519, 524 (2000), that wrongdoing by election officials should not go unpunished. The avenues of prosecution and disciplinary action remain open to be used against election officials after cases involving election contests have concluded. Of course, it would be difficult to mount a criminal prosecution of an official whose actions had been found by a state supreme court to be unintentional. Disciplinary action would be the more realistic response to those officials' misdeeds.

card. The Democratic and Republican Parties had printed and mailed out absentee ballot request forms to registered voters of their respective parties. The Democratic Party's forms had a place for the voter's registration number (some forms even had the voter's number on them), but the Republican Party's forms did not have the number on them, or a place for it, or an instruction to the voter to put the number on the form. Thousands of requests for absentee ballots using these forms were submitted by voters to the office of the Supervisor of Elections. Realizing their error, Republican Party operatives set up shop in the supervisor's office and, using her equipment, added voter registration numbers to Republican voters' absentee ballot request forms. After the Republican Party operatives were done, the supervisor accepted the amended Republican voters' absentee ballot requests and mailed absentee ballots to those Republican voters. The Democratic voters' forms were in order, and those Democratic voters got their absentee ballots too.

The plaintiffs in *Jacobs* wanted all absentee ballots invalidated where voter registration numbers had been added to the ballot request forms. If this was done they claimed, the election results in Seminole County should be nullified. This is a case where the Florida Supreme Court agreed totally with the trial court, and the Florida Supreme Court's decision is, in the main, a reprint of the trial court's decision.

The trial court began its recitation of the facts after quoting the applicable principles from *Boardman*. It found that the Florida statutes said that an applicant for an absentee ballot must furnish his or her voter registration identification number as one of nine required items of information. But while the statutes said that the failure to supply the voter's name, address and signature voids the ballot, the statute did *not* say that the failure to supply the other items of information, including the voter registration identification number, voids the ballot. Accordingly, that requirement was deemed directory, not mandatory, and the absence of that information did not invalidate either the absentee ballot request forms on which the information was added by Republican Party operatives, or the absentee ballots that were cast by the voters who used those forms.

The plaintiffs also had claimed that the supervisor of elections gave disparate treatment to the political parties when she allowed only the Republican operatives to camp out in her office and use the office equipment. The trial court disagreed, however, finding there was no disparate treatment because there was no *need* for the Democrats to use the supervisor's office to change the Democratic voters' absentee voter application forms. There was no evidence that the Democrats had made, and been denied, a request similar to that of the Republicans. Nor was there any evidence that the voters whose registration numbers were added to their applications were not qualified, registered voters. In addition, there was no evidence of fraud, gross negligence or intentional wrongdoing in connection with any of the absentee ballots.

Accordingly, this was a classic case where something obviously went wrong in the election procedures, but the statute governing the procedures was read as directory, not mandatory, because the errors were technical and the voters affected were qualified voters whose ballots had been innocently cast. The Florida Supreme Court affirmed the judgment of the trial court, finding that the plaintiffs were entitled to no relief.

The trial court's opinion also stressed the role of the court as to finding the facts and applying the law in deciding the election contest in an apolitical forum. This was important because the 2000 Presidential election was so close that the difference made by the inclusion or exclusion of the votes from Seminole County could have changed the outcome of the election. Judge Clark began her opinion by saying,

The purpose of a contest of election is to establish specific legal grounds upon which to set aside the results of an election. Significantly, this decision in this case may not be rendered for the purpose of sending a message to the community, a political party or the Seminole County Supervisor of Elections or the Seminole County Canvassing Board. This court decides this case, like any other lawsuit, under the fundamental principles of judicial restraint and judicial independence, and the ruling is necessarily based on existing statutory and case law and on the facts as they were developed during the trial of this matter. . . *Where ascertainable, this court must give effect to the will of the people who voiced their political choices by casting their votes on November 7, 2000.*

Judge Clark then set out the principle underlying the body of election law as she saw it.

*An accurate vote count is one of the essential foundations of our democracy. The very purpose of election laws is to obtain a correct expression of the intent of the voters, without imposing unnecessary and unreasonable restraints on that right.*

*Jacobs v. Seminole County Canvassing Board*, Case Number CL 00-2816, slip op. (2d Cir. Leon County, Fla., December 8, 2000) (emphasis supplied).

This is not to say that Judge Clark and the Florida Supreme Court ignored the extra-legal actions of the Seminole County Supervisor of Elections in allowing her office to be used as an adjunct of the Republican Party. The Florida Supreme Court said,

We especially note, however, that at the conclusion of its order, the trial court found that the Supervisor of Elections of Seminole County exercised faulty judgment in first rejecting completely the requests in question, and compounded the problem by allowing third parties to correct the omissions on the forms. Nothing can be more essential than for a supervisor of elections to maintain strict credibility in the outcome of the election. We find the Supervisor's conduct in this case troubling and we stress that our opinion in this case is not to be read as condoning anything less than strict adherence by election officials to the statutorily mandated election procedures.

At 524 (emphasis in the original). In making this statement, the supreme court cited to the similar language at pages 725-726 of *Beckstrom*.

#### **D. Leading case III: The facts of *Pullen v. Mulligan*.**

The mandatory/directory dichotomy is well defined by another of the leading cases in the area, *Pullen v. Mulligan*, 561 N.E.2d 585 (Ill. 1990). The facts of *Pullen* were set out in Chapter I to demonstrate that challenges to an election must be within the dictates of the written election laws.

To summarize, Penny Pullen lost to Rosemary Mulligan by 31 votes in the March 20, 1990 primary election for nomination as the Republican Party candidate for the 55th District of the Illinois House of Representatives. Ms. Pullen filed an election contest in the Cook County Circuit Court, alleging a number of irregularities. Ms. Mulligan claimed that other irregularities occurred in the vote count and asked the court to dismiss Ms. Pullen's petition. After a recount, the judge ruled that some ballots should be counted, while others should not, and the two candidates were tied. Ms. Mulligan won the nomination by a flip of a coin.

Before reviewing the trial court's determinations on the particular election irregularities claimed by the parties, the Illinois Supreme Court discussed the principles that apply to such challenges.

The Election Code is a comprehensive scheme which regulates the manner in which elections shall be carried out. Strict compliance with all applicable provisions in the Election Code is not necessary, however, to sustain a particular ballot. Rather, our courts draw a distinction between violations of "mandatory" provisions and violations of "directory" provisions. *Failure to comply with a mandatory provision renders the affected ballots void, whereas technical violations of directory provisions do not affect the validity of the affected ballots. . .*

There is no universal formula for distinguishing between mandatory and directory provisions. Rather, whether a particular statutory provision is mandatory or directory depends upon the intent of the legislature, which is ascertained by examining the nature and object of the statute and the consequences which would result from any given construction. . . *[W]here a statute, in prescribing the duties of the election officials, expressly states that failure to act in the manner set out in the statute will void the ballot, that statute will generally be given a mandatory construction. However, if the statute simply prescribes the performance of certain acts in a specific manner, and does not expressly state that compliance is essential to the validity of the ballot, then the statute generally will be given a directory construction. . .* We do not mean to suggest, of course, that election officials may simply ignore directory provisions of the Election Code. All of the provisions of the Election Code are mandatory in the sense that election officials are obligated to comply with their terms. It does not follow, however, that every failure to comply should invalidate the ballot in question. Literal compliance with directory provisions will not be required if it appears that the spirit of the law has not been violated and the result of the election has been fairly ascertained.

At 595-596 (emphasis supplied).

But this seemingly clear iteration of the distinction between mandatory and directory provisions, which we will see used to void ballots later in this chapter, cannot be mechanically applied. The Illinois Supreme Court in *Pullen*, after setting out the above statement of principles, proceeded to chip away at the cornerstone principle: that a statute is mandatory when it says that failure to act in the way the statute describes will void the ballot.

Paper ballots were used in the 1990 Republican primary election between Ms. Pullen and Ms. Mulligan. Illinois procedure required the election judges to put the voters' ballots in the ballot box and to initial each ballot before it was put into the ballot box. The Illinois Supreme Court noted that under Illinois law "[n]o primary ballot, without the endorsement of the judge's initials thereon, shall be counted," and that "If any ballot card or ballot card envelope is not initialed it must be marked 'Defective' on the back and not counted." At 596.

Some ballots cast in the precincts had not been initialed by the election judges, and some absentee ballots had not been initialed by the election judges. The parties agreed that the uninitialed in-precinct ballots should not be counted, but disagreed on whether the uninitialed absentee ballots should be counted.

D.1. *The requirements of a mandatory law will not be enforced if the goals for which it was designed cannot be achieved*

The trial court's analysis relied on a 1986 Illinois case, *Craig v. Peterson*, 233 N.E.2d 345, which held that the initialing requirement was directory. In *Craig*, none of the absentee ballots from 14 precincts were initialed. Because people who voted in the precincts on election day in *Craig* used voting machines, the absentee ballots were the only paper ballots in that election. The *Craig* court said that the initialing requirement usually is mandatory because it allows election judges to distinguish between the ballots they put in the ballot box and the ballots they did not, which is a safeguard against ballot box "stuffing" and other fraudulent practices. But in *Craig* there were no legal ballots to be separated from illegal ballots based on the presence or absence of the election judges' initials, because there were no paper ballots except the absentee ballots, and none of them had initials—there was no comparison to be made.

As described in *Pullen*, the *Craig* court found that "statutory requirements which deprive qualified voters of their right to have their vote counted, without fault on the part of the voters, are constitutionally suspect where such requirements do not contribute to the integrity of the election process." At 597. Since the initialing requirement was not necessary to ensure the integrity of the election in *Craig*, the court there construed the requirement to be directory.

The supreme court in *Pullen* then studied the parallels between *Pullen* and *Craig* to determine whether the facts in *Pullen* satisfied the two-pronged test in *Craig* for deciding that the initialing requirement was *directory* for absentee ballots: 1) that the in-precinct and absentee ballots can be distinguished and 2) that the initialing requirement was unnecessary to maintain the integrity of the election. It found that even though in *Pullen* all the ballots were paper ballots, the ballots cast in the precincts had pre-printed precinct numbers on them while the ballots cast absentee had handwritten precinct numbers on them. So the in-precinct ballots could be distinguished from the absentee ballots, and the first prong of the *Craig* formulation was satisfied.

The supreme court said it found the second prong to be a closer question, but its analysis is brief and straightforward. The court noted that the initialing process was necessary to preserve the integrity of the election because it was the only means of distinguishing between ballots that were legally cast and ballots that were illegally cast in the polling places. But the absentee ballots were not cast in the polling places. Rather, they remained unopened until the polls closed, and were opened only after the polls closed. At that point, having the ballots initialed by the election judges at the polling place would not prevent ballot box stuffing. And since the initialing of the ballots was not necessary to the function for which it was designed, it was not necessary to preserving the integrity of the election process.

The other irregularities in the 1990 election were then addressed by the Illinois Supreme Court. A statute said that the back of the ballot had to say Primary Ballot and have the precinct name, the date of the election and a facsimile of the signature of the official who requested that the ballots be printed. Some ballots did not identify the precinct. After citing three Illinois cases from between 1918 and 1921 that had voided elections and ballots because similar information was missing from the ballots, the court in *Pullen* relied on a 1958 Illinois case, *Hester v. Kamykowski*, 150 N.E.2d 196, that overruled all of those older cases, saying the "unintentional errors in printing will not void the ballot where they do not affect the merits of the election." The *Pullen* court then quoted the conclusion of the court in *Hester*, "By enforcing with too great technical exactness the provisions concerning the form of ballots the very object of those provisions in securing a fair election may be defeated." At 600. By this reasoning, the *Pullen*

court decided that the absence of precinct identification information on some ballots did not invalidate the ballots.

Other irregularities, however, were found to be more serious, so serious that some of the ballots were ruled to be invalid. The discussion of these ballots demonstrates how closely a court will look at the particular facts regarding the ballots, and how particularly the contestants in an election challenge must present the facts.

*D.2. Legitimate voters represent the will of the electorate, but ballots of ineligible voters are invalid*

In Illinois, the statute on voter eligibility said that a person, in addition to other qualifications, had to reside in his or her precinct for 30 days before the election. In *Pullen*, five ballots had the wrong precinct number on them: three were absentee ballots on which the wrong precinct number was handwritten, and two were in-precinct ballots on which the wrong precinct number was pre-printed. An additional four ballots had no precinct number, but had written on them the name of a precinct that is outside of the 55<sup>th</sup> Representative District in which Ms. Pullen and Ms. Mulligan ran.<sup>63</sup> Remember that Ms. Pullen and Ms. Mulligan finished in a tie for the nomination after the vote totals were adjusted according to the trial court judge's rulings on the ballots that each of the candidates challenged. So every vote that could be added to or subtracted from one of the candidates was vitally important in this election contest.

The Illinois Supreme Court began its analysis of the first five ballots by noting that the statute that required residency in the precinct for 30 days before the election did not *say* that a ballot cast in the wrong precinct is invalid. The supreme court then recognized that earlier cases—between 1944 and 1964—had decided that the ballots of voters who voted in the wrong precinct were illegal and should not be counted. But the court once again distinguished past cases on their facts, saying that in *Pullen* “there is no evidence that any voter cast a ballot in the wrong precinct. The evidence established only that certain ballots bore the wrong precinct number.” At 602.

The court recognized that the problem of having the *wrong* precinct numbers was different from the problem in *Hester* where there was no precinct number at all. In order to determine whether the statute required that those ballots be counted or invalidated, the supreme court stated the opposing policy considerations that were involved.

[I]gnorance, inadvertence or mistake on the part of the election officials should not be permitted to disfranchise an election district or to defeat the will of the electorate. . .

At the same time, courts have not hesitated to invalidate the ballots of voters who were not *qualified* to vote in the election in question.

At 602 (emphasis supplied).

This emphasis on the *qualifications of the voter*, as opposed to the *technical requirements for ballots*, creates a solid basis for the basic distinction between mandatory and directory provisions.

Using this basis for decision, the Illinois Supreme Court upheld the trial judge's decision that the five ballots with the wrong precinct number on them should be counted. There was no allegation that the ballots

<sup>63</sup> Precincts are the geographical area where polling places are located; voter registration books are arranged by precinct. Precincts, in other words, are areas set up for the administration of elections. Districts are geographic areas from which persons are elected to legislative offices; legislators represent people in their particular district.

were fraudulently cast, and no claim that the voters did not reside in the 55<sup>th</sup> Representative District. The court further reasoned that it could be assumed that the ballots were cast in the voters' proper precinct because voters can get ballots only after satisfying an election judge that they are qualified to vote in that precinct. Moreover, there were explanations of how ballots for one precinct could get mixed up with ballots for another precinct. The supreme court concluded,

Although these ballots were counted in the wrong precinct, they were cast by voters who resided in the 55<sup>th</sup> Representative District and who were *entitled* to vote for one of the candidates involved in this contest. Any error was attributable to the election officials and not the voters. We conclude that *otherwise qualified voters* should not be deprived of their right to have their votes counted simply because of error on the part of election officials.

At 603 (internal citation omitted) (emphasis supplied).

But voters who live in one district and cast their ballots for candidates in another district are not entitled to have their votes counted. This was true of the four voters who wrote on their ballots the name of a precinct outside of the 55th Representative District. The supreme court said these voters "had *no right* to cast a vote for one of the candidates in this election. . .the voters here were *not qualified* to vote for the office in question. Consequently, their votes may not be counted." At 603 (emphasis supplied).

In assessing other irregularities in the case the supreme court said:

- It was allowable to count some votes on the punch-card ballots that did not have the holes punched through completely, leaving the paper in the hole partially depressed or hanging by an edge.
- The trial court was wrong to disallow a visual inspection of the ballots that could not be read by the automatic tabulating machine, even though the statute says that punch card ballots shall be recounted on a tabulating machine; the supreme court interpreted that statute as directory.
- As to 77 ballots on which election judges erroneously wrote a number corresponding to the number on the voters' application for a ballot, no mandatory provision of the election code was violated because the provisions requiring secrecy of the ballot prohibited voters, but not election officials, from marking a number on the back of the ballot, and because the mark must be made with the intention of violating the secrecy of the ballot, not by mistake.
- Ms. Mulligan could not contend that one ballot was lost when the ballot totals for two recounts were one ballot less than the ballot total for the another recount, because Ms. Mulligan had stipulated that all the ballots had been preserved between the election and the trial (even though she wrote a caveat on the stipulation as to the precinct in question), and she did not object to the trial court's recitation of the total vote.

After all of the Illinois Supreme Court's reasoning and analysis, the vote between Ms. Pullen and Ms. Mulligan remained tied. The Illinois Supreme Court then sent the case back to the trial court for a visual inspection of the 27 ballots that the supreme court decided the trial court had erroneously decided not to examine. The trial court concluded that seven of those ballots looked like they had been punched for

Ms. Pullen and one for Ms. Mulligan (the votes on 19 of those ballots were still impossible to determine). All told then, Penny Pullen beat Rosemary Mulligan by six votes, 7,392 to 7,386.

A careful reading of this important case shows that the Illinois Supreme Court worked very hard to apply the legislative decisions reflected in the state election code in a way that *allowed peoples' votes to count*. The supreme court's approach to the principles it enunciated for interpreting the statutes recognizes that people make mistakes throughout the election process. Election officials make mistakes, and voters make mistakes. But it takes more than a mistake to decide that a candidate should not get the vote a person wanted that candidate to get. A decision to disregard that vote requires that the mistake affect the voter's qualifications or the ballot's legitimacy.

#### E. Application of mandatory/directory principles to specific types of statutes.

The distinction between mandatory and directory provisions in election law, and the principles underlying the distinction, are applied routinely in cases involving challenges to elections. Even though these cases affect many different aspects of election procedures, the courts use the mandatory/directory dichotomy as the basis of their decisions. However, while using the same principles, courts sometimes reach differing conclusions on similar facts. This can best be illustrated by the way the courts applied the distinction between mandatory and directory provisions to real-life fact situations involving four specific types of statutes commonly at issue in election challenges:

- initialing of ballots by election officials,
- handling ballots,
- candidate qualification procedures, and
- secrecy of the ballot.

##### *E.1. Initialing of ballots: Requirements that officials initial the ballots ensure the integrity of the election and can be considered mandatory*

In three cases—one from Minnesota in 1967, one from Indiana in 1985 and one from Mississippi in 1991—polling place officials failed to initial voters' ballots as required by state law. In the first two cases, the initialing requirement was found to be mandatory and the uninitialed ballots were ruled to be invalid. In the third case, the initialing requirement was found to be a technical error, and therefore directory, because the integrity of the uninitialed ballots was not questioned, and the uninitialed ballots were counted (although a dissent in the case argued that the requirement was mandatory and that the deviation from the law meant that there was not a legal expression of the will of the voters).

In 1967, the Minnesota Supreme Court decided *Johnson v. Trnka*, 154 N.W.2d 185, where Charles E. Johnson ran against Frank Trnka, the incumbent, for the office of county auditor in Isanti County. When the votes were counted, Mr. Johnson was ahead by four votes out of 5,082 total votes cast. But the election officials did not always follow the state law that required two election judges—polling place officials—to initial all of the ballots at the polling place before the polls opened. Six of the ballots in the ballot box at one precinct had not been initialed: four were for Mr. Johnson and two were for Mr. Trnka. In addition, while there were 505 registered voters in the precinct, there were 507 ballots in the ballot box, including the uninitialed ballots. In the subsequent challenge of the election, the trial court resolved the over-voting by simply drawing out two ballots at random from among all of the ballots counted, which left Mr. Johnson with a two-vote victory. But that victory was to be short lived.

On appeal, the Minnesota Supreme Court began by reviewing the “well-established policy of giving effect to the votes of legal voters regardless of irregularities in the election. No person should be deprived of his right to vote because of the neglect or carelessness of election officials unless that conduct has been carried to such an extent as to affect the true outcome of the election and put the results in doubt.” And, quoting one of its earlier decisions, the supreme court said,

“...[A]fter an election is over, statutory regulations are usually construed to be directory rather than mandatory unless the departure from the statutes casts uncertainty upon the result.”

At 187.

However, there was a Minnesota statute that dealt specifically with what should be done when there is an excess of ballots found in the ballot box. Under these circumstances, the supreme court said,

The liberal principles which generally hold that neglect and carelessness of election officials should not deprive a person of his right to vote must yield to the express provisions of this statute as it applies to the disposition of excess ballots.

At 187.

The express provisions of the statute required that the uninitialed ballots be taken out and not counted. The statute went on to say that if, after that were done, there *still* was an excess of properly marked ballots, all of the uninitialed ballots should be put back into the ballot box and an election judge (“without looking”) should take out as many ballots as were over the limit, and the remaining ballots would be counted.

The Minnesota Supreme Court supposed that the trial court felt that the last part of that statutory instruction—to draw out a number of extra ballots—should be followed because there was no evidence of fraud, and so a result should be reached that gave equal weight to everyone’s vote by pulling out two of the ballots at random. But the supreme court adhered to the statutory directions. Without the six uninitialed ballots, the number of ballots left was within the number of registered voters. Still following the statute, the supreme court decided that those six ballots should not be counted. That resulted in a tie vote between Mr. Johnson and Mr. Trnka. The supreme court reversed the trial court’s judgment and remanded the case for further proceedings consistent with the statute.

Uninitialed ballots also were determined to be invalid in *Fultz v. Newkirk*, 475 N.E.2d 706 (Ind. 1985). A trial court determined, after the examination of many contested ballots, that John D. Fultz beat Frank D. Newkirk, Sr., by 19 votes for election to the office of mayor of the City of Salem, Indiana. On appeal, the Indiana Court of Appeals followed then-recent decisions in Indiana that said that the initialing requirement *ensured the integrity of the voting system* by guaranteeing that only valid ballots went into and came out of the ballot box. Then the appeals court affirmed the trial court’s determination that *none* of the absentee ballots in three precincts should be counted because they were not initialed by the poll clerks as required by state statute.

A different result was reached in *Wilbourn v. Hobson*, 608 So.2d 1187 (Miss. 1992), where the Hinds County, Mississippi, Election Commission had certified Hershel Wilbourn as the winner over Peggy Hobson by 31 votes out of 10,673 in a 1991 race for a seat on the Hinds County Board of Supervisors

(county council). A state law required that before a paper ballot was given to a voter, it had to be initialed on the back by a poll worker so that the initials showed when the ballots were folded and deposited in the ballot box. This applied to *all paper ballots*. Another state law, which applied *only to affidavit ballots*, was silent about initialing.<sup>64</sup> The affidavit ballot is a paper ballot.

Ms. Hobson challenged the election result in the Hinds County Circuit Court because several ballots that had not been initialed by a poll worker had not been counted. The circuit court awarded her 27 affidavit ballots that had been cast for her but had not been initialed by a polling place worker and six affidavit ballots that had been cast for her but whose envelopes had been erroneously opened early by poll workers, the ballots counted and returned to their envelopes. There was also one curbside ballot<sup>65</sup> counted for Ms. Hobson and one uninitialed affidavit ballot counted for Mr. Wilbourn. (There were not more uninitialed ballots because voting machines were used at the election.)

As a result, the court declared Ms. Hobson the winner over Mr. Wilbourn by two votes. It was stipulated by the parties that all of the voters whose ballots were involved in these challenges were legitimate registered voters and that there was no question as to the integrity of the six affidavit ballots that had been opened early by the poll workers.

The Mississippi Supreme Court ostensibly focused on the basic rules of statutory construction, not the mandatory/directory approaches to election law, when it applied the law to the facts. But it was the mandatory/directory analysis that was used to resolve the questions raised by the exercise in statutory construction.

First, the supreme court examined the rule that, in construing statutes, a specific law controls over a general law if they apply to the same subject matter. This would give weight to Ms. Hobson's position that the affidavit ballots did not need to be initialed: the affidavit ballot statute, which does not mention initialing, is more specific to the subject matter (affidavit ballots) than the paper ballot statute, which requires initialing but refers generally to the subject matter (affidavit ballots are only one kind of paper ballot).

Then the Mississippi Supreme Court examined the rule that, in construing statutes, two statutes that refer to the same subject matter should be read together in a way that achieved the legislative intent. This would give weight to Mr. Wilbourn's position that the affidavit ballots had to be initialed and, because they were not, they were illegal and should not be counted. That is, the affidavit ballots were paper ballots, and the paper ballot statute supplied the initialing requirement that the affidavit ballot statute left out.

Another statutory requirement, however, cut against Mr. Wilbourn's argument. A ballot can be initialed only after the voter signs a receipt book. But a person whose name is not on the voter registration list is not permitted to sign the receipt book and can only vote by affidavit ballot. Also, the purpose of the initialing requirement was seen by the supreme court as a means of avoiding ballot box stuffing, and the affidavit ballots cannot be used in ballot box stuffing because they are not put into the ballot box; they are held separately and counted separately. The parties had stipulated that no fraud took place (they had stipulated to all of the facts).

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<sup>64</sup>In Mississippi, a person's name had to be on the poll books (a list of registered voters) in order to vote. But a person whose name was not found on the voter registration list could make an affidavit that he or she had been illegally denied registration and could cast an "affidavit ballot." The voter's marked ballot and the affidavit were put into an envelope with the voter's name on it. During the canvass of the ballots, the question of the challenged voter's qualifications was resolved. If the voter was found to be qualified, the ballot was counted.

<sup>65</sup>A disabled voter who cannot get into the polling place may wait in the car and have a ballot brought out to him or her.

But after all the analysis, the Mississippi Supreme Court concluded that even if the affidavit balloting provision were to be read to *require* that those ballots be initialed, “the initialing provision would be *directory* as to that statute. We have on many occasions held that technical irregularities will not vitiate an election where there is no evidence of fraud or intentional wrongdoing.” At 1192 (emphasis supplied).

If the integrity of a ballot is unquestioned, there is no good reason to disenfranchise a voter for some technical aberration beyond his control. . .

[I]f there had been even a hint of unseemliness associated with the ballots at issue, then even a technical irregularity might have rendered them void. . .the absence of initials on the twenty-eight contested ballots do not render the ballots invalid under our election code.

At 1193.

Then the court made short work of the complaint that six affidavit ballots were improperly opened by poll workers. The parties stipulated that the six affidavit ballots were opened after the polls closed, were put back in their envelopes, were delivered to the county election commission and were kept separately; in addition, they agreed that two of the ballots, found to be cast by unregistered voters, were not counted. The parties also stipulated that there was no question about the integrity of the ballots; the legality of the ballots was unquestioned except for the way that they were opened. With no evidence of fraud or wrongdoing, the Mississippi Supreme Court followed its prior cases stating that technical irregularities will not void the ballots.

We see no reason to disenfranchise innocent voters because of a technical irregularity which occurred long after their votes were cast.

At 1194.

In *Wilbourn*, the mandatory/directory analysis led the court to determine that the initialing of the ballots was only a technical requirement as applied to the facts of the case. But in *Johnson* and *Fultz*, no such analysis was necessary because the statute was ruled to be mandatory—based on the importance of initialing to the integrity of the ballot—and the officials’ failure to comply with the initialing requirement led to the invalidation of the uninitialed ballots. Election officials are required to initial ballots in order to ensure the integrity of elections, and in states where the initialing is required, the failure of election officials to initial the ballots will not easily be dismissed as a mere technical irregularity.

*E.2. Handling Ballots: Technical irregularities in counting ballots do not void an election unless they change the results.*

Another case—*Knight v. State Board of Canvassers*, 374 S.E.2d 685 (S.C. 1988)—demonstrates that an irregularity in the way the ballots are counted also can give rise to the conclusion that a statute is directory. *Knight* was mentioned in Chapter 2 where the South Carolina Supreme Court was quoted as saying, “mere technical irregularities or illegalities are insufficient to set aside an election unless the errors actually appear to have affected the result of the election.” Carl Knight lost the election for sheriff in Dorchester County, South Carolina. He filed a lawsuit against the State Board of Canvassers saying that the count of the absentee ballots was adjourned for the night and picked up again the next morning, in violation of a law that required the count to be conducted without interruption. However, the trial court affirmed the results of the election, and Mr. Knight appealed to the South Carolina Supreme Court.

On appeal, Mr. Knight argued that despite the general rule about technical irregularities, absentee balloting procedures should be subject to strict scrutiny. The supreme court disagreed, saying,

Petitioner's argument for a strict scrutiny standard for absentee voting must fail because our General Assembly has specified that statutes concerning absentee registration and absentee voting shall be liberally construed.

At 686. Accordingly, the supreme court decided that the State Board of Canvassers' decision affirming the absentee ballot count did not constitute an error of law, even though the counting procedure did not meet all the technical absentee ballot requirements. As was true of the other cases discussed in this chapter, the South Carolina Supreme Court stressed that the interrupted absentee ballot count did not affect the result of the election and that the absentee ballots were secure and had not been tampered with.

*E.3. Candidate Qualification Procedures: Irregularities in candidate nominating procedures will not void a candidate's election*

We mentioned earlier that the question of whether words in a statute regulating the actions of election officials are to be read as mandatory or directory depends in large part on whether or not the irregularity still can be corrected. We also mentioned that courts follow the liberal construction of election statutes, which makes them directory "after an election" even if they were mandatory "before the election," in order to do equity in situations where things go wrong and nobody is really to blame. That is what happened in *Tate v. Morley*, 153 S.E.2d 437 (Ga. 1967), when Dr. Horace E. Tate ran for a seat on the Atlanta, Georgia, Board of Education. He won in the primary election and was elected in the general election. But Robert S. Morley, as a citizen and a taxpayer, sued to remove Dr. Tate from the school board because Dr. Tate was allowed to qualify as a candidate in the primary election without paying the required qualifying fee and after the time for qualifying had passed. In fact, Mr. Morley was correct, after a fashion.

Dr. Tate was allowed on the ballot for the primary election without paying a fee only because the committee that administered the Atlanta primary election followed a ruling by a state court in another case, on August 17, 1965, that rejected the requirement for paying filing fees. On September 8, 1965, Dr. Tate was permitted to qualify as a candidate for school board. He won the primary and, in December 1965, he won the general election. But on January 11, 1966, the Georgia Supreme Court reversed the lower court's ruling in the case on which the Atlanta committee relied to let Dr. Tate get on the primary election ballot without paying a filing fee. Then Mr. Morley brought his lawsuit and, because the supreme court's reversal of the other case removed the legal basis for allowing Dr. Tate on the ballot for the primary election, the lower court in this case removed Dr. Tate from office. He appealed to the supreme court.

The Georgia Supreme Court began by noting that Mr. Morley did not attack Dr. Tate's qualifications to be on the school board or the way the general election was conducted. Then, faced with a qualified candidate who had been elected to office, the supreme court said,

...It is firmly established that objections to irregularities in the nomination of a candidate should be taken prior to election and it is too late to object after the nominee's name has been placed on the ballot and he has been elected to office; his election cannot be impeached on the ground that statutory requirements regarding nominations were not complied with in his case or that his nomination was procured by unlawful means.

And, quoting an earlier case, *Adair v. McElreath*, 145 S.E. 841 (Ga. 1928),

“All provisions of the election law are mandatory if enforcement is sought before election in a direct proceeding for that purpose; but after election all should be held directory only, in support of the result, unless of a character to effect an obstruction to the free and intelligent casting of the vote, or to the ascertainment of the result, unless the provisions affect an essential element in the election, or unless it is expressly declared by the statute that the particular act is essential to the validity of an election or that its omission renders it void. . . . And so an election in which the voters have fully, fairly, and honestly expressed their will is not invalid because the certificate of nomination of a successful candidate is defective through an omission of some detail.”

At 439.

The Georgia Supreme Court decided that, under the state statutes, Mr. Morley’s objection came too late.<sup>66</sup> But, the supreme court said, even if Dr. Tate’s nomination were contrary to the rules and regulations, he should not be removed from office because he got a majority of the votes in the general election.<sup>67</sup>

*E.4. Secrecy of the ballot: Technical requirements affecting the fundamental integrity of an election are mandatory after an election if the statute is totally disregarded*

A very different result was reached in *George v. Municipal Election Commission of the City of Charleston*, 516 S.E.2d 206 (S.C. 1999), after Charleston, South Carolina, held a referendum on November 3, 1998, on whether to change from partisan to nonpartisan elections. Usually the county helped with the city elections, letting the city use the county’s electronic voting machines and county precinct workers. But the ballot on November 3 had so many federal, state and county candidates running for office that the referendum issue could not fit on the county’s electronic voting machines. So the city set up a separate voting area in each of the polling places within the city for voting on the referendum.

After the voters in the city cast their ballots on the county’s electronic machines, they went to the separate table in the polling place where they signed in again, were given punch cards to vote on the referendum, punched the card at the table and dropped the card into a cardboard ballot box on the table. There were no voting booths in those separate areas: the city voters who wanted to shield their vote from the other people standing in line or working at the table could turn around, step away from the table, punch the card behind the ballot box or cup the punch card in one hand while punching out the yes or the no slot with the other hand. The punch cards could not be folded after they had been voted—folded cards could not be run through the counting machine—so the vote on the cards was visible as the cards were put into the ballot box.

The referendum passed by a large margin, 8,929 votes to 6,310. G. Robert George and others contested the results before the municipal election commission, saying that the state constitution and laws required the commission to have protected the secrecy of the ballot by providing voting booths and ballots that could be folded. The contest was submitted on stipulations—no witnesses or evidence were presented. As the South Carolina Supreme Court noted, Mr. George and the others presented a case where “no one testified he or she saw the vote made by another person, no one testified he or she refused to vote due to

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<sup>66</sup> “Objections relating to nomination must be timely made; otherwise they may be regarded as waived. It is too late to make them after the nominee’s name has been placed on the ballot and he has been elected to office. . . .” at 439.

<sup>67</sup> The Georgia Supreme Court might have reached a different result and found that Dr. Tate could not hold the office if Dr. Tate were found to have been lacking some essential qualification for the office. In much the same way, the Georgia Supreme Court found that an election was void because the candidate, who was not a duly registered voter of the county on the day of the election, was not a qualified candidate for office in *Thompson v. Stone*, 53 S.E.2d 458 (Ga. 1949), other aspects of which are discussed in Chapter 5.

the method of voting, and no one testified he or she was confused or intimidated during the process.” At 207. The municipal election commission upheld the election results.

The South Carolina Supreme Court’s decision begins similarly to the other court decisions discussed earlier in this chapter. In fact, the decision starts as if it will just be one more ruling that a violation of the laws governing election procedures will not nullify an election if the irregularities do not change the result of the election. As was noted in Chapter 2, the supreme court began its opinion by saying,

The court will employ every reasonable presumption to sustain a contested election, and will not set aside an election due to mere irregularities or illegalities unless the result is changed or rendered doubtful.

This Court, like many others, recognizes that perfect compliance in every instance is unlikely, and the Court is loathe to nullify an election based on minor violations of technical requirements.

At 208.

The supreme court continued by reciting the kind of standard statements about the mandatory/directory dichotomy that have been discussed earlier in this chapter.

As a general rule, such provisions are mandatory in two instances: when the statute expressly declares that a particular act is essential to the validity of an election, or when enforcement is sought before an election in a direct proceeding. After an election in which no fraud is alleged or proven, when the Court seeks to uphold the result in order to avoid disenfranchising those who voted, such provisions are merely directory even though the Legislature used seemingly mandatory terms such as “shall” or “must” in establishing the provisions.

At 208.

But then the South Carolina Supreme Court added other grounds for finding that seemingly technical statutory requirements are mandatory even *after* an election.

The Court still may deem such provisions to be *mandatory after an election*—and thus capable of nullifying the results—when the provisions substantially affect the free and intelligent casting of a vote, the determination of the results, an essential element of the election, or the fundamental integrity of the election....Furthermore, “where there is a total disregard of the statute, it cannot be treated as an irregularity, but it must be held and adjudicated to be cause for declaring the election void and illegal.”

At 208 (internal citation omitted) (emphasis supplied).

These grounds bear lingering over, since they are several and, as we shall see, capable of having facts fit into them, or not, as a court might desire. In fact, after *George*, the South Carolina Supreme Court came to the opposite conclusion in *Taylor v. Town of Atlantic Beach Election Commission*, 609 S.E.2d 500 (2005). But let’s finish the analysis of what the South Carolina Supreme Court concluded in *George*.

Under *George*, seemingly technical requirements can be found to be mandatory after an election if either:

- I. the provisions substantially affect
  - the free and intelligent casting of a vote,
  - the determination of the results,
  - an essential element of the election, or
  - the fundamental integrity of the election.
2. there is a total disregard of the statute.

The South Carolina Supreme Court reviewed the long history of ballot secrecy requirements in the South Carolina Constitution and statutes, and the salutary goals that secrecy of the ballot achieves. It then turned to judicial decisions in South Carolina cases involving the secrecy of the ballot and found cases dealing with varying degrees of breached ballot secrecy but said that it found no case where voters were not provided with any voting booths at all. Further, the supreme court found that other state courts that had considered the same issue disagreed on how to resolve it. In the end, after saying it could understand the municipal election commission's decision to hold the balloting without voting booths, the South Carolina Supreme Court concluded that the commission's decision was wrong.

We conclude this election challenge is not one in which we are faced with minor violations of technical requirements. The history of the secret ballot, our precedent, and the statutes persuade us that *the voting booth is an essential element of the electoral process*. The lack of any evidence of voter intimidation or fraud is not dispositive because the total absence of booths affects the fundamental integrity of the election. . . We cannot condone the method of voting employed by Commission [sic] because it would unwisely sanction a practice that “*circumvents[s] the plain purposes of the law and open[s] the door to fraud*” and intimidation. . .

At 211 (emphasis supplied).

The court came to the same conclusion about the inability to fold the punch cards.

We hold that the use of ballots that were not designed to be folded violates the constitutional and statutory right to a secret ballot. We do so for the same reasons expressed in connection with the absence of the voting booth. The provision for foldable ballots is *mandatory because it affects an essential element of the election and the fundamental integrity of the electoral process*.

At 212 (emphasis supplied).

As insistent as the South Carolina Supreme Court was in *George* that the ballot secrecy was mandatory because it was an essential element of the election process, it reached a different result in *Taylor v. Town of Atlantic Beach Election Commission*, 609 S.E.2d 500 (2005). This is one of the two *Taylor* cases discussed in Chapter I to show that there is no common law basis for election challenges. To recap briefly, Charlene Taylor lost badly in her attempt to be mayor of Atlantic Beach, South Carolina. Ms. Taylor came in third out of four candidates. The winning candidate got 104 votes and the other three candidates got, respec-

tively, 34, 18 and 13 votes. Ms. Taylor was the candidate with 18 votes. The day after the election, Ms. Taylor and two candidates who lost badly in their races for the town council filed letters with the town election commission claiming that there were a number of irregularities in the election and contesting the election results. The election commission replied with a letter saying that some of the claimed violations were not proven and that the other claimed violations would not have changed the result of the election. The commission rejected the contest.

Ms. Taylor and the two council candidates then sued the town council and the winning candidates in circuit court, claiming again that there were a number of irregularities, including the violation of the voters' right to secrecy of the ballot. Twenty-three ballots were challenged; 21 of them were in the record that the supreme court reviewed. The challenged ballots were sheets of plain paper on which the voter wrote the names of the candidates he or she wanted and, in six instances, then signed the paper! The six voters did this because the polling place manager told them to. The polling place manager said that she had the voters cast their ballots this way "because we were rushing and did not get situated." At 504.

There were issues involved in the case besides the claim that the secrecy of the ballot was violated. Most of those other issues were procedural.<sup>68</sup> The plaintiffs lost, and the case was appealed to the South Carolina Supreme Court.

The supreme court decided the procedural issues against Ms. Taylor. On the issue of the secrecy of the ballot, the supreme court began its analysis in much the same way as it had in *George*.

We will employ every reasonable presumption to sustain a contested election, and will not set aside an election due to mere irregularity or illegalities unless the result is changed or rendered doubtful. In the absence of fraud, a constitutional violation, or a statute providing that an irregularity or illegality invalidates an election, we will not set aside an election for a mere irregularity.

At 502.<sup>69</sup>

But the supreme court went even further to emphasize the need for a real impact on the election if an irregularity by an election official was to be considered serious enough to invalidate an election.

"Voters who have done all in their power to cast their ballots honestly and intelligently are not to be disfranchised because of an irregularity, mistake, error, or even wrongful act, of the officers charged with the duty of conducting the election, which does not prevent a fair election and in some way affect the result."

At 502 (internal citation omitted).

This statement, stronger than the similar pronouncement in *George*, set the stage for the supreme court's conclusion that the violation of the secrecy of the ballot, which actually identified the voters (while the violation in *George* did not), affected neither an essential element of the election nor the fundamental integrity of the election process. Thus, the South Carolina Supreme Court said, "We recently emphasized the importance of ballot secrecy in *George*..." But here,

<sup>68</sup> Among those issues was the issue discussed in Chapter 1: the plaintiffs had asked the circuit court to set aside the election or send the matter back to the town election commission because the commission failed to set out in writing the reasons they rejected the plaintiffs' alleged violations.

<sup>69</sup> These points were discussed in detail in Chapter 2.

[T]here was *no systematic invasion of privacy*, as was evident in *George*. . . which affected the fundamental integrity of the election and gave rise to a constitutional violation sufficient to set aside the election results. We conclude this issue constitutes an irregularity that *did not affect the result of the election*, and the record does not demonstrate evidence of fraud, a constitutional violation, or a statute providing this irregularity should invalidate the election.

At 505 (emphasis supplied).

So *Taylor* is distinguishable from *George* because the irregularities are isolated instances when viewed in the context of all of the ballots cast. As a result, violation of the secrecy of the ballot—ruled to be a violation of a mandatory procedure in *George*—was found, in essence, to be only a violation of a technical requirement in *Taylor*. Once again, the facts of the case, and not the reliance on a legal theory, drove the result of the case. Note that in neither case did the supreme court find that the irregularities affected the result of the election.

#### F. Substantial compliance with directory procedures will make ballots valid.

In *Boardman* the Florida Supreme Court determined that portions of the statutes that set out the requirements for casting absentee ballots were directory, not mandatory, and then analyzed the validity of absentee ballots by determining whether the ballots substantially complied with those directory provisions. In *Boardman* the supreme court said,

At issue is whether the absentee voting law requires absolute strict compliance with all its provisions, or whether *substantial compliance* is sufficient to give validity to the ballot.

At 262 (emphasis supplied). Then the supreme court concluded,

[W]e hold that the primary consideration in an election contest is whether the will of the people has been effected. In determining the effect of irregularities on the validity of [sic] absentee ballots case, the following factors shall be considered:

- (a) the presence or absence of fraud, gross negligence, or intentional wrongdoing;
- (b) whether there has been *substantial compliance* with the essential requirements of the absentee voting law; and
- (c) whether the irregularities complained of adversely affect the sanctity of the ballot and the integrity of the election.

The underlying concern of the election officials in making the initial determination as to the validity of the absentee ballots is whether they were cast by qualified, registered voters, who were entitled to vote absentee and who did so in a proper manner. The *substantial compliance test* used by the trial judge comports with our conclusion that strict compliance with the statutory requirements for absentee balloting is not required to validate the ballots.

At 269-270 (emphasis supplied).

Likewise, the Wisconsin Supreme Court emphasized the substantial compliance test in summarizing the basis for deciding whether a statute is mandatory or directory. In *McNally v. Tollander*, 302 N.W.2d 440

(Wisc. 1981), the issue was whether a referendum election should be rerun when 40% of the electorate were not allowed to vote, even if the result of the election would not have changed if all of those voters had voted.

The ballot question asked if the county seat should be moved. There were statutory deadlines by which petitions had to be submitted to get the question on the ballot, and by which the question had to be publicized. All of the deadlines were missed, although none of the tardiness was the fault of the petitioners. The matter was further confused when conflicting legal opinions were issued on whether putting the referendum question on the ballot was allowed, and whether election officials could be subject to criminal prosecution for distributing the ballots with the referendum question on them.

*McNally* is discussed in detail in Chapter 5. For now, our focus is on the approach the Wisconsin Supreme Court took to the many violations of statutory requirements in the case. The supreme court began by saying,

[T]he Court has traditionally looked to the specific statutory election provisions involved to determine whether they were “directory or mandatory” provisions. The Court has consistently sought to preserve the will of the electors by construing election provisions as directory if there has been *substantial compliance* with their terms. . .

This case, however, is fundamentally different from other election cases considered by this Court. . .

At 444 (internal citation omitted) (emphasis supplied).

The supreme court then decided the case in light of the significant deprivations of fundamental voting rights that were involved in the disenfranchisement of nearly half of the voters.

The test of substantial compliance was the key to determining whether Peter McDonough, the Democratic incumbent, or John Coughlin, his Republican opponent, won election as the county attorney in Hillsborough County, New Hampshire, on November 2, 2002, in *In re McDonough*, 816 A.2d 1022 (N.H. 2003). After a recount of ballots, which had been requested by Mr. McDonough, Mr. Coughlin won by 126 votes. Then Mr. McDonough contested 269 ballots.

Elections in New Hampshire allowed for straight-ticket voting as well as voting for individual candidates. A voter could mark the ballot to vote for all candidates in a particular political party (a straight ticket), or a voter could mark the ballot for the individual candidates on it. Or a voter could do both: if a voter marked a preference for a straight ticket, and also marked the ballot for particular candidates, then the New Hampshire law said that the voter’s preferences for the individually marked candidates would be counted, and in those races for which the voter had put no mark for an individual candidate, the voter’s straight-ticket choice would be counted for that office. The voter marked the ballot by darkening in an oval next to the name of the party or of the candidate.

The ballots Mr. McDonough challenged were those of voters who marked the ballot for a straight ticket for the Republican Party, *and* marked the ballot for *some* individual candidates *but not* for the candidates in the county attorney race. The question for the court was whether a skipped race (unmarked when a

straight ticket was voted) should count as a vote for the straight-party candidate. The instructions for marking the ballot, both inside the polling place and in sample ballots that had been distributed, were fairly long.

Mr. McDonough challenged the election results by bringing his case before the New Hampshire Ballot Law Commission (BLC), where he claimed that counting the skipped individual races as votes for the straight-party candidates violated the election officials' duty to ascertain the true choice of the voter. When the BLC ruled against him, Mr. McDonough appealed to the New Hampshire Supreme Court.

The supreme court said that under the statute,

[V]oters may vote for individual candidates, write in names of candidates, vote along straight party lines, and vote along split party lines. None of these voting methods is required. Nor, as we read the permissive statutory language, are these methods exclusive of one another. Thus, if a voter makes an appropriate mark for any candidate or office in *substantial compliance* with the...statute, the vote should be counted.

\* \* \* \*

[T]he principles guiding our inquiry in this case are as follows: (1) we will not void an election because of mere irregularities or technicalities in the form of a ballot, election or vote; (2) we strive to enfranchise voters by giving effect to all marks on the ballot; and (3) we strive to avoid diluting votes by counting as votes marks that were intended to indicate the voter's intent to abstain.

At I028 (internal citations omitted) (emphasis supplied).

The supreme court then decided that a voter's intent to vote a straight ticket was clear where the voter voted for a straight party ticket and then left blank at least seven of the 12 individual races on the ballot. There were 172 ballots like that among the 269 ballots that Mr. McDonough challenged in the county attorney race. After subtracting those 172 ballots from the 269 ballots that Mr. McDonough had challenged, there were only 97 challenged ballots left. Even if all of those 97 ballots had been counted for Mr. McDonough and then subtracted from Mr. Coughlin's 126-vote margin of victory, Mr. McDonough still would have lost to Mr. Coughlin by 29 votes.<sup>70</sup> So Mr. McDonough lost his challenge.

Looking at the ballot itself, the Supreme Court of Florida was able to decide quickly on one of the more notorious problems that occurred in the 2000 United States Presidential election by using the substantial compliance test. There was much publicity about the "butterfly ballot" used in Palm Beach County, Florida, on November 7, 2000. That ballot had two facing pages with the names of candidates on both pages. The names of the candidates on the facing pages were staggered so that each candidate's name was a little above or below the candidate's name on the facing page. Between the two pages there was a strip with holes, under which was the actual ballot cardboard rectangle. A voter would punch a hole in a cardboard to mark his or her choice. News reports quoted voters who were greatly concerned that they had punched the ballot for Pat Buchanan, the Reform Party candidate, instead of Al Gore, the Democratic Party candidate, on the facing page.

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<sup>70</sup> The supreme court's opinion says that Mr. Coughlin would still win by a margin of 25 votes. Mr. McDonough had also claimed that the ballot instructions were so confusing that they interfered with voters' fundamental right to vote. One of his witnesses was a psychologist who testified that the voter instructions would require at least three years of college to understand. But the supreme court said that the New Hampshire Ballot Commission determined that "although evidence was presented that the instructions were confusing and difficult to understand, this evidence was insufficient to demonstrate that voters did not understand the instructions...As the trier of fact, the BLC was free to reject the expert's testimony in whole or in part." At I029.

A lawsuit was filed by voters who said they had been confused by the butterfly ballot and were afraid that they had voted for the wrong candidate. They claimed that the butterfly ballot was defective on its face and that its form and design violated the requirements of the Florida election statutes. The trial court, in an unreported decision, issued a declaratory judgment holding that the law did not allow the plaintiffs to get a new election for Presidential electors, which was the remedy they asked for, and so the court denied the claims without an evidentiary hearing about the ballot confusion and the denial of the right to vote. *Fladell v. The Elections Canvassing Commission of the State of Florida*, Case Numbers CL 00-10965 AB, CL 00-10970 AB, CL 00-10988 AB, CL 00-10992 AB, CL 00-11000 AB, slip op. (15th Cir. Palm Beach County, Fla., November 20, 2000).

An appeal on the plaintiffs' butterfly ballot claim was certified directly to the Florida Supreme Court, where the plaintiffs lost again. Although there had been no evidentiary trial, a butterfly ballot had been attached to the plaintiffs' complaints that had been filed and therefore became a part of the pleadings and available to the court to look at. The Florida Supreme Court looked at it and said,

As a general rule, a court should not void an election for ballot form defects unless such defects cause the ballot to be in substantial noncompliance with the statutory election requirements. . .

In the present case, even accepting appellants' allegations, we conclude as a matter of law that the Palm Beach County ballot does not constitute substantial noncompliance with the statutory requirements. . .

*Fladell v. Palm Beach County Canvassing Board*, 772 So.2d 1240, 1242 (2000). The double negative ("does not constitute substantial noncompliance") seems to mean that the ballot was in substantial compliance, or was at least close to substantial compliance, with the statute. But the effect of the supreme court's ruling went even further than a judgment about the butterfly ballot. The ruling that the ballot was not in substantial noncompliance with the statute led to vacating all of the trial court's decision, including a ruling on the law that applies to choosing Presidential electors. The supreme court then said that the plaintiffs' claim about the butterfly ballot

was the threshold issue in respect to whether the complaints stated a cause of action. Accordingly, we affirm the trial court's dismissal with prejudice of the complaints. Because the dismissal would be proper on that basis, we conclude that all other issues ruled upon by the trial court were not properly reached and, therefore, the court's rulings thereon are a nullity.

At 1242-1243. The rulings that the Florida Supreme Court decided were a nullity involved laws about choosing Presidential electors. Those laws were discussed in detail when the U.S. Supreme Court decided *Bush v. Gore*, 531 U.S. 98 (2000), the case that resulted in the defeat of Al Gore and the election of George W. Bush as President of the United States.

But substantial compliance with a mandatory statute is not enough. *Taylor v. Central City Community School District*, 733 N.W.2d 655 (Iowa 2007), involved a July 13, 2004 special referendum election on whether to issue \$4,605,000 worth of general obligation bonds and whether to authorize a tax levy to pay for the bonds. To vote yes or no, the voter had to fill in an oval next to the words "yes" or "no." Each of those questions needed 60% of the vote in order to be adopted. The first question passed easily. However, the second question—whether to pay for the bonds—passed with just 60.09% of the vote.

Raymond Taylor and other opponents of the measure requested and got a recount. The recount board concluded that the ballot-reading machine did not properly read four ballots. On one of the four ballots the voter had completely darkened the word “No,” but did not fill in the oval next to the word “No.” On the other three ballots the voters had darkened-in the letter O in the word “NO,” but left the oval next to the word “No” empty. The board decided that the three ballots with the O filled in showed the voters’ intent to vote against the measure, and should be counted, but that the voter’s intent was unclear on the ballot with the word “No” overwritten, and that ballot should not be counted. As a result, only 59.89% of the votes were cast for the measure and it failed.

A three-member contest court, convened under Iowa law at the request of 28 other voters, decided that none of the four “No” ballots should be counted.<sup>71</sup> The measure passed.

Mr. Taylor and two other voters filed a petition in Iowa district court to try to reverse the recount court’s decision. The district court decided that because the voters of the four ballots had not marked inside the ovals, their intent could not be shown and all four ballots were rejected. The measure passed.

The case was appealed to the Iowa Supreme Court. First the supreme court closely read the statute allowing an appeal from the recount court to the district court. The statute “permits a ‘party against whom judgment [was] rendered [to] appeal within twenty days to the district court.’” At 658. But Mr. Taylor and his group had not filed an appeal to the district court from the recount court—they filed a petition in the district court.

The supreme court noted that, “The right to contest an election is only conferred by statute, and contestants must strictly comply with the provisions of the statute in order to confer jurisdiction.” At 657. Still, the supreme court went on to say,

In the same way as we strive to uphold those legislative requirements written into the statute through strict compliance, we must not defeat the legislative process by imposing requirements where none exist. . . It is clear that Taylor invoked the jurisdiction of the district court for the purpose of appealing the decision of the contest court. Taylor did not commence an independent action to dispute the results of the election. Instead, he properly commenced the action through a contest court, and his petition in district court indicated he was pursuing the matter as an appeal “pursuant to” [the applicable statute] and in doing so he asked the court to reverse the decision of the contest court. Under the circumstances, we find the filing of this petition was sufficient to meet the statutory requirements for making an appeal.

It looked like that the supreme court was ready to apply the substantial compliance test to the four ballots that were being contested. But that was not the way it turned out. The supreme court defined the issue by saying,

There is no claim that the form or content of the ballot in this case did not conform to our statutory requirements. . . Instead, the question is whether the voting mark on the disputed ballots complied with the requirements of our statutes. [State law] requires the voter to “designate a vote by making the appropriate mark in the voting target.”

At 659.

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<sup>71</sup> One member of the recount court was chosen by the petitioners, one member was chosen by the county commissioner of elections, and one member was chosen jointly by both the petitioners and the commissioner. I.C.A. § 57.7 (2003).

To determine if voting marks that were not in the oval were “appropriate marks” in a *referendum* election, the supreme court looked at other state statutes that relate to elections where *candidates* are on the ballot. The state law on counting ballots said that a ballot was required “to be rejected” if it was not marked in the way required for ballots in elections where candidates were on the ballot. The state statute on candidate elections said that marks “shall be placed in the voting targets opposite the names of the candidates.” At 659-660. The supreme court then read those statutes together, and applied the universal rule that a violation of a mandatory statute makes the ballot invalid.

Generally, a vote is counted in an election if the voter affixed any mark to the ballot that “fairly indicates” an intent to vote for a particular candidate or measure. See *Devine*, 268 N.W.2d at 623. However, this rule does not apply if the voter violates “a mandatory provision of the election law” in casting the ballot. *Id.* Thus, the intent of a voter to vote for or against a public measure is the prevailing issue only if the voter has followed the legal requirement in marking the ballot.

The supreme court rejected all four ballots, and the measure passed. In reaching its conclusion, the supreme court cited, quoted and distinguished its decision in *Devine v. Wonderlich*, 268 N.W.2d 620 (1978), a case brought by Francis P. Devine and decided by the Iowa Supreme Court nine years before it decided *Taylor*. Mr. Devine was a write-in candidate for a Keokuk, Iowa, county supervisor (commissioner) seat in 1976. The details of *Devine* are set out in Chapter 4. The outcome of the case, however, is important here because entries by voters on the ballots, including stickers with Mr. Devine’s name that were put in various places on the ballots, and varying ways of spelling Mr. Devine’s first and last names, were accepted by the Iowa Supreme Court in sufficient numbers to make Mr. Devine the victor.

Mr. Devine’s opponent, Raymond James Wonderlich, claimed that 52 of the sticker ballots for Mr. Devine violated the Iowa statutes that required write-in ballots to be put “in the proper place.” The supreme court said of this requirement,

To be valid, the write-in vote must be cast in *substantial compliance* with the statute. . . We hold, in accordance with the majority rule, that the standard is met when the sticker is close enough to the space designated for the write-in to show the elector’s intention.

At 626 (emphasis supplied).

And in approving the placement on the ballot of the stickers with Mr. Devine’s name on them, the supreme court said,

We have examined the 52 ballots on which Wonderlich contends stickers were incorrectly placed. We find the placement of these stickers *substantially complies* with the statute. Although on 30 ballots they conceal the words “Township Ticket,” printed on the ballot directly below the space for supervisor write-ins, the voters’ intent to cast these sticker votes for Devine in the board of supervisors race remains clear.

At 626-627 (emphasis supplied).

Faced with this precedent, the supreme court in *Taylor* said,

There are times when a voting mark does not strictly meet the ballot instructions or statutory requirements, but nevertheless is marked in such a way that it is not unauthorized *Devine*, 268 N.W.2d at 628 (“The voter’s intention, if it can be ascertained, should not be defeated or frustrated by the fact the name of the candidate is misspelled, or the wrong initials were employed, or some other

slightly different name of similar pronunciation or sound has been written instead of the actual name of the candidate intended to be voted for.”) In these cases the intent of the voter must prevail if it can be determined. That is not the case here, however, as none of the markings were made inside the “No” target. In such a case, the mark is unauthorized and uncountable. While “[t]he primary test of validity is whether the voter’s intent is sufficiently shown,” this intent cannot be derived from ballots that are marked inconsistently with the voting instructions provided on the ballot and the marking requirements of the statute. *Devine*, 268 N.W.2d at 628.

At 661 (some internal citations omitted) (emphasis supplied).

In *Taylor*, the voters’ intent to vote against authorizing a tax levy to pay for the bonds was unclear, at least to the extent that the recount board thought that the voters on three of the ballots wanted to vote “No,” while the contest board and the district court thought that the marks did not clearly show the voters’ intent. Did the uncertainty about the voters’ intent cause the Iowa Supreme Court to decide that the requirement for marking the referendum ballot in the oval was mandatory? Were there other aspects of the case that may have led the supreme court to its decision?

Remember that the supreme court went through a statutory analogy in order to reach the conclusion that the statute should be read to incorporate the language of another statute that required rejection of the ballot; a statute that requires the rejection of a ballot when there is a violation of its terms is considered to be mandatory. And in reaching its result in *Taylor*, the supreme court had to distinguish *Devine*, which was a leading case in the state. Finally, in *Taylor* the other measure on the referendum ballot, which authorized issuing \$4,605,000 worth of general obligation bonds, passed easily, making it illogical that the same ballot would result in a vote against authorizing a tax levy to pay for the bonds.

When all is said and done, it is likely that the Iowa Supreme Court decided that the voters’ marks on the ballot in *Taylor* were not like the actions of the voters in *Devine*, where voters’ attempts to write in Mr. Devine’s name, in many instances using stickers with Mr. Devine’s name on them, showed that the voters were clearly trying to do something to put his name on the ballot, and that the voters probably wanted to vote for him. Under those circumstances, applying strict rules that would defeat those voters’ attempts to mark the ballot for Mr. Devine would seem to fly in the face of the voters’ intent. It is easier to say that voters’ intent is not clear when a mark on the ballot is not where it is supposed to be, and it is supposed to be only in one place.

But could the use of stickers to vote for Mr. Devine withstand a statute that prohibited the use of stickers and said that contests for which stickers are put on ballots shall not be counted? The short answer is no, despite the fact that the voters’ intent to vote for that candidate is absolutely clear.

Mary Kibbe and Chip Gehres were on the ballot for the position of selectman of the Town of Milton, New Hampshire, in March 1996. Then Joan Tasker Ball mounted a write-in campaign and had stickers printed with her name on them and an X to the right of her name. Ms. Kibbe got 190 votes, Mr. Gehres got 174 votes and Joan Tasker Ball got 107 handwritten votes. But 113 sticker votes for Ms. Ball were not counted because the town’s attorney said they were illegal under New Hampshire law.

When Ms. Ball asked for a recount, the board of recount decided to count the stickers that were placed precisely in the write-in space on the ballot and had an X written in or printed on the ballot in the proper place to the right of Ms. Ball’s name. After the recount, Ms. Ball won with 215 votes over Ms. Kibbe’s 191 votes. Ms. Kibbe appealed to the superior court, which upheld the board’s decision, ruling that the voters’ clear intent to vote for Ms. Ball made the statute directory.

The Supreme Court of New Hampshire quoted the applicable statute which read, “A ballot shall be regarded as defective and...that part shall not be tabulated if...the ballot has attached to it an adhesive strip, sticker, or plaster.” *Kibbe v. Town of Milton*, 700 A.2d 1224, 1226 (1997).<sup>72</sup> The supreme court began its analysis by saying,

In cases involving the violation of an election law, we inquire whether there was *substantial compliance* with the statute. When the violation consists of a minor deviation from the statutory requirements, we may find *substantial compliance*, and in such a case we will not invalidate a vote if the voter’s intent is clearly evident. We apply the doctrine of *substantial compliance* to effectuate our long-standing rule that statutes regulating the form of ballots or votes “should not be applied to disenfranchise voters because of technical irregularities.”

Application of this doctrine is limited, however, to situations in which the defect or deviation is minor in nature. This is not such a case. Here, there was no *substantial compliance*; the statute clearly proscribes the use of stickers...The use of stickers in this case was neither a minor deviation nor a technical irregularity...[T]his is not a case in which a voter could have thought he or she was voting in compliance with the statute. Because there was no *substantial compliance* with the statute in this case, we are not at liberty to give controlling effect to the voters’ intent. Even when the voters’ intent is clear, if the means they employed to indicate their vote does not *substantially comply* with the applicable statute, “their attempt to vote...is a failure.”

At 1227 (internal citations omitted).

The supreme court’s most interesting statement may be that, “As applied in this case [the statute] regulates the manner by which a voter may *not* express his or her vote.” At 1228 (emphasis in the original). When the proposition is put that way, it is clear that Ms. Ball could not win by arguing that the voters’ intent to cast their ballots for her was expressed in substantial compliance with the statute.

The concept of substantial compliance was discussed in Chapter I in connection with the need to follow procedural requirements to begin an election challenge. In *Taft v. Cuyahoga Board of Elections*, 854 N.E.2d 472 (Ohio 2006), Frederick I. Taft and Richard M. Bain both received 1,124 votes in the November 8, 2005 election for the fourth council seat in the City of Pepper Pike, Ohio. After a hearing by the board of elections and a trial court, an examination of a hanging chad and a coin flip, Mr. Taft was the winner.

There were several issues raised when the case went on appeal to the Ohio Supreme Court, but first the supreme court had to decide whether Mr. Bain was correct in claiming that the lower court did not have jurisdiction to handle Mr. Taft’s lawsuit because Mr. Taft did not file an adequate bond for his lawsuit. An Ohio statute required that a petition to contest an election “shall be accompanied by a bond with surety to be approved by the clerk of the appropriate court in a sum sufficient, as determined by him, to pay all the costs of the contest.” But Mr. Taft had filed a cash bond, not a surety bond; the bond did not obligate Mr. Taft to pay all of the expenses of the lawsuit; and it said that Mr. Taft bound himself only to the board of elections. The supreme court held that,

<sup>72</sup> There was an exception to the no-sticker use in New Hampshire law, but it applied to situations where a candidate died or was disqualified and election officials used stickers to put a substitute candidate’s name on the ballot. Those were not the circumstances in *Kibbe*.

Bain is correct that, in general, “the procedure prescribed by statute to bring an election contest within the jurisdiction of a judge must be strictly followed.” If the contestor fails to comply with the bond requirement of [the statute], “the court is without jurisdiction to hear or determine the controversy.

Nevertheless, we have adopted and applied a *substantial compliance* standard for the statutory bond requirement.

At 476 (internal citations omitted) (emphasis supplied).

Then the supreme court noted that the clerk of the lower court had approved the form and amount of Mr. Taft’s bond, and went on to find that Mr. Taft had substantially complied with the requirements because paying in cash instead of a surety check was ok, and the bond obligated Mr. Taft to pay the costs incurred by him, although he could have used clearer language to say so. And it made no difference that Mr. Taft bound himself only to the board of elections, because he was willing to pay all the costs of the contest. Finally, the supreme court found that there was no evidence that Mr. Bain had been prejudiced because of the bond that Mr. Taft posted and the clerk approved.

#### G. Summary: Compliance with mandatory vs. directory procedures

- Mandatory requirements protect the integrity of the election process.
- A violation of mandatory provisions voids a ballot.
- The timing of a challenge affects whether a provision is considered mandatory or directory.

Before an election: while the procedure still can be corrected

After an election: when it is too late to correct the procedure

- Provisions which specify that failure to act in the manner described will void the ballot or election are mandatory before and after an election.
- Before an election, most provisions are considered mandatory.
- After an election, a provision is generally considered directory if it does not say that failure to follow its procedures will void the ballot.
- After an election, a provision may be considered mandatory if:
  - the provision is stated as necessary for validity of the ballot as noted above;
  - the provision substantially affects
    - the free and intelligent casting of a vote, or
    - the determination of the results, or
    - an essential element of the election, or
    - the fundamental integrity of the election;
  - there is a total disregard of the provision.
- If the integrity of the election process has not been violated and the result of the election has been fairly ascertained (i.e., the result reflects the will of the electorate), then most likely the election will stand even in the face of any of the following:

- o failure to comply with directory provisions,
  - o failure to comply with a mandatory procedure that does not contribute to the integrity of the election process, or
  - o technical irregularities that do not change the election results.
- Officials' gross negligence defeats the will of the voters and voids the election.
- Substantial compliance with directory requirements will be found when the will of the voter is clear.



## CHAPTER 4

### Fraud Invalidates the Ballot, but the Will of the Voter Will Still be Respected

In Chapter 3, the will of the electorate emerged as a controlling concept in determining whether a statute is mandatory and must be followed, or whether the statute is directory and need not be followed unless doing so would change the result of the election. In most instances, when the election was over, any irregularities involved in an election challenge were ruled to be directory because technical violations of the law should not defeat the will of the electorate.

Determining the will of the electorate turned out to be a protracted process that required the courts to take several steps before reaching their conclusions. The courts sifted through the facts to determine whether the people who cast the ballots in question were eligible voters, whether they were registered to vote, and whether the tasks that the election officials had failed to perform were crucial to having an honest election. Most often, the court's conclusion was to count ballots that had been challenged. Fraud changes everything.

#### A. Fraudulent votes cannot be included when determining the will of the electorate.

There are many famous quotations from courts declaring that elections and voting are the foundation of democracy. If fraud occurs in an election, that foundation (to continue the metaphor) is rotten and the edifice will crumble. For example, take the statement of the United States Supreme Court in *Wesberry v. Saunders*, 376 U.S. 1 (1964), which is set out in the Introduction:

No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.

That is why, in the preceding chapter, whenever a court decided that a statutory requirement was directory and that technical requirements could not defeat the will of the electorate, the court always noted that the case did not involve fraud. Fraudulent votes are invalid and cannot be included when determining the will of the electorate. In other words, fraudulent votes cannot be counted.

In most of the cases discussed, the parties agreed that fraud did not occur. However, in *In re General Election for District Justice*, 670 A.2d 629 (Pa. 1996), and after remand, 695 A.2d 476 (1997), the claim, and the proof, was that fraud did occur because someone altered the election results. In that case, Joseph Zupsic thought he had been elected as a state judge in Beaver County, Pennsylvania, when he had a 36-vote victory over Delores Laughlin after the ballots were counted the first time, but he found that he lost to her by 42 votes when a recount was held over a month later. That result was overturned by the Pennsylvania Supreme Court because the evidence showed that ballots had been altered in Ms. Laughlin's favor between the time of the initial results and the recount.<sup>73</sup>

<sup>73</sup> On remand, the trial court found overwhelming evidence that 45 of the 87 contested ballots had been altered, based in large part on the similarity between the marks on 15 ballots that Ms. Laughlin had conceded were altered, and the marks on 30 other ballots. On appeal from that decision, the supreme court said, "[C]lear and convincing evidence of fraudulent tampering can be established by an accumulation of circumstantial evidence that defines a pattern that is consistent with tampering." 695 A.2d at 481. Ms. Laughlin lost again. More complex discussions of the facts and the legal principles involved in *In re General Election for District Justice* are set out in the discussion of the case in Chapters 1 and 2.

In another case, *Jernigan v. Curtis*, 622 S.W.2d 686 (Ky. App. 1981), the difference between the candidates was only four votes. Patsy Jernigan got 1,857 votes but came in second to Jessie Pearl Curtis who had 1,861 votes in the May 26, 1981 contest for the Republican Party nomination for the Monroe County, Kentucky, Clerk of the Circuit Court. A third candidate, Melva Jean Headrick, got 889 votes.

The court of appeals considered the numerous irregularities claimed by Ms. Jernigan in two ways. First, the court looked at some individual instances where illegal votes were claimed to have been cast. Then the court considered the overall activities that were claimed to be illegal at two particular precincts, Fountain Run and West Tompkinsville. With only a four-vote margin, a decision that a few ballots were illegal could have had a significant impact on the election results, and a decision to void the results of an entire precinct could have resulted in a new election for the Republican Party nominee for the circuit court clerk, either in that precinct or in the whole county.

The court of appeals upheld the trial court's decision that one ballot was illegal because it was "openly" cast by a woman who voted for Ms. Curtis. "Open voting" in this case meant that two people were in the same voting booth at the same time. Anyone looking at the voting booth would have seen four legs behind the curtain. Often people in a voting booth together were husbands and wives. Sometimes they were not related, with one person assisting the other person in using the voting machines. The court of appeals agreed with the trial court that the open vote should be subtracted from Ms. Curtis' total but disagreed with the trial court's decision to add that vote to Ms. Jernigan's total, saying,

The illegality here was not that Mrs. Gillenwater's vote was cast for someone other than the candidate for whom she wished to vote, but rather was that the vote was openly cast. *A vote that is illegally cast cannot be counted.*"

At 689 (internal citation omitted) (emphasis supplied).

One other ballot was found to be illegal: Levi Waller lived in another county so he was not eligible to vote in the Monroe County election (he had property that lay across the line between two counties, and it was ruled that he lived on the part of his property that was not in Monroe County). He testified he had voted for Ms. Curtis. His vote was subtracted from Ms. Curtis' total, leaving her with a two-vote margin over Ms. Jernigan. Mr. Waller's wife, Vera, also voted in the election, but she resisted the attempts to get her to testify. The court of appeals said that the trial court probably could have inferred that Ms. Waller also voted for Ms. Curtis but that there was no need to make the inference because Ms. Curtis still would have had more votes than Ms. Jernigan. There were two other ballots that may have been illegal. Mr. and Mrs. Key (G.C. and Joanne) testified that they were assisted in voting and that their ballots were cast for Ms. Curtis rather than Ms. Jernigan, who was the candidate they wanted. But the person who had assisted the Keys testified to the contrary, and the election officials who were at the polls testified that the Keys had not been assisted at all. So the court found that the evidence was inadequate to find the Keys' ballots illegal.

With Ms. Curtis ahead by just two votes, the court of appeals turned to the irregularities in the Fountain Run and West Tompkinsville Precincts. The votes received by the candidates in those precincts were:

<u>Candidate</u>	<u>Fountain Run</u>	<u>West Tompkinsville</u>
Jessie Pearl Curtis	153	167
Patsy Jernigan	61	158
Melva Jean Headrick	12	107
Total	226	432

Similar irregularities occurred at both precincts. There was open voting, and people who assisted voters in casting their ballots did not execute the affidavit required of the assistor. The number of married couples who were allowed to vote together was not determined for either precinct (in the words of the court of appeals, it was “never even speculated on”). People who assisted at least four people in West Tompkinsville, and perhaps between 25 and 50 in Fountain Run, did not complete the affidavit that was required before giving assistance. At the West Tompkinsville Precinct, the omission may have been inadvertent. At the Fountain Run Precinct, it was deliberate: the poll manager testified that she decided that the affidavits were unnecessary saying, “If you can’t trust the judges [precinct officers] you shouldn’t have the election anyway.” At 692. At both precincts, there were people whose names appeared twice on the check list (two people at West Tompkinsville; one at Fountain Run). At the West Tompkinsville Precinct, there were five more votes cast on the voting machine than there were voters on the polling place check list. At the Fountain Run Precinct, this discrepancy was avoided by manipulating the numbers so that they came out equal.<sup>74</sup>

The court of appeals was satisfied that these irregularities occurred, but the evidence did not show either the particular *number* of ballots involved in the irregularities or *for whom* those ballots may have been cast. The court concluded that the irregularities were not sufficient to throw out the election results at the West Tompkinsville Precinct.

Although the above indicates that the election officials at the West Tompkinsville precinct were either ignorant of their function or didn’t care how they performed it, it is our opinion that the circuit judge was not erroneous in refusing to throw out this precinct. The count discrepancy was only shown to be seven votes. Improper assistance was proven in less than ten cases. The instances of improper open voting were not even estimated, and it cannot be assumed that it was substantial. There were over 500 votes cast in this precinct on May 26. It has not been demonstrated that the errors set out above so destroyed the fairness of the election in this precinct that the votes of this precinct should be discarded.

At 690.

The Fountain Run Precinct, however, was a different matter. There, the court said,

It would appear that standing alone, the amount of proven open voting would not justify throwing out the result in this precinct. However, the open voting, the technical failures of the election officers and their defiance of the law in providing assistance to voters create an ominous backdrop for the activities of Levi Waller and Bo Tooley.

<sup>74</sup> The number of voters on the voting machine usually is determined by subtracting the number shown on the machine when the polls open from the number on the machine when the polls close. At the Fountain Run Precinct, the opening number shown on the machine was not recorded. Instead, the opening number was made up—after voting was over—by subtracting the number of people on the clerk’s check list from the final number shown on the voting machine. That maneuver also made the number of voters on the machine match the number of voters on the clerk’s check list. Other manipulations, not discussed here, are described in the court’s opinion.

At 692.

Levi Waller admitted to buying votes at the Fountain Run Precinct. Bo Tooley also bought votes at the Fountain Run Precinct, although he did not admit to it. Mr. Waller went to the bank on election day and got a supply of \$5 bills. Witnesses saw both men bribing voters. One voter said that Mr. Tooley gave her \$10 to vote his way. Both men were supporting Ms. Curtis.<sup>75</sup>

The court described further worrisome facts, saying,

There was other evidence offered to indicate that something was amiss at Fountain Run: (1) Mrs. Curtis received only 12 votes in the Fountain Run precinct in a prior election where she did not have Waller's support; (2) Mrs. Jernigan had significant ties to the Fountain Run area; Mrs. Curtis did not. However, Mrs. Curtis won the precinct by a 3-1 margin; (3) Things were normally pretty "loose" in Fountain Run. The city clerk testified that 80% of the voters were "floaters" or votes for sale.

At 693.

The court of appeals reviewed Kentucky law that said (1) a precinct's votes could be *thrown out* when irregularities were "of such magnitude as effectively to destroy any hope that the results...were a fair indication of the sense of the voters..." and (2) that if the votes of a precinct that comprises less than 20% of the total vote were thrown out, then the election should be decided on *the basis of the remaining votes in the election*.

The court noted that in order to throw out the results of an election (the first step in the preceding paragraph),

The proof must be of such flagrant, extensive, and corrupt violations as to *destroy the fairness and equality* of the election.

It is the opinion of this Court that there was overwhelming evidence of dereliction of duty on the part of the precinct officers, such that it appears that the officers made little if any effort to properly perform their function. There was evidence of an extensive amount of open voting in that husbands and wives were permitted to enter the poll together and that voters were improperly and illegally assisted in casting their votes. That there was evidence of bribery of voters on a determined and significant significant scale. [sic] This combination of factors compels a finding that the election in Fountain Run was so *tainted with fraud* that the result must be discarded and the election determined on the basis of remaining votes.

At 693 (internal citation omitted) (emphasis supplied).

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<sup>75</sup> The court of appeals' decision recites more evidence of the vote-buying scheme and makes for informative and entertaining reading.

The court of appeals then ordered the lower court to declare that Patsy Jernigan was the Republican nominee for the office of circuit court clerk in Monroe County.<sup>76</sup>

*A. I. Fraud which does not affect the election outcome might not invalidate an election if it is not pervasive*

In *Jernigan v. Curtis*, the court was not able to determine the exact number of fraudulent ballots and found that the entire election in the Fountain Run Precinct was tainted by fraud. But what if the court knew exactly how many ballots had been affected, for whom those ballots had been cast, and that the fraudulent activity made no difference in how the election came out? In other words, what if the illegal activity had no effect on the election results?

That was the situation in *Nugent v. Phelps*, 816 So.2d 349 (La. Ct. App. 2002), where Benji Phelps ran against Gleason Nugent, the incumbent, for the office of Winnfield Police Chief. (Winnfield is in Winn Parish, Louisiana.) Also on the ballot was the incumbent mayor, Deano Thornton, who was running for reelection. On the ballot, Mayor Thornton was designated as candidate number two and Mr. Phelps as candidate number four.

Mr. Nugent lost the April 6, 2002 election to Mr. Phelps by four votes—907 to 911—and brought a lawsuit to have a new election held. In his lawsuit, Mr. Nugent claimed that the April 6 election should be voided because:

1. Mr. Phelps bought enough votes to change the result of the election;
2. Mr. Phelps deprived Mr. Nugent of three specific votes and votes from hundreds of other unnamed people by arranging for three of Mr. Nugent's campaigners to be jailed from the Thursday before the election to the Monday after the election; and
3. Mr. Phelps deprived Mr. Nugent of votes from unnamed people by causing Mr. Nugent to spend the entire week before the election testifying before a grand jury instead of campaigning.

The evidence showed that Mr. Phelps set up a \$100 account at a convenience store known, alternatively, as the Winn-Mart or the Corner Store. Robert Hall, Jr., known as "Lip," was to:

- give voters a piece of paper with the numbers two and four, the numbers on the ballot that corresponded to candidates Thornton and Phelps;
- ask the voters to vote for those candidates; and
- take the voters to the Corner Store (after they had voted) and buy them whatever they wanted, paid for out of the \$100 account, known as "Benji's account."

<sup>76</sup> Note that, in awarding the election to Ms. Jernigan rather than ordering a re-run of the election, the court was following state law that specified that result. This is a good example of how a particular state law impacts the resolution of election disputes.

Monroe County and the West Tompkinsville Precinct have been a source of trouble in Kentucky for over 50 years. In 1957 the Kentucky Supreme Court in *Crowe v. Emmert*, 305 S.W.2d 272, 274 (1957), found that illegal voting activity existed in Monroe County, quoting the trial court as saying, "[T]here is no conceivable abuse of the absentee-voting statute which is not reflected in this record; and the proved violations of both letter and spirit are so many and so extensive that the touch of fraud, actual or constructive, extends to every ballot, making it impossible to segregate the valid from the invalid." At the time that the second edition of this book went to press, we were still waiting for the Supreme Court of Kentucky's decision in *McClendon v. Hodges* (2007-SC-559-DGE), appeal argued Jun. 13, 2008, where the Kentucky Court of Appeals concluded that a substantial number of illegal ballots were cast in the November 7, 2006, Tompkinsville mayoral election, which again involved the West Tompkinsville Precinct. Noting the history and continuing presence of vote fraud in the county, the Court of Appeals of Kentucky said, "...we DIRECT the CLERK of this Court to serve a copy of this opinion by certified mail on the...Attorney General of Kentucky, the...Secretary of State of Kentucky and the...Monroe County Clerk...and request that the Attorney General and Secretary of State take whatever action that they may deem to be warranted concerning the conduct of the... November 7, 2006 mayoral election, as well as to prevent such abuses in the conduct of future elections." No. 2007-CA-000488-MR, 2007 Ky. App. LEXIS 230 (Ky. Ct. App. Jul. 20, 2007) (emphasis in the original).

Six voters testified that they got the piece of paper from Lip or were told by him to vote for Mr. Phelps, voted, and then went to the Corner Store and got beer and/or cigarettes; a seventh voter said she was given the piece of paper and promised \$5 by Lip. Of those seven voters, one said she had planned to vote for Mr. Nugent but instead sold her vote for two packs of cigarettes and voted for Mr. Phelps. Another voter said she voted as instructed by the paper because she thought that was what she was supposed to do; it was the first time she had voted. But the other five voters said that they voted the way they wanted to even though they took beer or cigarettes from Lip at the Corner Store; two of those voters said they did not vote for Mr. Phelps.

The incarceration of three of Mr. Nugent's campaigners resulted from an investigation begun the year before and involved their activities in the operation of the Winnfield Housing Authority. All three had been called before the grand jury during the week before the election, and all said that their grand jury subpoenas kept them from campaigning for Mr. Nugent. All three also said that they would have voted for Mr. Nugent had they not been in jail and prevented from voting. They could not get out of jail in order to vote because the district attorney's office had filed a motion to deny them bond, and a bond hearing was not set until the following Monday.

Mr. Nugent claimed that the district attorney, Terry Reeves, was a friend of Mayor Thornton and Mr. Phelps, and that the judge, James Wiley, was a former assistant district attorney who worked for Mr. Reeves. One of the Nugent campaigners claimed that, if he had not been in jail, he could have gotten hundreds of people to vote for Mr. Nugent. Mr. Nugent also spent the week before the election testifying under subpoena before the grand jury and was unable to campaign during that time.

The trial court dismissed the case, and Mr. Nugent appealed (Judge Wiley had been scheduled to hear the case but recused himself and was replaced by another judge at trial). The Louisiana Court of Appeal had to decide whether the evidence that at least seven voters were given bribes was enough to order that seven votes be subtracted from Mr. Phelps' vote total and change the result of the election. The statutory standard for deciding the case was that the election could be voided and a new election held if:

1. it is impossible to determine the result of the election, or
2. the number of qualified voters who were denied the right to vote by election officials was sufficient to change the result if they had been allowed to vote, or
3. the number of unqualified voters who were allowed to vote by election officials was sufficient to change the result if they had not been allowed to vote, or
4. a combination of the factors referred to in (2) and (3) would have been sufficient to change the result had they not occurred.

...[A] party contesting an election no longer must show that "but for" the irregularity he would have won the election.

Although a party contesting an election is no longer limited to the "but for" standard, we note that a party contesting an election still must show at least that because of fraud or irregularities, the outcome of the election is impossible to determine. Thus, *it is the effect of the irregularity on determining the outcome rather than the fact of an irregularity by itself*, that guides us in these matters. Accordingly, we conclude that a vote should not be cast out simply because a voter was offered a bribe, or even because a voter accepted something of value for the vote, provided that voter still voted the way he originally intended. *Regardless of criminal implications*, our focus is on whether the alleged activities actually *changed*

*the result of the election by changing the vote totals, or at least made the election result impossible to determine. Based on this record, no more than two votes would be subtracted, a difference that would be insufficient to change the election result or make it impossible to determine.*

At 357 (emphasis supplied).<sup>77</sup>

Nor was the court of appeal sympathetic to Mr. Nugent's arguments that three votes should be added to his total to represent the votes of his three campaigners who were in jail during the election. Their arrests, the court of appeal said, flowed from the grand jury indictments, not from an order of the district attorney.

Furthermore, the trial court's remarks at the end of the trial indicate that the judge simply did not believe that the plaintiff had met its burden of proving a scheme by the District Attorney that would have included the district judge and the grand jury.

At 359. This view was repeated by the court of appeal when it rejected Mr. Nugent's argument that the district attorney abused his power by having Mr. Nugent subpoenaed to be before the grand jury during the week before the election.

But after the court of appeal decided that Mr. Nugent had lost his lawsuit, as well as the election, it had some pointed criticism of the way in which the election and the trial were conducted.

Although we ultimately conclude that there is no manifest error in the trial court's finding that plaintiff failed to carry his burden of proof to annul the election, this does not mean we find no evidence suggesting irregularities and/or fraud in this election. . . . [T]here are other remedies for election offenses.

At 359 (internal citation omitted) (emphasis supplied).

How does this case compare with the situation in *Jernigan* where the court declared that fraudulent ballots are illegal and that "a vote that is illegally cast cannot be counted?" At 689 (emphasis supplied). The fraud in both *Jernigan* and *Nugent* was vote buying. But, in *Nugent*, the court concluded that the evidence showed the vote buying was isolated to seven instances, only two of which the court felt actually were *sold* votes—where the voters cast their ballots for a candidate *because* of the payment—and that the other five people cast their ballots as they would have in any event. That situation was seen by the court as resulting in two, not seven, fraudulent ballots.

Accordingly, the court in *Nugent* would agree with the court in *Jernigan* that fraudulent ballots should not be counted—the two ballots that the *Nugent* court concluded were "bought" were discounted—but the court in *Nugent* would say that the situation in *Nugent* was distinguishable from the situation in *Jernigan*: without a plot by the district attorney to use the grand jury to disrupt the police chief's campaign, *Nugent* did not have a situation comparable to the "flagrant, extensive, and corrupt violations" in *Jernigan*, where the vote buying appeared to pervade an entire precinct, to *change* the vote in the precinct and to "destroy the fairness and equality of the election." Note, too, the distinction in *Nugent* between the treatment accorded the ballots and the treatment accorded the vote buyers. A crime occurred, and even if it was not so pervasive as to require that the election results be thrown out or that the election be rerun, we all can agree

<sup>77</sup> As was noted in the analysis of *Moreau v. Tonry*, 339 So.2d 3 (La. 1976), in Chapter 2, a Louisiana statute said that an election may be upset only if the one contesting the election can show that "but for irregularities or fraud he would have been nominated. . . ." At 4 (emphasis added). Alternatively, the statute allowed proof that the voters had been deprived of their free will by fraud or serious irregularities. This is the standard that preexisted *Nugent* and is addressed in the court's opinion in *Nugent*.

with the court's desire that the vote buyers be prosecuted for their criminal activities.<sup>78</sup>

A.2. *Fraud will invalidate procedures early in the election process as well as during the balloting and the vote count*

In *Flower v. D'Apice*, 104 A.D.2d 578 (N.Y. 1984), *aff'd*, 468 N.E.2d 1119 (1984), Daniel Sadofsky's nominating petition as a candidate for the Westchester county council was invalidated, and Mr. Sadofsky's name was taken off of the ballot, because his nominating petition contained the names of people who did not sign the petition (at least one was in California at the time he was supposed to have been in New York signing Mr. Sadofsky's petition and another was dead).

In addition, the veracity of each page of the petition had to be sworn to by a subscribing witness who was to have asked each person to verify his or her identity before getting the person to sign the page. Significantly, the court found that one person let someone else complete the subscribing witness statements on three pages sometime later and another subscribing witness did not ask the signatories to identify themselves. In addition, Mr. Sadofsky testified that, when he signed as a subscribing witness, he knowingly got signatures that were invalid—he knew that people signed the names of other people—and did not ask the signatories to identify themselves. The court concluded,

Since Sadofsky is a candidate, his fraudulent acts warrant that his name be stricken from the ballot.

Moreover, we also find that *fraud and irregularity so permeated the designating petition as a whole as to call for its invalidation.*

At 578 (emphasis supplied).

Similarly, the District of Columbia Board of Elections and Ethics disallowed nominating petitions for Washington, D.C., Mayor Anthony Williams that had been circulated by Scott Bishop, Scott Bishop, Jr., and Crystal Bishop, leaving Mayor Williams short of the 2,000 signatures that were required to become a candidate on the 2002 Democratic Party primary election ballot. The petitions had a variety of names on them that clearly were fraudulent, including actors' names and the names of TV and cartoon characters. Many names were written and signed in the same handwriting on page after page, and all were attested to by the Bishops as the circulators of those petitions. Scott Bishop, Jr., who also signed pages dated June 31 (a nonexistent date), coordinated the petition process for the mayor.

In *Williams v. District of Columbia Board of Elections and Ethics*, 804 A.2d 316 (D.C. 2002), the D.C. Court of Appeals held,

In the circumstances of this case, where the Board found, with the support of substantial evidence in the record, that *the integrity of the nominating process has been seriously compromised* by the actions of the Bishop circulators, we hold that it was within the Board's authority to disallow all of the signatures affected by the wrongdoing.

At 318 (emphasis supplied).

Defects either in circulation or signatures deal with matters of form and procedure, but the filing

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<sup>78</sup> As an alternative to the above analysis, the *Nigent* decision can be looked at as being wrongly decided on the grounds that bought votes are invalid and should not be counted. It is not clear that votes that have been bought would be counted in other states.

of a false affidavit by a circulator is a much more serious matter involving more than a technicality. The legislature has sought to *protect the process* by providing for some safeguards in the way nomination signatures are obtained and verified. *Fraud in the certification destroys the safeguards unless there are strong sanctions for such conduct such as voiding of petitions with false certifications.*

At 319-320 (emphasis supplied).

The court of appeals drew support from a 1984 decision of the Supreme Court of Arizona that relied on the decisions of courts in Ohio, Illinois, Pennsylvania, New York and New Jersey to void petitions with false certifications and refuse to count the signatures on those petitions. With those signatures discounted, Mayor Williams was unable to get on the 2002 Democratic primary ballot and was forced to run in the general election as an independent, where he won election to another term in office.

**B. An anti-fraud statute will not apply to ballots that could not have been involved in the fraudulent activity.**

States take great pains to guard against fraud in elections. Many election procedures that are enacted by states have as their primary goal the prevention of fraud. Therefore, when fraud is alleged in a lawsuit that was brought to challenge an election, the court must squarely face the statutes that were enacted to prevent against fraud and determine whether those statutes were violated, in order to determine the will of the electorate as a whole.

The cases in Chapter 3 that dealt with polling place officials' responsibility for initialing the ballot are good examples of courts determining the will of the electorate while dealing with anti-fraud statutes. Remember, for example, *Johnson v. Trnka*, 154 N.W.2d 185 (1967), where the Minnesota Supreme Court decided that the requirement that the ballots be initialed on the back was mandatory because the *initialing was crucial to preventing fraudulent ballots from being put into the ballot box*. Therefore, the six ballots that were not initialed in that election were removed, and the remaining ballots were counted to determine the will of the electorate.

A similarly straightforward result was reached in *Fultz v. Newkirk* 475 N.E.2d 706 (Ind. 1985), where uninitialed ballots also were determined to be invalid. A trial court determined, after the examination of many contested ballots, that John D. Fultz beat Frank D. Newkirk, Sr., to become mayor of Salem, Indiana. On appeal, the Indiana Court of Appeals followed then-recent decisions in Indiana that said that the initialing requirement ensures the integrity of the voting system by guaranteeing that only valid ballots went into and came out of the ballot box. Then the appeals court affirmed the trial court's determination that none of the absentee ballots in three precincts should be counted because they were not initialed by the poll clerks as required by a state statute.

In other cases in Chapter 3, where initialing requirements were not followed, the courts did not throw out the ballots because the purpose of the requirement (preventing fraud) could not have been achieved in those cases: the ballots had not been cast in a way that exposed them to the fraudulent activity that initialing could prevent. Two of those cases are good examples of the way the courts treated the anti-fraud aspects of the initialing requirement in light of the will of the electorate.

As discussed in Chapter 3 in *Pullen v. Mulligan*, 561 N.E.2d 585 (Ill. 1990),<sup>79</sup> Penny Pullen ran against Rosemary Mulligan for the Republican Party nomination as a candidate for the Illinois House of Representatives but lost to Ms. Mulligan by a flip of a coin after the trial court determined that the election resulted in a tie vote. Among the issues on appeal were whether some uninitialed ballots should be counted and others should not be counted. Paper ballots were used in the election. Under Illinois law, a paper ballot could not be counted unless it had a polling place official's initials on it. The Illinois Supreme Court said that the initialing process was necessary to preserve the integrity of the election because it was the only means of distinguishing between ballots that were legally cast and ballots that were illegally cast *in the polling places*. Some of the ballots cast by voters at the polls *during the election* in *Pullen* had not been initialed by the election judges, and the parties agreed that those ballots should not be counted. But some absentee ballots, which had remained in their envelopes and were opened at the polls only *after the election was over*, were treated differently. The Illinois Supreme Court ruled that, because the absentee ballots remained unopened until the polls closed, having the ballots initialed by the election judges at that point would not prevent ballot box stuffing and initialing was not necessary to preserving the integrity of the election process. Those ballots were counted.

A similar result was reached in *Wilbourn v. Hobson*, 608 So.2d 1187 (Miss. 1992), another case discussed in Chapter 3. Hershel Wilbourn and Peggy Hobson ran for a seat on the Hinds County, Mississippi, Board of Supervisors (county council). Voting machines were used in that election, but a paper ballot, known as an affidavit ballot, was used by voters whose names were not on the polling place lists. Under state law, paper ballots had to be initialed on the back by a poll worker before the ballot was given to the voter, but the state law which applied to affidavit ballots was silent about initialing. The initialing requirement was meant to preclude people from stuffing the ballot box by secretly putting into the ballot box additional ballots they brought with them into the polling place. Several affidavit ballots cast by legitimate registered voters for Mr. Wilborn had not been initialed by poll workers. The Mississippi Supreme Court decided that those ballots should be counted because, among other reasons, the affidavit ballots cannot be used in ballot box stuffing: they are not put into the ballot box, but instead are held separately and counted separately. Moreover, the parties had stipulated that no fraud took place.

**C. An unusual mark on a ballot is not evidence of fraud if the ballot shows the voter's intent and the mark is not meant to identify the voter.**

There also are cases where courts had to face the anti-fraud concerns on a ballot-by-ballot basis and decide whether an *individual* voter's will could be determined from the way the ballot was marked. In these cases, state anti-fraud statutes required the ballots to be marked in a very specific way and prohibited any marks on the ballots other than the authorized marks for a candidate. These laws were designed to prevent vote buying schemes where a voter would be paid to vote for a particular candidate and, in addition to marking the ballot for that candidate, to put another mark on the ballot to *identify* it as the voter's ballot. That way, paid voters could prove they marked the ballot for the candidate they were paid to vote for, and they would get credit for having cast the ballot as they were paid to do.

This prohibition against additional identifying marks was an important element of the election challenge in *Devine v. Wonderlich*, 268 N.W.2d 620 (Iowa 1978), where the candidate who initially was determined to have been elected as a Keokuk, Iowa, county supervisor (commissioner) in 1976 was not even on the ballot. Francis P. Devine, a Democrat, had lost an election for the same seat by 50 votes two years earlier, in 1974, and had decided not to try again. But nobody filed to run in the Democratic primary in 1976,

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<sup>79</sup> Pullen also was discussed in Chapter I.

and when Mr. Devine got several write-in votes in the primary election, he changed his mind and decided to run for the office in the general election. The Democratic Party tried to get Mr. Devine's name on the ballot but it was decided by the county auditor, who was in charge of preparing for the election, that Mr. Devine's name should not be on the general election ballot because there was a concern that the Democratic Party did not nominate Mr. Devine in the way the law said it should be done.

Mr. Devine brought a lawsuit challenging that decision. Meanwhile, election day was approaching. In order to be prepared in case Mr. Devine won his lawsuit, the county auditor made up stickers showing Mr. Devine's name and the name of the office for which he was running. The stickers could be put on the ballots in case Mr. Devine won his lawsuit. But Mr. Devine lost the lawsuit, and the county auditor gave away the stickers to the secretary of a county taxpayers' association who, in turn, handed out 3,000 of the stickers to the public—they could be put on the ballot in the general election as write-in votes for Mr. Devine.<sup>80</sup>

Mr. Devine campaigned as a write-in candidate. The intensity of his campaign, along with the publicity that was given to the circumstances surrounding his write-in candidacy, made him well-known to the voters. On election day, hundreds of people used the stickers with Mr. Devine's name and the name of the office for which he was running. When all the votes were canvassed (counted), Mr. Devine won by two votes: 2,655 to 2,653. But in a later election challenge, a court reviewed a number of claims by Mr. Devine's opponent, Raymond James Wonderlich, the Republican incumbent, and decided that particular ballots should not be counted. When those ballots were discounted, the court found that Mr. Wonderlich had won the election by 135 votes: 2,638 to 2,503.

Mr. Devine appealed to the Supreme Court of Iowa. There were four categories of contested ballots: 108 ballots where the stickers were used, 77 ballots where the candidate's name was written as "Devine" or as "F. Devine," 46 ballots where the candidate's name was written in a variety of other ways and 51 ballots with other irregularities (41 of which Mr. Devine claimed should be counted for him and 10 of which Mr. Wonderlich claimed should be counted for him).

The Iowa statutes allowed voters to write in a person's name and to put a cross or check mark next to the name. Mr. Wonderlich said that all 108 of the ballots with the stickers on them should not be counted because there were words other than Mr. Devine's name on the stickers, and, in addition, 52 of the stickers were put in the wrong place on the ballots. The Iowa Supreme Court examined a statutory prohibition on marking a ballot in a way that would identify it, and a statutory requirement that a write-in vote be put in the proper place on the ballot. The court said that the legitimate statutory objects for these requirements are "shielding the elector from the influence of coercion and corruption, protecting the integrity of the ballot, and insuring orderly conduct of elections." At 623.

The supreme court decided that the extra words on the stickers—the words identifying the office for which Mr. Devine ran—were not identifying marks since they all were the same and, because the county auditor had printed the stickers all the same way, were not intended to allow particular voters to be identified. So the supreme court agreed with the trial court on that issue. But Mr. Wonderlich also challenged all 108 sticker ballots because the additional language "spoiled" them. A state law said that voters were to be told not to vote with a spoiled ballot—those that were defaced by erasures, marked-out words or

<sup>80</sup> The state law allowed voters to write in the name of any person they wanted on the ballot in the general election instead of marking the ballot for the candidates whose names were printed on the ballot.

other extraneous markings—but to turn in a spoiled ballot and get a fresh one, and then to vote on the fresh one. But this law, the supreme court said, did not make the spoiled ballots invalid, it simply allowed voters to exchange them. And if the voters did not exchange the spoiled ballots—if they put them in the ballot box—the ballots were “not invalid so long as the voter’s intent can be ascertained and the markings were not placed on the ballot for the *purpose* of identifying it.” At 626 (emphasis supplied).

The supreme court said that the statute that required write-in votes to be put in the proper place on the ballot served three purposes:

First, it helps prevent the fraudulent alteration of ballots to conceal votes properly marked by another for a different candidate...Second, it limits the opportunity to use placement of stickers to identify the ballot...Third, it serves the obvious purpose of preserving the integrity of the ballot by insuring the vote is cast as the elector intends.

At 626.

The supreme court then reviewed cases from Indiana, Iowa, Maine, Massachusetts, Michigan, Minnesota, New Jersey and North Dakota that dealt with where and how stickers could be put on ballots for the votes to be valid. Most of the decisions upheld stickers that were placed in various places on the ballot as long as the material parts of the ballot could be seen, while some of the cases did not uphold the use of stickers. These decisions included cases where, for example, the sticker was put over the opposing candidate’s name. But the Iowa Supreme Court said that it would not follow the cases that required strict compliance on the placement of stickers. It also said that most of the stickers in *Devine* were stuck in places that “substantially complied” with the statute, including 30 ballots where the stickers were stuck over the words “Township Ticket,” because “the voters’ intent to cast these sticker votes for Devine in the board of supervisors race remains clear.” At 627.

The voters’ intent to vote for Mr. Devine was also read into the 77 ballots that were marked with just Mr. Devine’s last name, or his first initial and last name. On this point, the supreme court said,

*[T]he issue is to be decided in light of all facts of a general public nature surrounding the election which the voter may be presumed to know and in view of which he may be presumed to have exercised his franchise. Among the circumstances bearing on the determination of voter intent are whether the write-in candidacy was well publicized and whether other candidates and other residents of the locality involved had the same or similar names.*

At 627 (emphasis supplied).

The facts of a general public nature that the supreme court considered included Mr. Devine’s prior candidacy, the fact that none of the other 10 people in Keokuk named Devine were likely to be mistaken for the candidate, and the fact that the publicity and advertising associated with the campaign made it unlikely that people who wrote in Mr. Devine’s name in an abbreviated fashion meant their vote to go for somebody else. Of the variations of Mr. Devine’s name, the Iowa Supreme Court said,

The voter’s intention, if it can be ascertained, should not be defeated or frustrated by the fact the name of the candidate is misspelled, or the wrong initials were employed, or some other slightly

different name of similar pronunciation or sound has been written instead of the actual name of the candidate intended to be voted for.

At 628. The deviations *accepted* by the supreme court included “France Devine,” “France P. Defvine,” and Franics P. Deiven.” However, the supreme court agreed with the trial court and *rejected* ballots cast for a variety of other names including “Dan Devnine,” “Danny Devine,” “James Devine,” “Russell Devine,” “Louis P. Devine,” Frances D. Levine” and “V. Devine.” For these, the supreme court continued,

The variations in given name are not similar to the candidate’s true name nor did it appear he was known by any of those names.

Finally, there were 51 ballots with other marks on them. Among them were 13 ballots where Mr. Devine’s name was written twice, one where his name was written three times and crossed out twice, one where his first name was crossed out and his full name was written-in, and other instances where Mr. Devine’s first or last name was written and crossed out and rewritten. Of these and other similar markings the supreme court said,

[I]t is obvious the voters were confused regarding where to write in Devine’s name. We believe this confusion caused the voters to cross out and rewrite the name, and *no evidence exists of an intent to place identifying marks on these ballots.*

At 629 (emphasis supplied).

The court also allowed to be counted ballots with erasures where there was no evidence that the voter intended to make identifying marks. Following the voters’ intent, the Iowa Supreme Court also allowed to be counted ballots where Mr. Devine’s name was written under both the Democratic and Republican headings, and ballots where Mr. Devine’s name was written under Mr. Wonderlich’s on the Republican heading. Three ballots where Mr. Wonderlich’s name was written under the Democratic heading also were counted. As to all of these ballots, the supreme court said,

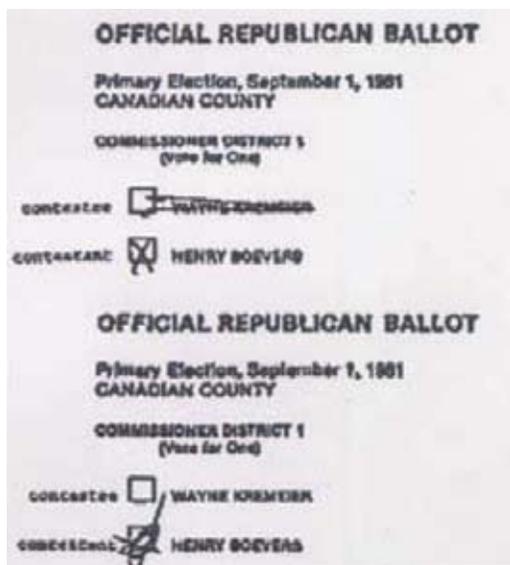
We believe common sense and general principles should govern. *No doubt exists regarding the voters’ intent to vote for Devine.*

At 629 (emphasis supplied).

When all of the marks on the ballots were considered, and all the ballots were counted, Mr. Devine won the election by 20 votes, with 2,667 votes to Mr. Wonderlich’s 2,647 votes.<sup>81</sup>

There was a similar result in *Boevers v. Election Board of Canadian County*, 640 P.2d 1333 (Okla. 1981), a dispute between Henry Boevers and Wayne Kremeier over the Republican Party nomination for county commissioner in District I of Canadian County, Oklahoma. After a recount, Mr. Kremeier was ahead of Mr. Boevers by one vote: 228 to 227. Two ballots were at issue. One had Mr. Kremeier’s name crossed out and an X placed in the box next to Mr. Boevers’ name. The other had no mark in the box next to Mr. Kremeier’s name and a squiggly marking in the box next to Mr. Boevers’ name.

<sup>81</sup> Mr. Wonderlich served as county supervisor from the time of the election until after Mr. Devine won his case. When Mr. Devine won this case he took Mr. Wonderlich’s place as county supervisor. Then Mr. Devine sued Mr. Wonderlich to get the money Mr. Wonderlich had been paid as county supervisor during that time. The Iowa Supreme Court specifically overturned its own clear precedent to hold that Mr. Devine could not recover the money from Mr. Wonderlich, saying that “the de jure officeholder who ultimately prevails in an election may not recover from the de facto officeholder the salary he or she received while serving in office during the pendency of the contest litigation.” *Devine v. Wonderlich*, 288 N.W.2d 902, 905 (1980).



Neither ballot was counted by the county election board, but both were allowed by the Oklahoma Supreme Court. This decision gave Mr. Boevers two additional votes and the nomination as the Republican Party candidate for the District I commissioner in Canadian County, Oklahoma.

The Oklahoma Supreme Court had two state statutes to interpret in reaching its decision. The first statute made invalid, and not to be counted, any ballot that had a distinguishing mark on it. After noting the long history of the statute and that the statute codifies the common law, the supreme court said of the term “distinguishing mark,”

The term is one of art. It does not include every form of excess material penned on the ballot but not needed to show the voter’s designated intention. Under the proscribed rubric fall only those marks—not used in an attempt to indicate a voter’s choice—which show on the face of the ballot, or from evidence aliunde, a deliberate intent of having been placed there to set the ballot apart from others.

At 1336 (emphasis supplied).<sup>82</sup> The supreme court explained that the purpose of the rule voiding ballots with distinguishing marks is “to protect the secrecy of the elections and to discourage bribery, fraud or corruption.” At 1336 n.7 (citation omitted). The court concluded that the X combined with the cross-out did not constitute a prohibited distinguishing mark.

The second statute dealt with the kind of markings that voters could use to vote for a candidate. They included a circle or square that had been “blackened in ink, even if the entire circle or square is not filled and even if the blackened portion may extend beyond the boundaries of the circle or square.” The Oklahoma Supreme Court determined that the squiggly mark in the box next to Mr. Boevers’ name was within the statute’s definition of acceptable marks.

After finding that the marks on the two ballots fit within the allowable limits of the state laws, the Oklahoma Supreme Court concluded that,

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<sup>82</sup> Evidence *aliunde* means evidence from outside or from another source. Black’s Law Dictionary 30 (2d Pocket Ed. 2001). As used here, it means evidence other than that which can be obtained from the face of the ballot.

Neither ballot in contest here bears improper marks and both clearly designate the voter's intention to favor contestant.

At 1336. There was a dissent in the case in which one justice, with the concurrence of another justice, would have allowed the ballot with the cross-out and the X to be counted but not the ballot with the squiggly mark in the box. The latter was said to "completely distort the intention of the voter." It is not clear what the justice meant by that remark. In any event, if the dissent would have prevailed and added one vote to Mr. Boevers' total, the vote would have ended in a tie between Mr. Boevers and Mr. Kremerier.

Nor were smudges or extraneous marks enough to void the ballots in *In re Second Ward, Second Precinct of Borough of Canonsburg*, 290 A.2d 69 (Pa. 1972). There, two ballots for council candidate Jack Passante that had been disallowed by a lower court were allowed by the Pennsylvania Supreme Court despite the arguments of Francis J. Buckley, Jr., his opponent. A state statute said that any ballot with an erasure was void as to the office for which the erasure appears (the votes on the rest of the ballot would be counted). But what Mr. Buckley called an erasure the Pennsylvania Supreme Court called a "smudge which is barely visible to the naked eye" and concluded that "it is not reasonably certain the smudge was caused by an erasure." At 71.

Another state statute disallowed ballots that were marked with two separate writing instruments. Mr. Buckley pointed to a ballot that had been marked for Mr. Passante in pencil, as it should have been, but also had what the supreme court called "a single very light semicircular line made with ink in the box opposite Buckley's name" and "some small scratch marks made with ink on the ballot above the candidates' names running for the councilmanic seats." At 71. Mr. Buckley said that this voter was either trying to vote for more candidates than were allowed in that election or made marks with both a pencil and a pen, either of which would disallow the ballot. The supreme court concluded, however, that,

This position is founded on a faulty premise, namely, that the voter placed the ink marks on the ballot. Everything indicates the contrary. The voter who cast this ballot voted for a total of eleven candidates. In each instance, an X *marked in pencil* was properly placed in the box opposite the candidates' names. To conclude the voter then used an ink pen to make the extraneous marks is too speculative, especially since the marks themselves indicate they were made with an old fashioned ink writing pen, rather than with some modern writing instrument.

At 72 (emphasis supplied).

Although we do not know from the supreme court's opinion how many votes the candidates got in *In re Second Ward*,<sup>83</sup> we do know the outcome of the race for mayor of the City of Salem, Indiana, in 1985, but it was not easily determined. After the election, John D. Fultz led Frank D. Newkirk, Sr., by five votes: 1,218 to 1,213. After a recount, they were tied with 1,205 votes. Both of them presented their case in court where, after making determinations on many contested ballots, the court concluded that Mr. Fultz lost to Mr. Newkirk by 19 votes: 1,091 to 1,072. Mr. Fultz appealed. The mention of this case, *Fultz v. Newkirk*, 475 N.E.2d 706 (Ind. 1985), earlier in this chapter noted that the Indiana Court of Appeals affirmed the trial court's decision that none of the absentee ballots in three precincts should be counted because they were not initialed by the poll clerks as required by a state statute.

<sup>83</sup> The Pennsylvania Supreme Court said that "an extremely close contest developed between Buckley and Passante..." at 70. It added, in a footnote, that it cannot be ascertained from the briefs or the record filed with the Supreme Court whether the counting of the ballots will change the result of the election.

The court of appeals continued its analysis by saying that, on review, the appellate court cannot weigh the evidence—it will only review the lower court’s decision to determine whether it made errors of law.<sup>84</sup> Still, as will be seen below, the court of appeals was able to address the errant marks on the ballots in *Fultz*. As described by the court, instead of making an X as required by state law, voters made:

- Two parallel lines crossed by another line,
- A strung bow mark,
- A pronged ‘X’,
- A small ‘x’ made by a dull or broken pencil, and
- An ‘x’ with a distinct spur.

At 708.

The court of appeals said that it would not decide (1) whether certain marks were an X as required by the statute, (2) whether an imperfect X was allowed (as in an earlier case) because the mark had been made by an infirm hand or (3) whether another ballot had a distinguishing mark prohibited by another statute. Those decisions, the appellate court said, would be weighing the evidence, and so the appellate court said it would let the trial court’s decisions on those issues stand. But the court of appeals took a slightly different approach to achieve a somewhat similar end when it talked about those marks in the context of reviewing whether the trial court followed the law. Thus, the court of appeals, citing the decisions in various prior Indiana cases on similar issues:

- Affirmed the trial court’s decision to count the infirm person’s mark of two parallel lines crossed by a third line,
- Affirmed trial court’s decision to disallow three ballots where a blue penciled X was covered by an X made with a pen, following a case that said that two Xs in one box invalidated the ballot,
- Affirmed the trial court’s decision that a retraced X that contained some parallel lines was inadvertent and not a distinguishing mark, and
- Affirmed the trial court’s decision to exclude ballots marked with a check instead of an X (given that a statute to allow check marks became effective after the date of the election).

At the end of this non-review reviewing, the court of appeals said that the trial court did not err in declaring Mr. Newkirk as the winner.

#### **D. Summary: Fraud invalidates a ballot but the will of the voter will be respected.**

- An illegally cast vote cannot be counted. It cannot be included in determining the will of the electorate.
- A court will void a precinct’s election results if violations of statutory requirements are so flagrant, extensive and corrupt as to destroy the fairness and equality of the election. This includes fraud or gross negligence on the part of officials.

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<sup>84</sup> This maxim will be discussed in detail in Chapter 6.

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- An anti-fraud statute usually will not invalidate ballots that are cast in a way that does not expose them to the fraudulent activity.
  - Election officials are required to initial ballots to prevent people from stuffing the ballot box by secretly putting into the ballot box additional ballots they brought with them into the polling place.
  - Identifying marks on the ballot are prohibited (and ballots with such marks are invalidated):
    - o to protect the secrecy of the elections,
    - o to discourage bribery, fraud and corruption, and
    - o to protect the integrity of the ballot by preventing vote buying schemes.
  - State statutes commonly invalidate ballots with identifying marks.
  - An unusual mark on a ballot is not evidence of fraud unless there is a deliberate intent to place an identifying mark on the ballot. A nonconforming mark for a candidate usually will be counted if it is:
    - o not fraudulent, and
    - o clearly shows the voter's intention to vote for one candidate.
  - However, a nonconforming mark on a ballot will be rejected in states where marking directions are strictly construed.
  - Fraud in the certification of petitions for candidate nominations destroys the safeguards for the petition process, and courts will void individual signatures determined to be fraudulent.
  - Where a petition is permeated with fraud, the court will void the entire petition.
  - Criminal behavior that does not change the election results (by changing the vote totals or making the election result impossible to determine) will not void an election. Such behavior would, however, be subject to prosecution in a separate proceeding.



## CHAPTER 5

### **Add in the Ballots Determined to be Legal, Subtract the Ballots Determined to be Illegal, Unless the Fairness of the Election has Been Undermined**

Earlier, we saw that election results will be upheld unless it has been proven in court that irregularities or illegal activities changed the result of an election or made it impossible to determine the will of the electorate. We also saw examples of the kinds of specific evidence that had to be introduced to show that those irregularities took place and that the result of an election was (or could be) changed by those irregularities. Some plaintiffs proved that particular ballots were invalid (because they lacked a poll official's initials, for example), while other plaintiffs proved that the voters were not legal voters (because they did not live in the jurisdiction holding the election or were improperly registered to vote). The question presented in this chapter is what should a court do once it determines that particular ballots are invalid?

Should the court order that the remaining valid ballots be counted and the winning candidate determined by that count? Should the court order that the election be held again in the precincts where the tainted ballots were found and those results then added to the results from the other precincts? Or should the entire election be held again to obtain a true result untainted by irregularities? The answer will depend on whether the court can determine the will of the electorate.

**A. The court will subtract the illegal votes when possible, but void the election when the number of undetermined illegal votes is greater than the margin of victory.**

Where the courts can determine which ballots were illegal but had been counted, those ballots are subtracted from the candidates' totals. Where the courts can determine which ballots were legal but had not been counted, those ballots are added to the candidates' totals. After the illegal votes have been subtracted from the candidates' totals, and the legal votes have been added, the candidate with the most votes will be the victor.

Cases discussed in earlier chapters have given good examples of the way that courts dealt with these types of situations.

- In *Boardman v. Esteve*, 323 So.2d 259 (Fla. 1975), Edward F. Boardman had received 643 more absentee ballot votes than Henry Esteve and had won the election by 249 votes. Mr. Esteve challenged 1,450 absentee ballots. The trial court found that many absentee ballots had irregularities, but only 88 were *illegal*. The supreme court subtracted the 88 invalid votes from Mr. Boardman's 249-vote victory margin and said, "Edward F. Boardman is hereby declared the winner of the October 3, 1972, election for the Second District Court of Appeal by a total of 161 votes." At 270.
- In *Mirlisena v. Fellerhoff*, 463 N.E.2d 115 (Ohio 1984), after a recount Sally Fellerhoff beat John Mirlisena by 62 votes out of 76,592 total votes (or .008% of the vote) in her 1983 race for the city council in Cincinnati, Ohio. The court found,

In this case, a total of approximately thirteen voters have been deemed by the court, without deciding the issue, as disenfranchised. . .

At 122. The 13 votes cast by people who were not eligible to vote were subtracted from Ms. Felthoff's victory margin of 62 votes, which meant she won the election by 49 votes.

- In *Pullen v. Mulligan*, 561 N.E.2d 585 (Ill. 1990), Penny Pullen lost to Rosemary Mulligan by 31 votes in the 1990 primary election for nomination as the Republican Party candidate for the 55<sup>th</sup> District of the Illinois House of Representatives. After a recount, the judge ruled that some ballots should have been counted while others should not have been, and after the ballots that should not have been counted were subtracted from the candidates' totals, the two candidates were tied. Ms. Mulligan won the nomination by a flip of a coin. On appeal, the litigants questioned whether some uninitialed ballots should be counted and whether ballots of people who voted in the wrong precinct or wrong district should be counted. After all of the Illinois Supreme Court's reasoning and analysis, when the invalid ballots were subtracted from the candidates' totals, the vote between Ms. Pullen and Ms. Mulligan was still tied. The case was sent back to the trial court for a visual inspection of 27 ballots, and the trial court concluded that seven of those ballots looked like they had been punched for Ms. Pullen and one for Ms. Mulligan. Those ballots were added to the candidates' totals, and Penny Pullen beat Rosemary Mulligan by six votes.

But the court will void the election and require that it be run again when:

1. there is proof that ballots have been illegally cast,
2. the court cannot determine for which candidate those ballots were cast, and
3. the number of undetermined votes is greater than the margin of votes between the candidates.

We had a good example of this situation in Chapter 2.

- In *Green v. Reyes*, 836 S.W.2d 203 (Tex. App. Houston 1992), Ben Reyes ran against Raymond Eugene Green for the nomination as the Democratic candidate to the United States House of Representatives for the 29<sup>th</sup> Congressional District in Texas. Mr. Green appeared to have won the nomination by 186 votes in the Democratic Party's run-off primary election, but 429 people had illegally voted because they had voted earlier in the Republican Party's primary election.<sup>85</sup> (State law barred people from voting in one party's primary election and then voting in another party's run-off election in the same election cycle.) Under state law, the votes of those people who crossed over from one party's election to the other's were void. There were 220 illegal votes for Mr. Green, 75 illegal votes for Mr. Reyes and 8 votes that were not illegal. The illegal votes were subtracted from the candidates' totals, leaving Mr. Green with a 41-vote margin of victory. But because there were also 126 crossover voters whose choice of candidate *could not be determined*, the *entire* election was declared void and a new election was ordered.

This principle—that a court will void an election in which ballots are proven to have been illegally cast and in which the court cannot determine for whom ballots were cast—was honored in the breach by the majority opinion in another case from Chapter 2, *Moreau v. Tonry*, 339 So.2d 3(La. 1976), *appeal dismissed*, 430 U.S. 925 (1977).

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<sup>85</sup> A primary run-off election was needed because no candidate got a majority of the votes in the earlier primary election. Since a candidate needed a majority of the votes to be nominated, a run-off primary election was held between the two candidates who got the most votes in the earlier primary election.

- In *Moreau v. Tonry*, Richard Tonry won the Democratic Party nomination for the United States House of Representatives, but there were 43 forged signatures on the polling place sign-in books and 315 more votes on the voting machines than there were signatures on the polling place sign-in books. Although more than 100,000 votes were cast in that election, the number of votes involved in the irregularities was greater than the margin of Mr. Tonry's victory, so the court of appeal decided that the result of the election could not be determined and voided the election. On further appeal, the Louisiana Supreme Court cited Louisiana law that said,

[I]f the court finds the proven frauds and irregularities are of such a serious nature that the voters have been deprived of the free expression of their will, the election will be nullified.

At 4. But the supreme court reversed the decision of the court of appeal, apparently because it disagreed with the remedy that was ordered by the court of appeal, which allowed the Democratic Party Committee to pick a nominee rather than conducting a new election involving so many voters.

The *Moreau* decision is out of the mainstream of election law in general, and of Louisiana election law in particular. Cases decided in Louisiana 20 years before and after *Moreau* support the general principle cited, but ignored, in *Moreau* that "...if the court finds the proven frauds and irregularities are of such a serious nature as to deprive the voters of the free expression of their will, it will decree the nullity of the entire election." *Valence v. Rosiere*, 675 So.2d 1138, 1139 (La. Ct. App. 1996), quoting *Dowling v. Orleans Parish Democratic Committee*, 235 La. 62, 102 So.2d 755, 762 (1958). This comparison, using these cases, was discussed in detail in Chapter 2.<sup>86</sup>

The principle of subtracting illegal votes from the candidates' totals when possible, illustrated by *Boardman*, *Mirlisena* and *Pullen*, and the principle of voiding the election when the illegal votes cannot be assigned to a particular candidate, illustrated by *Green* and *Valence*, came together in a single case in *Jernigan v. Curtis*, 622 S.W.2d 686 (Ky. Ct. App. 1981).

- As was discussed in detail in Chapter 4, Patsy Jernigan came in second by four votes to Jessie Pearl Curtis in the 1981 contest for the Republican Party nomination for the Monroe County, Kentucky, Clerk of the Circuit Court. The Kentucky Court of Appeals decided that one known irregular vote (where there were two people in the voting booth at the same time) should be subtracted from Ms. Curtis' total but should not be added to Ms. Jernigan's total because "A vote that is illegally cast cannot be counted." At 689 (emphasis supplied). The vote of one person who did not live in the county also was subtracted from Ms. Curtis' total.

With Ms. Curtis ahead by just two votes, the court of appeals found that the polling place officials at the Fountain Run Precinct had instructed people who assisted voters in casting their ballots not to execute the affidavit required of the assistants and had manipulated the vote-count data to cover up the discrepancy between the number of votes cast on the voting machine and the number of people who voted. The court also found that there was admitted

<sup>86</sup> As also was discussed in Chapter 2, under Louisiana statutes at the time *Moreau* was decided, a candidate had to prove that "but for" election irregularities he or she would have won the election or, alternatively, that fraud or serious irregularities had deprived the voters of the free expression of their will. However, the "but for" prong of that law did not compel the result in *Moreau* because the court there could have, and should have, relied on the second prong of the standard (depriving voters of the free expression of their will) in deciding the case. The standard regarding the free expression of the voters' will, which is solidly within the mainstream of election law, predated and was contemporaneous with the "but for" standard in Louisiana and remains the standard in these cases since the "but for" standard was removed from the statute. "Although a party contesting an election is no longer limited to the 'but for' standard, we note that a party contesting an election still must show at least that because of fraud or irregularities, the outcome of the election is impossible to determine." *Nugent v. Phelps*, 816 So.2d 349, 357 (La. Ct. App. 2002).

vote buying on behalf of Ms. Curtis at the Fountain Run Precinct, that the results at the precinct were far out of line with usual election results there and that the vote buying there was common knowledge. Accordingly, the court of appeals decided that "...the election in Fountain Run was so tainted with fraud" that, following Kentucky law, it voided the results of the Fountain Run Precinct and, on the basis of the rest of the votes cast in the county, ordered the lower court to declare that Patsy Jernigan was the Republican nominee for the office of circuit court clerk in Monroe County.

A different result was reached in *Nugent v. Phelps*, 816 So.2d 349, 357 (La. Ct. App. 2002), where vote buying did not work. Even though there was a vote-buying scheme, and people who voted received something of value, the votes cast by people whose *choice of candidate was not affected* by the scheme were counted for the candidates they chose, including the candidate who sponsored the vote-buying scheme.

- Robert "Lip" Hall, Jr., asked voters to vote for candidates two and four. Lip was working for a candidate for police chief, Benji Phelps (number four on the ballot; the mayor was number two). Afterwards, Lip took those voters to a convenience store to get cigarettes and beer, paid for out of the \$100 account, known as "Benji's account," which had been set up by Benji Phelps. Phelps won the election by four votes. Six voters testified that they got a piece of paper from Lip or were told by him to vote for Mr. Phelps and got beer and/or cigarettes; a seventh voter said she was promised \$5 by Lip. Two voters voted as instructed by Lip. The other five voters took the beer or cigarettes but said that they voted the way they wanted; three of those voters voted for Mr. Phelps, two did not. As to the vote-buying scheme (there were other issues in the case), the Louisiana Court of Appeal said that the plaintiff

...must show at least that because of fraud or irregularities, the outcome of the election is impossible to determine. Thus, *it is the effect of the irregularity on determining the outcome rather than the fact of an irregularity by itself*, that guides us in these matters. Accordingly, we conclude that a vote should not be cast out simply because a voter was offered a bribe, or even because a voter accepted something of value for the vote, provided that voter still voted the way he originally intended. Regardless of criminal implications, *our focus is on whether the alleged activities actually changed the result of the election by changing the vote totals, or at least made the election result impossible to determine*. Based on this record, no more than two votes would be subtracted, a difference that would be insufficient to change the election result or make it impossible to determine.

At 357 (emphasis supplied).

*Jernigan* and *Nugent*, then, illustrate the manner in which ballots are treated when the irregularity in an election is caused by fraud, as contrasted with *Boardman*, *Mirlisena*, *Pullen* and *Green* where the irregularity was caused by an inadvertent failure to follow the correct statutory procedures. *Jernigan* illustrates the principle that:

1. when ballots have been illegally cast, and
2. the court cannot determine for whom those ballots were cast, and
3. the entire election is tainted with fraud,

the court will void the election and may require that it be run again.

*Nugent*, on the other hand, illustrates the principle that

specific ballots that are determined to be illegal are subtracted from the candidates' totals and the candidate with the most votes is the victor.

*Nugent* also stands for the proposition that

criminal behavior should be punished but will not void an election unless it changed the election result or made the result impossible to determine.

Some prefer to view this basic proposition by using the terms “ascertained” and “unascertained” invalid ballots. Ascertained invalid ballots are those a court can identify as void ballots *and can* determine for whom the ballot was cast. Unascertained invalid ballots are those a court can identify as void ballots *but cannot* determine for whom the ballot was cast.

In the cases discussed above, ascertained invalid ballots would be ones that were *subtracted* from candidates' totals to determine the winner, *i.e.*, the will of the electorate was determined by taking the ascertained invalid ballots out of the candidates' vote totals. Unascertained invalid ballots could cause an *election result to be thrown out* because the will of the electorate could not be determined, *i.e.*, a new election was required because there were enough unascertained invalid ballots to affect the results of the election. The concept of unascertained ballots can be useful, too, in understanding the effect of fraud on an election; if there are enough unascertained tainted ballots in an election, it becomes impossible to determine the will of the electorate.

The principles that apply to determining the outcome of election disputes also apply to disputes about candidates' nominating petitions, as we saw in Chapter 4.

- Daniel Sadofsky's candidate nominating petition to run for the Westchester county council contained names of phony voters, included names of voters who had not signed the petition and was attested to by subscribing witnesses who had not asked signers for identification (as they said they had). Mr. Sadofsky also lied as a subscribing witness: he asked people to sign other people's names, and he handed in petition pages on which he knew there were phony signatures. The court removed his name from the ballot because of his fraudulent acts and invalidated the petition because “fraud and irregularity so permeated the designating petition as a whole.” *Flower v. D'Apice*, 104 A.D.2d 578 (N.Y. 1984), *aff'd*. 468 N.E.2d 1119 (1984).
- In *Williams v. District of Columbia Board of Elections and Ethics*, 804 A.2d 316 (D.C. 2002), the nomination petition of Washington, D.C., Mayor Anthony Williams was rejected, and he was ruled not to have qualified to be on the ballot for the Democratic Party primary election, because there were falsified names on his nominating petitions. Mayor Williams was forced to run in the primary election as a write-in candidate. (He won the primary and subsequently was elected to another term in office.)

The rule is that fraudulent signatures will be subtracted from the total number of signatures on nominating petitions to determine whether the candidate has satisfied state signature requirements. However, petitions that are permeated with fraud are invalid, and the candidate will not be allowed to qualify to run in the election.

## B. When the right to vote is abridged, the fairness of the election is undermined.

The concept of fairness is one that is ingrained in the legal principles that apply to the resolution of election disputes. We focused on fairness very early in this book when, in Chapter I, we discussed the fact that common law principles ensure fairness in election challenges. There, it was stated that

not all election irregularities arise in circumstances that are neat and clean. Even though there is no common law *basis* for challenges to elections, courts will apply common law *principles* to the facts of an election challenge when fairness demands that they be applied. The doctrine of fairness in an election context routinely is couched in terms of determining the *free expression of the public's will*. . . . It is the touchstone of courts' discussions of how to treat the facts in these cases.

Since that early chapter, this book has described many cases in which the courts have reached decisions based on whether the result seemed to be fair or not fair. For example, as described in *Jernigan v. Curtis*, there were irregularities at two precincts in Monroe County, Kentucky. In the West Tompkinsville Precinct, many things went wrong and the court shrugged off the irregularities as unintended errors and, therefore, not grounds for voiding the election results, saying, "It has not been demonstrated that the errors set out above so destroyed the *fairness* of the election in this precinct that the votes of this precinct should be discarded." *Jernigan v. Curtis*, 622 S.W.2d 686, 690 (Ky. Ct. App. 1981) (emphasis supplied).<sup>87</sup> But when the election officials at the Fountain Run Precinct *caused* the same kinds of irregularities, which were augmented by apparent widespread vote buying, the court found "flagrant, extensive, and corrupt violations as to destroy the *fairness* and equality of the election." At 693 (emphasis supplied).

This theme is especially notable where courts found that procedural requirements were directory, not mandatory, and therefore did not require voiding an election or barring a candidate from office. Take, for example, *Tate v. Morley*, 153 S.E.2d 437 (Ga. 1967), discussed in Chapter 3, where Dr. Horace E. Tate won in the primary election and was elected in the general election to a seat on the Atlanta, Georgia, Board of Education. However, he had qualified as a candidate in the primary election without paying the required qualifying fee and after the time for filing his qualifying papers had passed. It turned out that Dr. Tate was allowed to proceed because the officials who oversaw the nominating process were misled by a court decision in another case with similar circumstances. In other words, the errors happened but they were not Dr. Tate's fault. In those circumstances, the Georgia Supreme Court said,

And so an election in which the voters have fully, *fairly*, and honestly expressed their will is not invalid because the certificate of nomination of a successful candidate is defective through an omission of some detail.

At 439 (emphasis supplied).

The same approach was taken by the South Carolina Supreme Court in *Taylor v. Town of Atlantic Beach Election Commission*, 609 S.E.2d 500 (2005), also discussed in Chapter 3, where a candidate who finished far out of the running claimed that there were a number of irregularities, including the violation of the voters' right to secrecy of the ballot. Twenty ballots were cast on sheets of plain paper on which the voter wrote the names of the candidates the voter wanted; in six instances, the voters signed the paper. The six voters did this because the polling place manager told them to. The supreme court decided that the ballots of those voters should not be rejected even though they left much to be desired in terms of secrecy of the ballot.

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<sup>87</sup> *Jernigan* is discussed in Chapters I and 4, and in Section A of this chapter.

“Voters who have done all in their power to cast their ballots honestly and intelligently are not to be disfranchised because of an irregularity, mistake, error, or even wrongful act, of the officers charged with the duty of conducting the election, which does not prevent a *fair* election and in some way affect the result.”

At 502 (internal citation omitted) (emphasis supplied).

Fairness also was a predominant theme in two of the leading cases discussed in Chapter 3 and summarized in the preceding section. In *Boardman v. Esteva*, 323 So.2d 259 (Fla. 1975), Edward F. Boardman had been declared the winner over Henry Esteva by 249 votes for a Florida state judgeship. Mr. Esteva had received 404 more votes on the voting machines, but Mr. Boardman got 653 more absentee votes. Mr. Esteva said that there were irregularities in 1,450 absentee ballots, and since the invalid absentee votes had been commingled with the valid absentee votes, Mr. Esteva said all the absentee ballots should be discounted, and he should win the election. The Florida Supreme Court agreed with the trial court that many absentee ballots had irregularities, but only 88 were *illegal*. The other irregularities included ballots where the reason for voting absentee was not set out on the ballot application or on the return envelope, where there was no attesting witness’s address or the identification of the witness was vague, where there was no post office cancellation stamp, where the election officials did not record the voters’ oath, and where the return envelopes had been either lost or destroyed in 429 instances by the canvassing board.

The 88 illegal votes were discounted but the other ballots were counted in Mr. Boardman’s total, making him the winner. As to the ballots that ended up being counted in Mr. Boardman’s total, the Florida Supreme Court reasoned,

In developing a rule regarding how far irregularities in absentee ballots will *affect the result* of the election, a fundamental inquiry should be whether or not the irregularity complained of has prevented a full, *fair* and free expression of the public will. Unless the absentee voting laws which have been violated in the casting of the vote expressly declared that the particular act is essential to the validity of the ballot, or that its omission will cause the ballot not to be counted, the statute should be treated as directory, not mandatory, provided such irregularity is not calculated to affect the integrity of the ballot or election.

At 265 (emphasis supplied).

And in *Pullen v. Mulligan*, 561 N.E.2d 585 (Ill. 1990), the trial court ordered that a tie between Penny Pullen and Rosemary Mulligan be broken by a flip of a coin, and Ms. Mulligan won the nomination. On appeal, the litigants questioned whether some uninitialed ballots should be counted and whether ballots of people who voted in the wrong precinct or wrong district should be counted. The supreme court’s resolution of those issues was guided by its view that,

There is no universal formula for distinguishing between mandatory and directory provisions. Rather, whether a particular statutory provision is mandatory or directory depends upon the intent of the legislature, which is ascertained by examining the nature and object of the statute and *the consequences* which would result from any given construction. . . . All of the provisions of the Election Code are mandatory in the sense that election officials are obligated to comply with their terms. It does not follow, however, that every failure to comply should invalidate the ballot in

question. Literal compliance with directory provisions will not be required if it appears that the spirit of the law has not been violated and the result of the election has been *fairly* ascertained.

At 595-596 (emphasis supplied). When the case was sent back to the trial court for a visual inspection of 27 punch-card ballots, the trial court concluded that seven of those ballots looked like they had been punched for Ms. Pullen and one for Ms. Mulligan. So Penny Pullen beat Rosemary Mulligan by six votes.

Most of the cases involving the resolution of election disputes (and most of the cases in all areas of law) have attempted to achieve a result that is fair. The cases described in Chapter 3—which discusses mandatory and directory requirements—can be seen as attempts by courts to apply the concept of fairness to statutory dictates.

But what if people who were eligible to vote were not allowed to vote at all? How would the standard of fairness apply? At first blush, it sounds as if an election should be voided if eligible voters were prevented from voting, because an election is a process by which eligible voters are allowed to cast their ballots. If some people were purposefully kept from casting their ballots, one might argue, then the election process failed—in essence, the polling exercise did not fit the definition of an election—and should not have any effect. But what if the number of people prevented from voting was not enough to make a difference in the result, i.e., the election would come out the same way with or without the votes of the people who were excluded? Is that fact important? When does an irregularity that prevents a portion of the electorate from casting their ballots become grounds for voiding the results of the election?

This question was squarely faced in *McNally v. Tollander*, 302 N.W.2d 440 (Wisc. 1981). The case started out, as so many election disputes do, as a disagreement about the timing of a notice. In fact, if all Wisconsin's statutory timing and notice procedures had been followed, this issue would never have turned into a lawsuit about the abridgment of the right to vote. However, county officials failed to follow the correct procedures a number of times and the result was that nearly half the county was unable to vote.

A group of people living in the central part of Burnett County, Wisconsin, wanted to have a referendum on whether to move the county seat from the Village of Grantsburg in the western part of the county, where the courthouse was inadequate and the jail was about to be condemned, to the Town of Siren, which was more centrally located in the county. They wanted the referendum to be on the ballot for the November 2, 1976 election. The state statute concerning moving a county seat required a petition asking for the move to be signed by one-half of the county freeholders, filed with the county clerk and given to the county board of supervisors (commissioners).

The people who wanted the county seat moved filed their petition in plenty of time, but the county waited eight months before it got around to the petition. When they finally determined the number of signatures that were needed, they found that the petition had too few signatures. At that point, it was already nearly two months after the time that the county was required to publish a notice of the referendum. Still, additional signatures were filed in September 1976 (less than two months before the election), and the county board determined that there were an adequate number of signatures. The county board ordered the county clerk to prepare and send out the ballots for the referendum<sup>88</sup> but the county clerk

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<sup>88</sup> On November 20, 1975, the proponents of the move filed a petition. A state statute required notice of the referendum be published on the last Tuesday in May and the first Tuesday in June, 1976. The county board appointed a committee that got the petition on July 23, 1976, and determined that the petition had 2,486 signatures and that there were 5,727 freeholders in the county. Since a simple majority of the number of freeholders was 2,864, the petition was more than 375 signatures short. Additional signatures were filed in July and August, and notice of the referendum was published on October 27 and 28, 1976, five months after the statutory deadline.

refused because, based on a letter the clerk had received from the executive director of the state board of elections, the notice had been published too late to hold the referendum.

However, the legal counsel for the state board of elections said the referendum election could be valid if held. The county board of supervisors meanwhile passed a resolution directing the county clerk to distribute the referendum ballots, and if he did not, directing the chairman of the county board to distribute the ballots. The county clerk continued to refuse to distribute the ballots so the county board chairman appointed a committee to print and distribute the ballots to all municipal precinct clerks. Then the county clerk sent a letter to all election clerks, drafted by a lawyer for a group opposing the move, warning the clerks not to distribute the ballots and saying they could be subject to criminal liability if they did. The district attorney then sent a letter to the clerks urging them to distribute the ballots and saying it was not illegal to distribute the ballots.

These and other gyrations led up to election day, November 2, 1976, when the referendum ballots were distributed in 16 towns in the eastern part of the county but not distributed in eight towns in the western part of the county. Accordingly, there were 2,578 people (or 40% of the county's voters) who were denied referendum ballots. The referendum passed 3,257 votes to 588 votes. Further complications ensued during the process of certifying the referendum results, but on September 9, 1977, the results were certified (actually, because of the complications, they were *recertified*), and on September 25, 1977, the Town of Siren was proclaimed the Burnett County seat.<sup>89</sup> The lawsuit challenging the certification was filed on December 9, 1977.

The trial court found “reasonable doubt overall that the election *fairly* represented the will of the voters of Burnett County,” and voided the election. Relying on the principles of traditional election dispute cases, and following an 1894 decision by the Wisconsin Supreme Court, the court of appeals reversed the trial court's decision. In this 1894 case, 18 qualified voters were mistakenly thought not to be qualified voters and were not allowed to vote. The 18 had testified that they were going to vote for a candidate who had lost the election by 13 votes; their votes would have made him the winner by five votes. In this case, the Wisconsin Supreme Court did not count the extra 18 ballots, following what it characterized as public policy considerations,<sup>90</sup> and said that the election results should stand and that steps should be taken so the irregularities would not recur in the future elections. Following the appeals court's decision, the plaintiffs in *McNally* (the 1981 case) appealed to the Wisconsin Supreme Court.

First the Wisconsin Supreme Court dealt with the numerous violations of statutory requirements involved in the case saying,

[T]he Court has traditionally looked to the specific statutory election provisions involved to determine whether they were “directory or mandatory” provisions. The Court has consistently sought to preserve the will of the electors by construing election provisions as directory if there has been substantial compliance with their terms. . .

This case, however, is fundamentally different from other election cases considered by this Court. . .

<sup>89</sup> In a final absurdity, the proclamation was revoked in December 1978.

<sup>90</sup> The supreme court reasoned that it was dangerous to rely on post-election statements of how people would have voted on election day, and that a court would not be more certain about an election result by getting oral evidence after the election, even though individuals may have been deprived of their votes. This can be contrasted with the situation in *Nugent*, where voters testified about how they had voted.

Because we hold that the failure to provide ballots to forty percent of the voters by itself requires that the election be set aside, we need not consider whether the several other defects involved mandatory provisions that would provide additional bases for setting aside the election.

At 444 (internal citation omitted).

The supreme court said that the court of appeals was correct in its description of the general election dispute resolution rules, but

...the facts of the case before us set it apart from the usual election contest case. First, the *number of voters* who were denied ballots in the present case *was very substantial*...

Second...we are confronted with *an entire class of voters* whose right to participate in a referendum election was denied through no fault of their own.

Then the supreme court noted an opinion it had entered in a 1963 case where it had suggested that

...a case involving deprivation of the right to vote would be treated differently from the run of cases involving procedural irregularities.

At 445 (emphasis supplied).

Having defined the problem as one beyond the precedential application of cases involving procedural irregularities, the supreme court looked to the broader principles that apply to the basic right to vote. Thus, the supreme court first noted that the right to vote was established in the Wisconsin Constitution and that the Wisconsin Constitution also established a right to vote on moving a county seat. Then the supreme court described the principles that were at the heart of its decision.

The right to vote is the principle means by which the consent of the governed, the abiding principal of our form of government, is obtained. As this court stated...

...If citizens are deprived of that right, which lies at the very basis of our democracy, we will soon cease to be a democracy. For that reason *no right is more jealously guarded and protected* by the departments of government under our constitution, federal and state, than is the right of suffrage. It is a right which was enjoyed by the people before the adoption of the constitution and is one of the inherent rights which can be surrendered only by the people and subjected to limitation only by the fundamental law.

At 446 (emphasis supplied). Next, after examining some cases in which individuals' ballots were counted after having been mistakenly rejected by election officials, the supreme court said,

While in [those cases] the right to vote could be vindicated by counting the defective ballots and upholding the election, *that remedy is unavailable when the ballots were neither distributed nor cast*.

We conclude that the evidence of these 2,578 voters so undermines the appearance of *fairness* in the election that the election must be set aside.

At 446 (emphasis supplied).

The last hurdle facing the Wisconsin Supreme Court was what it called the “outcome rule.” This principle, which we have encountered in several cases, says that if the outcome of the election would not be changed by the irregularities, the election should not be voided. As to this rule the supreme court said,

We agree with these statements as they apply to most cases of election irregularities. But in a case where deprivations of the right to vote are so significant in number or so egregious in character as to seriously undermine the appearance of *fairness*, we hold such an election must be set aside, *even where the outcome of the election might not be changed*.

At 447-448 (emphasis supplied).

Finally, the supreme court noted that fraud was not involved in the case and that even though voiding an election is a serious undertaking, this particular election did not affect the occupant of an elective office. Instead, at 446, the supreme court viewed the *status quo* in Burnett County as having been preserved “as it has been for more than one hundred years,” and if the people in the county really wanted to move the county seat, they could do so in a referendum election in which everyone could vote.

*McNally* is a good example of a case where the application of the standard principles of election dispute resolution did not resolve the problem that the facts presented. It describes how a court, facing those circumstances, can find an overarching principle that fits the facts and remedies the problem without disturbing the traditional principles of election dispute resolution. In other words, it is possible to apply remedies *beyond* those dictated by the traditional principles of election dispute resolution when fairness demands that extraordinary steps be taken to cure the irregularities that occurred.

Is there a danger that this approach could lead to court decisions that are based on subjective impressions rather than decisions that follow the rules and are bound by precedent? This is always a danger when a court uses its equity powers to right a wrong. But the legal system has built-in procedures for dealing with overreaching. When a lower court oversteps the bounds of its equity power, the corrective action comes in the appeal process. When a state supreme court seems to overstep those bounds, the corrective action comes in later decisions that overrule the precedent or restrict it to the particular facts of that case.

Remember, for example, *George v. Municipal Election Commission of the City of Charleston*, 516 S.E.2d 206 (S.C. 1999), and *Taylor v. Town of Atlantic Beach Election Commission*, 609 S.E.2d 500 (S.C. 2005), as those cases were discussed in Chapter 3. In both cases, the South Carolina Supreme Court found that voters did not cast their ballots in secret. In *George*, where the secrecy of the ballot was wholly absent, the supreme court found that the secrecy requirement was mandatory and the election was voided. Six years later in *Taylor*, where the secrecy of the ballot was absent in particular instances for some of the voters, the South Carolina Supreme Court found that the secrecy requirement was directory and the election was upheld.

The South Carolina Supreme Court explained that the differences in the results of the two cases flowed from the differences in their facts. But it is more likely that the South Carolina Supreme Court used *Taylor* (2005) to rein in its use of its equity power in *George* (1999) when it said that the ballot secrecy requirements were mandatory. While there was some difference in the facts of the two cases, there was no proven intrusion on the secrecy of any particular voter’s vote in *George*—the facts do not show that voters

or polling place officials actually saw the vote cast on any voter's ballot. Rather, the wholesale failure to provide the voters with any secrecy of the ballot was seen by the court as being fundamentally unfair in *George*. The South Carolina Supreme Court in *Taylor* also may have recognized that the combination of factors that led to voiding the election in *George* was unlikely to recur and that holding ballot secrecy to be mandatory under all circumstances put too great a burden on the electoral process.

In other words, the South Carolina Supreme Court used the *overarching principle* of preserving the fundamental integrity of elections to achieve a *fair* election ensured by the secrecy of the ballot in *George*. But later, in *Taylor*, the court returned to *traditional principles* of election dispute resolution to resolve cases dealing with ballot secrecy in that case and in future cases. The result was that the supreme court in *Taylor* effectively restricted the decision in *George* to its particular facts, limiting the precedential value of *George's* extreme remedy of voiding an election.

The Wisconsin Supreme Court in *McNally* combined these approaches in one decision. That court applied an *overarching principle*, the principle of the right to vote, to achieve a *fair* distribution of ballots to all county residents, while acknowledging that in most cases the more usual application of the *traditional principles* of election dispute resolution would be appropriate.

The Wisconsin Supreme Court made a pointed comparison of the facts in *McNally* with an earlier decision where the result in an election with a 13-vote margin was not disturbed even though 18 voters were not permitted to vote. While the distinctions that the supreme court made between those two cases freed the *McNally* decision from the court's precedents in election dispute resolution cases, the distinctions also highlighted the limitation of *McNally* to its facts and isolated its precedential value. It is likely that the *traditional principles* of election dispute resolution will be applied to future cases dealing with ballot allocation in Wisconsin, unless *fairness* demands otherwise.

### C. Votes for ineligible candidates reflect the will of the electorate.

There is an old saying that there is nothing sure except death and taxes. It's death that we will talk about here, the death of the winning candidate. Carroll H. Christian was the incumbent Treasurer of Pima County, Arizona, until he died on August 22, 1968, 19 days before the September 10, 1968, Democratic Party primary election, which he won.

The results of the September 10 primary election, as related in *Tellez v. Superior Court in and for County of Pima*, 450 P.2d 106 (Ariz. 1969), were:

Carroll H. Christian	8,087
Bill Dumes	7,864
Robert F. Tellez	5,209

In this case, Mr. Tellez appealed a lower court decision that ruled that Mr. Dumes was the victor and that his name should be put on the ballot as the Democratic Party nominee in the general election.

The Arizona Supreme Court said that the lower court reached its decision by following the "English Rule," which holds that votes cast for a dead person, or someone otherwise ineligible or disqualified, are

void and should not be considered when determining the results of an election if the voters have sufficient notice of the candidate's death.<sup>91</sup> The "English Rule" was characterized in *Ingersoll v. Lamb*, 333 P.2d 982, 984 (Nev. 1959)—a case quoted at length by the Arizona Supreme Court in *Tellez*—as concluding that "where a vote is cast for a candidate known to be dead the effect is 'a deliberate intent to waste it' and a 'wanton' misapplication of it..."

But the Arizona Supreme Court said,

The general rule which we think the better is that the votes cast for a deceased, disqualified or ineligible person are not to be treated as void or thrown away but must be counted in determining the result of an election as regards to other candidates where such deceased or disqualified person received the highest number of votes.

At I08.

Arizona's statutes were not helpful in reaching this conclusion because they just said, "the person or persons receiving the highest number of legal votes shall be declared elected." At I08, quoting the Constitution of the State of Arizona, Article 7, § 7, A.R.S. The law in the United States was not totally on the side of the analysis favored by the Arizona Supreme Court, but the supreme court characterized its view as the majority view in this country and found support in cases from Arkansas, Colorado, Georgia, Kentucky, Louisiana, Missouri, North Dakota, Pennsylvania, Tennessee and Wisconsin, *Corpus Juris Secundum* and American Jurisprudence. Quoting further from *Ingersoll*, the Arizona Supreme Court set out the view in *Tellez* that

...[W]e have concluded that petitioner, not having received the highest number of votes cast, is not entitled to receive a certificate of election.

Votes cast for the dead candidate were not

...to be thrown away but could be counted in support of a showing that the opposing candidate had not received a majority. This, in short, is the application of what has come to be known as "the American rule..."

At I09-I10. The remedy of having the county Democratic Party choose a replacement nominee was based on an interpretation of a state statute that said that vacancies "due to death, mental incapacity or voluntary withdrawal of a candidate after a primary election may be filled by the political party committee of the state, country, city or town..." The supreme court concluded that the words "after a primary election" modified only the words "or voluntary withdrawal of a candidate," leaving a vacancy due to death *before* a primary election to be filled by "the political party committee" as the statute dictated.

Four years later the Supreme Court of Maine reached a similar conclusion about the effect of a candidate's death in *Barber v. Edgar*, 294 A.2d 453 (Maine 1972), stating as its premise:

Ineligibility to take, or hold, an office is a subject matter separate from, and, therefore, incapable of being controllingly dispositive of, the independent question of the legal effect to be given to

<sup>91</sup> Mr. Christian was the incumbent county treasurer and his death got a lot of media publicity.

votes as they have been actually cast in an election duly held and completed in conformity with the legal requirements directing the appropriate conduct of elections.

At 456. Simply stated, the court said that the question of whether a candidate is eligible to take office does not control the question of whether the votes that candidate got in the election should be given legal effect.

The candidate in *Barber* died at noon on election day. It was Robert W. Bonenfant. He was running against Robert Barber and Emile Roy in the Democratic Party primary on June 19, 1972, for sheriff of Androscoggin County, Maine. The vote in that election was:

Robert W. Bonenfant	6,135
Robert Barber	2,884
Emile Roy	2,691

In accordance with Maine statutes the governor proclaimed that Mr. Bonenfant was the nominee, that he had died, and that there was a vacancy for a candidate to run for sheriff. The governor directed the county's Democratic Party to nominate a candidate to run for sheriff. Then Mr. Barber filed his lawsuit saying that he was nominated in the election in accordance with the state law that says the winner is the "person who receive[d] a plurality of the votes cast for nomination" and that his name should go on the ballot as the Democratic nominee.

The Maine Supreme Court paraphrased Mr. Barber's position in a distinctly unfriendly way: "The asserted ground for such total obliteration of the legal effectiveness of 6,135 votes cast is that the noon-time death, while the primary was in progress, of...Robert W. Bonenfant...suffices, *ipso facto*, to nullify absolutely all legal effectiveness of the total votes thus cast." At 455-456. Unfortunately for Mr. Barber, that is exactly what he was asserting. After separating the issues of Mr. Bonenfant's ability to take office from the legitimacy of his votes, as set out above, the supreme court said that the issue of the legitimacy of Mr. Bonenfant's votes

...must be evaluated, and decided, on the basis of the unique public policy considerations which derive from governmental concern to respect the *will of the electorate* as it has been objectively manifested in votes which have been actually cast. These policy considerations dictate that the objective results of elections conducted to actual completion, in accordance with legal directives prescribed for the procedural course of the election and the tabulation of its outcome, *shall be accorded*, rather than denied *maximum possible legal effectiveness*...

It is in light of this public policy that the overwhelming weight of authority in the United States has developed the principle that a person's ineligibility to take, or hold, office will not be permitted to vitiate absolutely and totally the legal effectiveness of the votes actually cast for him in a lawfully conducted election.

At 456 (emphasis supplied).

In other words, the votes cast for a candidate who is ineligible to take office will be counted in determining who won the election.

In reaching this decision, the Maine Supreme Court took the same path as did the Arizona Supreme Court in *Tellez* by citing several decisions from other states. Thus, in addition to the states noted in *Tellez* as supporting this majority view, the supreme court in *Barber* cited to decisions in Iowa, Ohio and Massachusetts. The Maine Supreme Court took special pains to denigrate the “English Rule” in noting that

The Iowa Court stressed the irrationality, because of the high degree of conjecture and speculation involved, or any legal presumption that a voter, even if he knowingly votes for an ineligible candidate, intends that his vote should be entirely without legal effect—that he is deliberately throwing away his vote.

At 456-457.

On this basis, the supreme court said that,

...the conclusion is inescapable that there were 11,710 valid votes cast for the office of Sheriff of Androscoggin County at the June 19, 1972, Primary Election. Plaintiff Barber failed to receive a plurality of these votes. His claim that he was elected must fail.

At 457. And so that there be no mistake as to the impact of the ruling, the supreme court added,

We declare that, plaintiff, Robert Barber, was not the duly nominated candidate of the Democratic Party for the office of Sheriff of Androscoggin County at the June 19, 1972, Primary Election.

At 457.

What, then, to make of *Jones v. Norris*, 421 S.E.2d 706 (Ga. 1992)? There were three candidates running in the primary election for the Wayne County, Georgia, Superintendent of Schools: Larry Hulvey, Jerry Jones and David Norris. Two weeks before the election, with the ballots already printed and no time to print new ones, Mr. Hulvey withdrew. Mr. Hulvey’s withdrawal was widely reported in the newspapers and a sign was put up at each polling place saying that Mr. Hulvey had withdrawn. The election results were:

Jerry Jones	3,190
David Norris	3,161
Larry Hulvey	213

A “majority of the votes cast” was required for election. If no candidate got a majority of the votes cast there was to be a run-off primary election between the two candidates with the most votes.

The county election superintendent declared that the votes for Mr. Hulvey were void and that Mr. Jones had won the election. Mr. Norris sued. In the lawsuit, the trial court said that the votes for Mr. Hulvey had to be counted when determining if any candidate got a majority of the votes that were cast in that election. Then the trial court concluded that, on that basis, a candidate would need 3,283 votes to win

the nomination with a majority of the votes cast. Since neither Mr. Jones nor Mr. Norris got a majority of the votes cast, the trial court held that a run-off election had to be held to determine whom the nominee would be.

The Georgia Supreme Court looked to state statutes for guidance but found that the only statute regarding candidates who have withdrawn dealt with elections where paper ballots were used; vote recorders had been used in the election for school superintendent from which Mr. Hulvey withdrew. The supreme court decided it could use the paper ballot statute as a guide, finding that there was essentially no difference between a paper ballot marked with a pencil and a cardboard ballot marked with a punch. That statute said,

“[i]n primaries, votes cast for candidates who have died, *withdrawn*, or been disqualified shall be void and shall not be counted.”

Given that direction, the supreme court said,

...the votes cast for Larry Hulvey were void and should not have been counted. The judgment of the trial court is therefore reversed.

At 707 (emphasis is the court’s).

This decision is opposite from the majority view that says that the votes cast for a candidate who died, withdrew or was ineligible should be included when determining the outcome of the election. What led the Georgia Supreme Court in *Jones* to ignore the majority view? The answer lies in Chapter I, Section B (*Statutory procedures must be strictly followed*) of this book. In *Jones*, there was a statute directly on point that commanded that the votes for Larry Hulvey not be included in the vote totals. So they were not, and the trial court’s decision to the contrary was reversed.

This conclusion was anticipated by *Thompson v. Stone*, 53 S.E.2d 458 (Ga. 1949), which was cited in *Tellez* as one of the cases that *follows* the “American Rule,” which is the majority rule, that the votes cast for an ineligible candidate should be included when determining the outcome of the election. There, 43 years before *Jones*, the Georgia Supreme Court laid the foundation for *Jones* even while it said that it would follow the “American Rule.”

The American doctrine, supported by an undoubted preponderance of authority, is that though the candidate receiving the highest number of votes because of his ineligibility fail of an election [sic], yet the votes cast for him are so far effectual as to prevent the election of other candidates, and there is no election at all [citing cases from Wisconsin, California, Louisiana, Missouri, Mississippi and Pennsylvania]. *Unless the votes for an ineligible person are expressly declared to be void*, the effect of such person receiving a majority of the votes cast is, according to the weight of the American authority and the reason of the matter, that a new election must be held, and is not to give the office to the qualified person having the next highest number of votes.

At 462 (emphasis supplied).

The statute relied upon by the Georgia Supreme Court in *Jones* in 1992 is exactly the kind of express declaration that the supreme court in *Thompson* said in 1949 would counteract the “American Rule.”<sup>92</sup> Thus, *Jones* and *Thompson* give us the final version of the legal principle that governs situations where votes were cast for an ineligible candidate: the votes cast for a candidate who is ineligible to take office will be counted in determining who won the election unless a statute voids those votes.

**D. Summary: The court will determine the legality of the challenged ballots and adjust the vote totals to achieve the narrowest remedy possible unless fairness has been undermined.**

- When possible, the court will adjust the candidates’ vote totals when the proof shows that there were uncounted legal ballots or counted illegal ballots.
  - Where the court can determine which specific ballots were illegal but had been counted, those ballots are subtracted from the candidates’ totals;
  - Where the court can determine which specific ballots were legal but had not been counted, those ballots are added to the candidates’ totals; and
  - After the appropriate additions and subtractions, the court will declare that the candidate with the most votes is the victor.
- Sometimes a reallocation of votes is not possible or not appropriate. A court will void the election and require that it be run again when:
  - There is proof that ballots have been illegally cast, and
  - The court cannot determine for which candidate those ballots were cast, and
  - Either the number of undetermined votes is greater than the margin of votes between the candidates or the entire election is tainted by fraud.
- Cases involving the deprivation of the right to vote will be treated differently from cases involving procedural irregularities.
- Votes cast for a candidate who is ineligible to take office still count in determining the winner, i.e., they count as votes for the ineligible candidate, unless those votes are specifically voided by statute.
- Fraudulent signatures will be subtracted from the total number of signatures on a candidate’s nomination petition, but petitions that are permeated with fraud are invalid and the candidate will not qualify to run in the election.
- Criminal behavior should be prosecuted and the perpetrators should be punished, but criminal behavior will not void an election unless it changed the election result or made the result impossible to determine.

<sup>92</sup> The statute relied on in *Jones* was enacted after the decision in *Thompson*. Current Georgia law says that, when a candidate in a general election withdraws, “All votes cast for the withdrawn candidate shall be void and shall not be counted.” Ga. Code Ann. § 21-2-134(a)(1) & (2) (2005). See also Ga. Code Ann. 21-2-134(b)(2) and 21-2-501(a) (2005).



## CHAPTER 6

### **Factual Findings of a Lower Court or Administrative Body Will Stand Unless They are Clearly Wrong**

The court decisions in this book were reached in cases that were on appeal. The initial decision in each case was made by an administrative body or by a trial court and was composed of two parts: a finding of the facts and a legal conclusion about what should be done about those facts. In every case, at least one person disagreed with the decision of the administrative board or the trial court and asked a reviewing court to come to a different conclusion. But, as in the law generally, there are limits to what an appellate court can do when it is reviewing the decision of an administrative body or a lower court in a case resolving an election dispute.

#### **A. The scope of a court's review is limited.**

The limited scope of an appellate court's review determined the outcome of many of the cases that we discussed in earlier chapters, especially where we focused on the procedural or administrative issues that were involved in those decisions. Now we will concentrate on how the courts in some of those cases handled the issues before them given the scope of their review.

The scope of review was stated succinctly in *Knight v. State Board of Canvassers*, 374 S.E.2d 685 (S.C. 1988), which was discussed in Chapters 2 and 3. Carl Knight lost the election for sheriff in Dorchester County, South Carolina. He filed a lawsuit against the State Board of Canvassers saying that the count of the absentee ballots was adjourned for the night and picked up again the next morning in violation of a law that required the count to be conducted without interruption. However, the trial court affirmed the results of the election, and Mr. Knight appealed to the South Carolina Supreme Court.

On appeal, the supreme court said,

This Court's scope of review of decisions of the State Board of Canvassers is limited to corrections of errors of law; findings of fact will not be overturned unless wholly unsupported by the evidence.

At 686. Ultimately, the supreme court decided that the State Board of Canvassers' support of the absentee ballot count did not constitute an error of law, even though the counting procedure did not meet all the technical absentee ballot requirements.

#### **B. A reviewing court may not substitute its views for the opinion of an administrative body or lower court.**

The concept of limiting a court's scope of review is similar to the approach that courts take when they presume that official actions and election results are valid. Both approaches recognize the authority, proximity and expertise of the first-level actors. We have noted earlier in this book that the presumption of correctness given to official actions and decisions creates a very difficult burden of proof for plaintiffs

in election dispute cases. That is because the plaintiffs in these cases seek to *attack* those official actions or decisions. The South Carolina Supreme Court in *Taylor v. Town of Atlantic Beach Election Commission*, 609 S.E.2d 500 (S.C. 2005), demonstrated in a single paragraph the close relationship between the rules that apply to the scope of review and the presumption that official actions are valid.

In municipal election cases, we review the judgment of the circuit court only to correct errors of law. Our review does not extend to findings of fact unless those findings are *wholly unsupported by the evidence*. We will *employ every reasonable presumption to sustain a contested election*, and will not set aside an election due to mere irregularity or illegalities unless the result is changed or rendered doubtful. In the absence of fraud, a constitutional violation, or a statute providing that an irregularity or illegality invalidates an election, we will not set aside an election for a mere irregularity.

At 502 (emphasis supplied).<sup>93</sup>

It is the principal tenet of the scope of review that a reviewing court may not substitute its view of the case for the decisions made by the administrative agency or trial court whose decision is under review. This was stated clearly in *Mirlisena v. Fellerhoff*, 463 N.E.2d 115 (Ohio 1984), where John Mirlisena lost the election for the city council in Cincinnati, Ohio, to Sally Fellerhoff by 62 votes out of a total of 76,592 votes cast. He challenged a number of irregularities, including the decision of the board of elections about the location of a polling place. (Other aspects of this case are discussed in Chapters I, 2 and 5.) As to this challenge the court said,

It is certainly arguable that a better site could have been selected or that more work might have been done in selecting the site. However, petitioner has not shown that the site was located fraudulently or with deliberate intent to disenfranchise voters.

“...The test for reversing a decision of a board of elections is not necessarily whether this court *agrees or disagrees* with such decision, but it is whether the decision of the board of elections is procured by fraud or corruption, or whether there has been a flagrant misinterpretation of a statute or a clear disregard of legal provisions applicable thereto.”

At 188-119 (internal citation omitted) (emphasis supplied).

**C. The decision of an administrative body or lower court will not be reversed unless it is against the manifest weight of the evidence.**

There is a corollary to the tenet that a reviewing court will not substitute its view of the case for the decision of an administrative body or a trial court: a reviewing court will not reverse the decision of an administrative body or trial court unless that decision was against the manifest weight of the evidence.

These tenets were pointedly addressed in *Stapleton v. Nyhan*, 1995 WL 809921 (Mass. Super. 1995). In 1994, William Stapleton was one of many people who signed a petition to recall Mary Claire Kennedy, the mayor of Lawrence, Massachusetts, who had won election by 15 votes the previous November. Under Massachusetts law, there were many steps that had to be taken to recall Mayor Kennedy, and most of those steps had to be taken quickly. Time periods for acts such as determining how many voters' signatures were needed on the petitions, for submitting a petition to the board of registrars of voters, for

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<sup>93</sup> Part of the paragraph quoted here was set out in Chapter 3. *Taylor* also was discussed in Chapters I and 5.

making objections to the petition, and so on, were very short, ranging from “forthwith” to two weeks.

The petitioners needed a number of signatures that equaled 15% of the voters at the last general election, which was 3,275 voters. After all of the procedural steps were taken and the signatures counted and examined, the board of registrars certified that there were 4,250 signatures, which was more than enough to hold a recall election. The city council notified the mayor, and within the 48 hours given under the law, she filed objections to the board’s certification.

The court issued a preliminary injunction against the board’s certification, delaying it until after the board held a hearing on the mayor’s objections. During the 14-day statutory period, the board held over 22 hours of hearings with 58 witnesses and 64 exhibits. As a part of her evidence, the mayor presented a handwriting expert who concluded that 1,722 of the 4,250 signatures were forgeries. In the end, the mayor proved to the satisfaction of the board that there were at least 976 invalid signatures, meaning that the petition did not have enough signatures to force a recall election.

But this case is not about recall elections. Nor is it about recall election petitions, or forgeries or preliminary injunctions. This case is about the *standard of review*: the boundaries within which an appellate court must remain when reviewing the decision of a board or lower court. The standard of review controls how much of a lower court’s decision the appellate court can and cannot change. While the court in *Stapleton* bases its comments on Massachusetts statutes, the standards contained in those statutes are applied universally.

First, the court looked at the options it had.

The Court may affirm, remand, set aside or modify the Board’s decision if it determines the decision is *unsupported by substantial evidence, was based upon an erroneous interpretation of the law, or was arbitrary or capricious*. . . The board’s decision will be upheld if supported by substantial evidence. . .

Then the court set out the basic rule for reviewing the administrative board’s treatment of the evidence that was presented to the board.

To the extent that the agency makes a determination of fact, the agency’s finding must be permitted to stand unless it is *unsupported by substantial evidence* in the entire record. . .

At 3. There is a very good reason that a reviewing court pays such fealty to the decision of a first-level administrative board or a trial court, and the court in *Stapleton* gave a very good statement of it.

Since the agency has been entrusted with the function of applying its administrative expertise to the determination of complex social, economic, and technical issues, the role of the judiciary in reviewing administrative agency actions is *not to substitute its own view* of the rightness of [sic] correctness of the agency’s decision for that of the agency. Traditional judicial review requires that the judiciary sustain and support the administrative agency’s decision regardless of whether or not the reviewing Court believes it would have reached the same decision if it had been given initial decisional responsibility for the decision.

At 3 (emphasis supplied).

At the board's hearing there was testimony that the petition contained forged signatures of dead people, that voters were misled as to the nature of the petition they were signing, that some of the forms with signatures did not set out the purpose of the form, that the names of fictitious people were on the petition, that wrong addresses or misspelled names were on the forms, and that some newly registered voters were told that signing the petition was part of the voter registration process (500 of 700 newly registered voters signed the form). As to all of this information, the court in *Stapleton* said,

Whether or not all of this comprised sufficient evidence for the Board to conclude, as some members apparently did, that there was pervasive fraud sufficient to invalidate the entire petition. . . *there was substantial evidence upon which the Board majority could reasonably conclude*, as it did, that there were insufficient valid signatures to require a recall election. . .

At 4 (emphasis supplied).

. . . The Court's role is merely to insure that the Board reasonably complied with the legal requirements of fair procedure and of the . . . applicable laws. . . The Court finds that the Board, under the circumstances and in the limited time it had available, dealt as fairly as it could with the difficult and emotion-provoking issues thrust upon it, and that the Board's decision not to certify the mayoral recall petition *was supported by substantial evidence, was not contrary to law, and was not arbitrary or capricious*.

At 5 (emphasis supplied).

**D. On review, a lower court's findings can be reversed based on a new interpretation of the law.**

The standard that administrative or judicial findings of fact will not be reversed unless they are against the manifest weight of the evidence is very hard to meet. But it is not impossible. Sometimes, a reviewing court may appear to unfairly decide that an administrative board or lower court's finding was not supported by the evidence because the *reviewing court* adopted a new interpretation of the law.

That is what happened in *Keating v. Iozzo*, 508 N.E.2d 503 (Ill. App. 1987), which arose when Mike Iozzo was a candidate for village trustee in Villa Park, Illinois. He wanted to challenge the sufficiency of the signatures on nominating papers that three other candidates—Dennis Keating, Emil “Bud” Vittorio and Larry Dean (ne Mieszczak)—had filed to run as village trustee. Objections to nominating papers had to be filed with the village clerk by February 2, 1987. At 10:50 a.m. that day the village clerk called all of the candidates, including Mr. Iozzo, and told them she would be in the office only until noon that day. Mr. Iozzo told her he would be filing his objections by three o'clock. When he arrived at city hall shortly after three o'clock, the clerk's office was closed and there was no deputy clerk there, so he did not file his objections until the next day, February 3.

The village electoral board decided that Mr. Iozzo's inability to file his objections was the clerk's fault because her office was supposed to be open from 9 a.m. to 5 p.m. The board found that Mr. Iozzo's objections were timely filed, and because they were timely filed the board had jurisdiction to hear evidence about the sufficiency of the signatures on the other candidates' nominating petitions. The board found that the other candidates' nominating signatures were insufficient and took their names off of the ballot.

Candidates Keating, Vittorio and Mieszczak filed a lawsuit against Mr. Iozzo, the electoral board and others challenging the board's decision. The trial court reversed the electoral board's finding that the ob-

jections were filed on time and reinstated the candidates' names on the ballot. Mr. Iozzo and the board appealed. The appeals court began its analysis by saying,

It is worthy of note at the outset of discussion of timeliness that judicial review of decisions of an electoral board is not intended to provide a *de novo* hearing but rather to provide a remedy against arbitrary or unsupported decisions...The findings of an electoral board will not be reversed unless they are against the manifest weight of the evidence. In this case the trial court reversed the Board's conclusion that the objections were filed on time. The inquiry is whether the Board's decision was against the manifest weight of the evidence.

At 505.

The appeals court said that this precise set of facts had not arisen before, but there were a number of cases that were similar. Those cases involved people who tried to extend a statutory filing period because the last day of the filing period was on a weekend or a holiday when the office in which a filing was supposed to be made was closed. Thus, filing periods were extended in two additional circumstances. In the first, the office that was to accept the filing was closed (according to its regular schedule). In the second, the office that was to accept the filing was in fact open (when it was scheduled to be closed), but no public notice was given of the change of schedule. In a separate case, the filing period was not extended when it was clear that the legislature had intended that the deadline fall on a day the office was closed. Based on these cases, the appeals court said,

We conclude that when a plaintiff has no opportunity to comply with a statutory deadline, or no notice of such an opportunity, it is likely the deadline will be extended. On the other hand, when plaintiff has notice of the opportunity to comply, and can show no hardship resulting from limitations on the opportunity, extension of a statutory deadline is disfavored.

At 507-508. The appeals court in *Keating* decided that, under the legal standards of past cases, the deadline of Mr. Iozzo's filing could have been extended if the evidence showed that (1) he had no opportunity to file, (2) he had no notice of the opportunity to file, or (3) the limitation on filing was a particular hardship. In order to determine whether the electoral board's decision was against the manifest weight of the evidence, the appeals court then reviewed the facts in the case and found,

...there is *no evidence* that the village clerk was under any statutory or local obligation to be present in her office at any specific time or to provide deputy clerks to function in her stead. ...The *evidence does not demonstrate*, either, that the clerk voluntarily set up and maintained regular office hours. In fact, it seems clear she was not customarily present in her office on a full-time basis.

...on the last day for filing objections she personally contacted all the candidates by telephone. ... Mr. Iozzo himself testified that he was so informed.

...Iozzo made *no showing*, either at the time or at the subsequent hearing, that the limited hours set by the clerk worked a hardship on him or made it impossible for him to comply with the filing deadline.

At 508 (emphasis supplied).

Under these circumstances, the appeals court decided that Mr. Iozzo did not introduce any evidence that would meet legal standards. The appeals court concluded that,

Since the objector had both notice and an opportunity to file, and showed no hardship from the limits on his opportunity, we cannot say that the filing deadline should have been extended. Iozzo's objections were not timely filed, and the petitioners' names were properly placed back on the ballot.

At 507-508.

Thus, the appeals court affirmed the trial court's decision, which had reversed the electoral board's decision. In effect, the appeals court said that the electoral board should have made its decision on the basis of evidentiary standards that were not clear until the appeals court enunciated them, long after the electoral board had acted.

What could the electoral board have done to avoid the appeals court's conclusion that the board's decision was against the manifest weight of the evidence? When the appeals court extrapolated legal standards from past cases to determine that the board's decision was against the manifest weight of the evidence in this case, did the appeals court second guess the board's fact finding even while proclaiming that the court would not do so?

The answer is no, because the only way a court can determine if particular facts are relevant is to examine them in relation to the law, and it is the court's job to define the law. So if the law is unclear, as it was in *Keating*, an administrative board or trial court naturally runs the risk that its interpretation of the law will be overruled when an appeals court clarifies the law to mean something different from the meaning that the board or lower court applied to the facts. And when that happens, the board's or the lower court's decision may be found to not have been supported by substantial evidence, or to have been contrary to the law.

The appeals court in *Keating* said its review was "not intended to provide a *de novo* hearing," and that is the thrust of this chapter. But what difference would it have made if the court would have provided a *de novo* hearing? One answer is illustrated by *Devine v. Wonderlich*, 268 N.W.2d 620 (Iowa 1978), which we discussed in detail in Chapter 4.

Briefly, Francis P. Devine had won election as a write-in candidate by two votes (2,655 to 2,653) to be the Keokuk, Iowa, county supervisor (commissioner). But a court reviewed a number of claims in a lawsuit brought by Mr. Devine's opponent, Raymond James Wonderlich, and decided that some of the ballots should not have been counted. After calculating the new totals, the court found that Mr. Wonderlich had won the election by 135 votes (2,638 to 2,503). Mr. Wonderlich's challenge was based on a variety of ways that Mr. Devine's name had been written in: there were differences in the exact spelling of his first and/or last names; many people used stickers (with his name on them) placed in varying ways and places on the ballot; and in some instances Mr. Devine's name was written two or three times, crossed out, or written partially and rewritten. Mr. Devine appealed from the trial court to the district court but still lost. Mr. Devine then appealed to the Iowa Supreme Court.

The Iowa Supreme Court began by observing that,

The contest is tried as a civil action. . . . Appeal lies from the contest court to district court which hears the appeal in equity and determines anew all questions in the case. . . . Hence our review is *de novo*.

At 623.

Thus, the Iowa Supreme Court did not limit itself to a review of legal errors but instead proceeded to review all of the evidence and law and then apply the law to the evidence to determine which of the marks on the ballots should have been considered. On the basis of this extensive review of all of the evidence in the case, the supreme court decided where the lower court had been right and where it went wrong. Once all the legitimate ballots were added up by the supreme court, Mr. Devine won the election by 20 votes, with 2,667 votes to Mr. Wonderlich's 2,647 votes.

But note that the process the Iowa Supreme Court went through—defining the law, then analyzing the facts in the light of the law and then reaching a conclusion on the basis of that analysis—is what the appeals court did in *Keating*. The juxtaposition of these two cases shows that the pivotal role of a reviewing court is to interpret the law in order to determine whether or not the trial court's legal conclusion is against the manifest weight of the facts.

Of course, whether the trial court's decision will be in line with or against the manifest weight of the facts depends on how the law is defined. When a lower court decision is reversed, it is because the lower court got the law wrong—it was wrong in the way it interpreted the facts in light of the law. We know that most appellate courts do not conduct a *de novo* review of the lower court's decision. But we also have seen that whether a reviewing court is acting *de novo* or not, depending on the *state's rules of procedure*, the court will still define the *law*, and if the lower court's decision on the law is not in line with the manifest weight of the facts in light of the way the *reviewing court* defined the law, then the lower court will be reversed.

*Boevers v. Election Board of Canadian County*, 640 P.2d 1333 (Okla. 1981), which was discussed in Chapter 4, is another case where the outcome was reversed after the reviewing court corrected a misreading of state law and then applied the corrected law to the facts. Henry Boevers and Wayne Kremeier ran for the Republican Party nomination for county commissioner in District I of Canadian County, Oklahoma. After a recount, Mr. Kremeier was ahead of Mr. Boevers by one vote (228 to 227). Two ballots were at issue. One ballot had Mr. Kremeier's name crossed out and an X placed in the box next to Mr. Boevers' name. The other ballot had no mark in the box next to Mr. Kremeier's name and a squiggly marking in the box next to Mr. Boevers' name. The first mark was not counted because it was determined by the county election board to be a distinguishing mark prohibited under state law, and the second mark was not counted by the county election board because the board decided it was not one of the marks that a state statute said were acceptable.

Mr. Boevers filed a lawsuit contesting the election, but the county judge declined to review the election board's decision because a state law said that the election board's recount decision was final in all cases. The Oklahoma Supreme Court disagreed, saying,

The power of this court stems not from legislation but from fundamental law. . . In the exercise of that constitutional authority—known as our “general supervision control” over all courts and administrative agencies—this court is empowered to re-examine the correctness of any board ruling on an *issue of law* which may affect the ultimate outcome of an election.

At I335 (internal citations omitted) (emphasis supplied).

The supreme court said that the lower court judge was wrong when he read the state statute as prohibiting him from reviewing the election board’s decision about those two odd ballot marks. Once the supreme court decided that the board’s decision could be reviewed, the supreme court went ahead and reviewed the marks, i.e., the supreme court analyzed the evidence to determine whether the electoral board’s decision was correct under the law. As in *Keating*, the court in *Boevers* decided that the board had made the wrong decision under the law: the Oklahoma Supreme Court decided that the marks on the two ballots were not improper and, therefore, Mr. Boevers and not Mr. Kremeier won the nomination.

#### E. The limitations on the scope of review are universally applied.

The above cases are a few of the many cases in this book in which the scope of review is mentioned and often is determinative. A brief set of quotations from some of the other cases already discussed in this book will give a sense of the universal importance with which the courts treat the limitations on their scope of review.

- “In municipal election cases, this Court reviews the judgment of the circuit court upholding or overturning the decision of a municipal election commission *only to correct errors of law*. The review does not extend to findings of fact unless those findings are wholly unsupported by the evidence.” *George v. Municipal Election Commission of the City of Charleston*, 516 S.E.2d 206, 208 (S.C. 1999), citing *Knight*, among other cases.
- “This Court is bound by the trial court’s findings of fact unless those findings are not based on competent evidence.” *In re General Election for District Justice*, 670 A.2d 629, 637 (Pa. 1996), and after remand, 695 A.2d 476 (1997).
- “A court of appeal may not set aside a finding of fact by a trial court in the absence of *manifest error or unless it is clearly wrong*, and where there is a conflict in the testimony, reasonable evaluations of credibility and reasonable inferences of fact should not be disturbed on review. . .” *Nugent v. Phelps*, 816 So.2d 349, 359 (La. Ct. App. 2002).
- “[*The trial court’s*] judgment based upon that testimony is presumed correct and will be reversed only if, after consideration of the evidence and all reasonable inferences to be drawn therefrom, the judgment is found to be plainly and palpably wrong.” *Blocker v. City of Roosevelt City*, 549 So.2d 90, 91 (Ala. 1989).
- “In respect to issues three and four, we conclude from our review of the record *that the trial court did not abuse its discretion* in the final judgment with respect to those issues. We therefore affirm the final judgment as to those issues but do not find that they merit discussion.” *Beckstrom v. Volusia County*, 707 So.2d 720 (Fla. 1998).

- “[T]he standard of review to be placed on an appeal from a judgment in an election contest is whether from the record it appears that the trial court abused its discretion. This court will reverse only if the evidence in support of the finding is so weak as to render the outcome manifestly unjust or clearly wrong.

Although the Findings of Fact in a judge-tried case are not conclusive when a complete statement of facts appears in the record, great deference must be given to the judge’s determination of the witnesses’ credibility and the weight to be given to their testimony.” *Green v. Reyes*, 836 S.W.2d 203, 208, 211, 212 (Tex. App. Houston 1992).

- “[W]e feel it necessary to state perhaps the most primary rule of appellate review and that is *the court on review, cannot weigh the evidence.*” *Fultz v. Newkirk* 475 N.E.2d 706, 707 (Ind. 1985).

#### F. Summary: Judicial review of decisions in election challenges has a limited scope.

- As in the law generally, there are limits on a court’s scope of review of an administrative body or lower court’s decision resolving an election dispute.
- The scope of review controls how much of an earlier decision a court can or cannot change.
- A reviewing court is not to substitute its view of a case for the decision made by an administrative body or lower court.
- A court’s scope of review of an administrative or judicial decision is limited to corrections of errors of law. Findings of fact will not be overturned unless wholly unsupported by the evidence.
  - A reviewing court must uphold an administrative body’s decision regardless of whether the reviewing court would have reached the same decision if it had the initial responsibility for making the decision.
  - A reviewing court will only determine whether the decision of an administrative body or trial court was:
    - Unsupported by substantial evidence,
    - Against the manifest weight of the evidence,
    - Based upon an erroneous interpretation of the law, or
    - Arbitrary or capricious.

Only in these cases can the decision be reversed.



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## Conclusion

The legal principles in this book are drawn from cases that were decided by courts in many states. While it is true that a court in one state may look to decisions of courts in other states to determine the legal principles that should be applied to the facts, it also is true that courts' decisions are governed primarily by the law that prevails in their own state. Therefore, the legal principles that are discussed in this book will not be applied in the same way or with the same result in all states.

The introduction to this book emphasized this point:

Because there are variations from state to state, and sometimes from case to case within a state, these decisions provide an analytical framework that lawyers and administrators can apply to fact situations that arise in their own jurisdictions; they do not provide a set of rules that can be applied in an unthinking fashion.

Nevertheless, the legal principles discussed in this book are generally accepted rules that are applied to resolve election disputes. While these principles are not easily compiled in a list of dos and don'ts, the chapter headings and some of the summaries in this book can be gathered to provide an overview of the teachings of the cases.

### **Chapter 1. Challenges To Elections Must be Based on Written Authority: Constitutions, Laws and Regulations**

- There is no common law basis for an election challenge, but courts will apply common law principles in an election challenge when fairness demands.
- Procedures and deadlines in laws and regulations must be strictly followed in bringing a lawsuit to challenge election procedures.
- A court does not have jurisdiction to hear a challenge to election irregularities if a statute governing a fundamental procedure for election contests has not been satisfied.
- Election officials are presumed to perform their duties in a proper and lawful manner in the absence of a sufficient showing to the contrary.
- There is a presumption that returns certified by election officials are correct.

### **Chapter 2. Election Results Stand Unless a Violation Materially Affects the Outcome**

- To win an election challenge, the plaintiff usually must prove that the actions complained of constituted irregularities under the election laws, and that the number of irregularities were sufficient to change the result of the election.
- An election challenge can also succeed if the plaintiff presents facts showing that serious fraud and irregularities deprived the voters of the free expression of their will.
- Threats, violence or disturbances that do not materially affect the election results do not invalidate an election.

### **Chapter 3. Strict Compliance is Required With Mandatory Procedures, but not With Directory Procedures**

- A violation of mandatory requirements voids a ballot.
- A statute is mandatory if it *says* that failure to act in the way the statute describes will *void* the ballot.
- If a procedure is called into question while the procedure still can be corrected (i.e., before the election), the statute is mandatory.
- When it is too late to correct an irregularity (after the election), a statute is directory unless the statute says that failure to follow its procedures will void the ballot.
- Officials' gross negligence defeats the will of the voters and voids the election.
- Technical irregularities usually do not void an election if they do not change the election results.
- Substantial compliance with directory procedures will be found when the will of the voter is clear.

### **Chapter 4. Fraud Invalidates the Ballot, but the Will of the Voter Will Still be Respected**

- A vote that is illegally cast is invalid and cannot be counted.
- Fraudulent votes cannot be included when determining the will of the electorate.
- A court will void a precinct's election results if violations of statutory requirements are so flagrant, extensive and corrupt as to destroy the fairness and equality of the election.
- Identifying marks on the ballot are prohibited:
  - to protect the secrecy of the elections,
  - to discourage bribery, fraud and corruption, and
  - to protect the integrity of the ballot by preventing vote-buying schemes.
- But an unusual mark on a ballot is not evidence of fraud unless there is a deliberate intent to place an identifying mark on the ballot.

### **Chapter 5. Add in the Ballots Determined to be Legal, Subtract the Ballots Determined to be Illegal, Unless the Fairness of the Election has Been Undermined**

- After the illegal votes have been subtracted from the appropriate candidates' totals, and the legal votes have been added to the appropriate candidates' totals, the courts will declare that the candidate with the most votes is the victor.

- A court will void the election and require that it be run again when:
  - there is proof that ballots have been illegally cast, and
  - the court cannot determine for which candidate those ballots were cast, and
  - either the number of undetermined votes is greater than the margin of votes between the candidates or the entire election is tainted by fraud.
- Criminal behavior will void an election only if it changed the election result or made the result impossible to determine. This fact does not preclude a separate criminal prosecution of the offenders.

### Chapter 6. Factual Findings of a Lower Court or Administrative Body Will Stand Unless They are Clearly Wrong

- A reviewing court is not to substitute its view of a case for the decision made by an administrative body or lower court.
- A reviewing court can only determine whether the decision of an administrative body or trial court was unsupported by substantial evidence, was based upon an erroneous interpretation of the law or was arbitrary or capricious.
- A reviewing court will reverse the decision of an administrative body or trial court if that decision was against the manifest weight of the evidence.

Throughout the book, there are cases where it appears that someone should be punished for what they did in the election process. For example, the person who had his rival's campaign workers jailed, the deputy sheriffs who harassed and intimidated people to vote in favor of an annexation, the election official who purposefully rejected the directive that people who give assistance to voters must execute an affidavit, and the person who bought votes. But the cases talk only about the effect of those actions on the election process, and often those actions did not necessarily mean that the election result should be overturned.

However, the fact that such actions might not lead a court to overturn an election is not a license for people to attempt to disrupt elections or bully voters. If the actions of an election officer, candidate or other person were so flagrant as to warrant punishment, that punishment would be the subject of a separate proceeding—which could be anything from a job-related disciplinary proceeding to a criminal prosecution—despite their effect on the outcome of the election.

One more caution is in order. In this book, we have seen courts in different cases apply similar legal principles to similar facts and reach seemingly contradictory conclusions. What was going on under the surface of these court decisions? What good are legal principles if they can't be applied uniformly? One answer is that cases that seem to be wrongly decided can be analyzed according to the way the judges viewed the facts against the template of the will of the electorate. Using this approach, a well-presented case will win the day if the facts are within the bounds of the prevailing legal principles and the desired outcome manifests the will of the electorate. This is the viewpoint from which this book is written.

On the other hand, sometimes cases are decided wrongly; the prevailing legal principles either are not followed or are applied to reach a conclusion that is not justified by the facts. Wrongly decided cases often are dealt with through decisions in later cases that limit or overturn the precedent established in the wrongly decided case. In these circumstances, courts in later cases commonly will say that the decision in

the wrongly decided case should be limited to its facts and therefore does not serve as precedent for cases that come after it. Some of the cases in this book can be looked at in this light.

One case that is not included in this book is *Bush v. Gore*, 531 U.S. 98 (2000), the decision of the United States Supreme Court in the election dispute that arose in Florida during the vote count of the 2000 Presidential election between the Democratic Party nominee, Vice President Al Gore, and the Republican Party nominee, Governor George W. Bush. In Chapter 3, we discussed *Jacobs v. Seminole County Canvassing Board*, 773 So.2d 519 (2000), one of the Florida lawsuits that arose during the 2000 Presidential contest. In that case, the traditional principles of election dispute resolution were applied by Judge Clark and the Florida Supreme Court to resolve a challenge to the use of official county office space and resources by Republican Party operatives to correct errors they had made in printing absentee voter application ballot request forms. That case ended after the Florida Supreme Court's decision. We also discussed *Fladell v. Palm Beach County Canvassing Board*, 772 So.2d 1240 (Fla. 2000), where the "butterfly ballot" was not in substantial noncompliance with the operative state statute.

The other cases that were involved in contests of the 2000 Presidential election in Florida—the lawsuits that ended up in the United States Supreme Court in *Bush v. Gore*—also percolated through the Florida state court system and were decided by the Florida Supreme Court using the traditional principles that apply to the resolution of election disputes.<sup>94</sup> But the United States Supreme Court did not base its decision on traditional principles of election disputes. The Supreme Court did not vitiate those traditional principles; it just said it was applying both more specific and more overarching legal authorities to the particular issues in the 2000 Presidential race. In *Bush v. Gore*, the United States Supreme Court said that it decided the case under United States statutes that apply to choosing Presidential electors as well as under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

The impact of *Bush v. Gore* and the extent to which the decision is based on sound legal reasoning have been the subject of many and varied opinions in law review articles and books. We know that *Bush v. Gore* led to the enactment of the Help America Vote Act of 2002, 42 U.S.C. §§ 15301-15523, and had an immediate impact on states' decisions to adopt voting devices. But because *Bush v. Gore* purports to deal with legal theories outside of the traditional principles of election dispute resolution, that analysis would take another book. For that reason, *Bush v. Gore* is not discussed in this book.

It is fitting to end this book that way it started. As was said in the introduction, the legal principles that apply to the resolution of election disputes were derived from court decisions which, taken together,

reflect a broad analytical approach to achieving certain goals: to give effect to the will of the electorate, to give effect to the desire of the voter, to avoid upsetting the results of an election (where possible), and to respect specific legislative commands. In many cases, a court's decision depends upon how the court balances respect for legislative commands, on the one hand, and effecting the voters' will, on the other.

In sum, it is the goal of election dispute resolution to achieve, in the words of the Florida Supreme Court in *Boardman v. Esteve*, 323 So.2d 259, 265 (Fla. 1975), "a full, fair and free expression of the public will."

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<sup>94</sup> Especially *Boardman v. Esteve*, 323 So.2d 259 (Fla. 1975), and *Beckstrom v. Volusia County*, 707 So.2d 720 (Fla. 1998).

59 So. 769  
 131 La. 355, 59 So. 769  
 (Cite as: 131 La. 355, 59 So. 769)



Supreme Court of Louisiana.

**ANDREWS**

v.

**BLACKMAN.**

**No. 19,633.**

Oct. 3, 1912.

Appeal from Thirteenth Judicial District Court, Parish of Rapides; G. H. Couvillon, Acting Judge.

Contest by James Andrews of the nomination of Wilbur F. Blackman at the primary election for the judgeship of the Thirteenth judicial district. From a judgment for the defendant, plaintiff appeals. Affirmed.

West Headnotes

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[144k158 Most Cited Cases](#)

Irregularities in conduct of a primary election, not preventing free and honest expression of will of voters, will not affect the validity of a nomination.

**Elections** **158**

[144k158 Most Cited Cases](#)

Act No. 198 of 1912, § 2, amending Act No. 49 of 1906, § 1, does not affect the validity of primary elections as affected by irregularities in their conduct.

**\*356 \*\*769** Andrews & Hakenyos, Hundley & Hawthorn, and R. H. McGimsey, all of Alexandria, for appellants.

Blackman & Overton, Mims & Dawkins, T. A. Carter, and H. B. Gist, all of Alexandria, for appellee.

Statement of the Case.

MONROE, J.

At a Democratic primary election held in the Thirteenth judicial district on September 3d of this year, plaintiff and defendant were opposing candidates for the nomination to the judgeship of the district court, and it having been made to appear through the promulgated returns, that defendant had received a majority of the votes cast, and was therefore the

nominee, plaintiff instituted this suit and contest, on the grounds (stated in substance):

That no set of returns of the election were delivered by the commissioners to the chairman of the Democratic committee of the district, and no effort to obtain such a set was made by him; that the chairman did not convene the committee to receive the tabulation of, together with, the said returns, and that neither he nor the members of the committee were present at the place of meeting at the appointed time; but that, late in the afternoon of September 7th, certain persons, holding proxies from said chairman and members, assembled as, and assumed to discharge the functions of, the committee; that **\*357** the committee, as thus composed, obtained, from the office of the sheriff of Rapides parish, certain papers purporting to be returns from several boxes in Grant parish (the district, it may be stated, being composed of the parishes of Rapides and Grant), but, finding that other returns from Grant parish, and all the returns from Rapides were missing, adjourned until September 9th, in order to get them, and then obtained an order from the judge of the district court (defendant herein) authorizing them to get the ballot boxes, containing the returns from the several precincts of the parish of Rapides; that having procured and gone into said boxes, and having obtained the missing returns from Grant parish, said committee tabulated the votes and promulgated the result of their work, showing that defendant had received 1,609 votes and plaintiff 1,302, and declaring defendant the nominee; that all the proceedings thus set forth were illegal and void for this: This the law requires a sealed set of the returns to be delivered to the chairman of the committee in person, requires the chairman to tabulate same and present his tabulation, with the returns, to the committee, and confines the committee, in the discharge of its functions, to said tabulation and returns; that there could be no meeting of the committee without the chairman, and no meeting where the members were not actually present, but were represented by proxies; that the judge of the district court, being himself a candidate, could make no order pertaining to the count or promulgation of the result, and should have recused himself; that no returns were made from Rapides parish, and no tally sheets were made or sworn to, as the law requires, or delivered to any one authorized to receive them; that the returns from Grant parish,

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which were obtained by the committee, had been for several days in the hands of unauthorized persons; that at Verda, \*358 Montgomery, Georgetown, and Pollock sample ballots were willfully given by the commissioners to voters desiring to vote for contestant, with the intention of perpetrating irregularity and fraud; that no booths for the preservation of the secrecy of the ballot were provided at any of the precincts in either parish; that at Woodsworth, Forest Hill, Lecompte, Gum, Hineston, Union Church, Tioga, Bell, Borland, and Lena, in Rapides parish, all voters were interfered with by unauthorized persons, 'many of whom went inside the guard rail and into the booths with the voters and insisted on marking the voter's ballot'; that no polling \*\*770 places were designated by the parish committee, or published, in either parish.

The contestant further alleges that, should the court not decree the nullity of the election, he should be awarded the necessary certificate, and that his name should be placed on the official ballot, as the nominee, for the reasons that no polling places were designated or published in the parish of Rapides; that sample ballots were illegally and fraudulently used and counted in the parish of Grant; that voters were illegally and fraudulently hindered and interfered with; that the returns from different precincts in Rapides parish contained no tally sheets, and such as were returned were unsigned and unsworn to, especially those from Forest Hill, Gum, Hineston, Union Church, Welchton, Lecompte, Hammond, Cheneyville, Echo, and Tioga, and that the same is true as to the returns from Grant parish, and especially those from Montgomery, Verda, Georgetown, Pollock, Lincecum, and Antonio; 'that those boxes, in both parishes after having been either thrown out or purged of the frauds committed thereat, by a recount of the votes, will show a clear majority for petitioner over said Wilbur F. Blackman, and entitle him to be declared the nominee at said election.'

\*359 The prayer of the petition is:

'That there be judgment decreeing that said primary election is null and shall have no effect as to the declaration of the name of the nominee and the placing of the nominee's name on the official ballot, or, in the alternative, that the boxes and votes be purged of the irregularities and frauds, as alleged in the petition, and that a recount thereof be

ordered, and that your petitioner be declared the nominee of the Democratic party for judge of the Thirteenth judicial district, \* \* \* and ordering that his name be placed on the official ballot as such nominee.'

The contestee (being the judge of the court in which the suit was instituted) recused himself and appointed Judge Couvillon, of an adjoining district, to hear and determine the case, and that officer, after ruling upon some interlocutory matters and hearing the case on its merits, gave judgment for the contestee, from which the contestant prosecutes this appeal. Among other matters ruled on prior to final judgment was an application by the contestee for a recount of the ballots, which, with the acquiescence of the contestant, was granted--two experts, named by each litigant, from each parish, being appointed to make the count, and the count for each parish being required to be made in the presence of the clerk of the court, or his chief deputy, and two witnesses, which was done accordingly.

The report as to the parish of Rapides shows that no sample ballots were cast in that parish; that there were 932 (white) ballots cast for contestant and 1,206 (white) ballots for contestee, and 5 (white) ballots that were doubtful-- two of them being marked or stamped to the left, instead of in the square to the right, of the contestant's name, two being similarly marked to the left of the contestee's name, and one being marked in the square to the right of the contestee's name, but having the name of the contestant defaced or marked over with a pencil. The report as to the parish of Grant shows that 246 white ballots and 118 \*360 yellow (sample) ballots were cast for the contestant, 307 white ballots and 94 yellow (sample) ballots for the contestee, and 4 ballots that were doubtful, of which upon one there is no mark or stamp opposite the name of either candidate, upon another there is a mark in the square to the right opposite each name, but the mark opposite the name of the contestee is scratched over with a pencil, upon the third there is a distinct round spot or stamp opposite the name of the contestant, and a distinct mark, in the same ink, but not round, opposite the name of the contestee, and upon the fourth ballot there is no mark or stamp opposite the name of either candidate. The reports were, on motion approved, though the contestant interposed some objections--one of his grounds being that the boxes at

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Colfax, Fairmount, Bagdad, Bruce's Mill, Dry Prong, Creed, and Buckelew, in Grant parish, and Holloway, Glenmora, Elmer, Horn's, Boyce, Weil, Pineville, and Quadrate, in Rapides, were not and are not, in contest. Upon the trial of the case the following admissions were placed of record:

**Grant Parish Admission.**

'It is admitted by plaintiff and defendant that the ballots throughout the various voting precincts in Grant parish were, after being counted, placed in each ballot box at each voting precinct, and each ballot box sealed by the commissioners and delivered by the commissioners to each proper returning officer and one commissioner, and delivered by them, so sealed, to the clerk of court of said parish of Grant, where they have remained in his possession until now, and that said ballot boxes and said ballots, from the time that they were counted and placed in each sealed ballot box until the present time, have not been altered or changed or tampered with in any respect, and that the election at each precinct was held at the usual polling or voting place, and no voter was deprived of his right to vote through ignorance of the voting place.'

**Cheneyville Admission.**

'It is admitted by plaintiff and defendant that all the ballots cast for the office of judge in the primary election in contest at Cheneyville precinct, in the parish of Rapides, were correctly counted by the commissioners, and, \*361 after being counted, were placed by the commissioners in the ballot box, and the ballot box sealed by the commissioners and delivered by the commissioners to the returning officer and to one commissioner, and by said returning officer and commissioner delivered to the clerk of court of said parish of Rapides, at the clerk's office in Alexandria, in said parish of Rapides, where the same has been kept in his custody ever since, and that from the time said ballots were counted and placed in said ballot box to this time said ballots and said ballot box have not been changed, altered, or \*\*771 in any wise tampered with, and that said election at said precinct was held at the usual voting place and no voter was deprived of his opportunity to vote through ignorance of the location of said polling place. This admission to be hereafter known and referred to as the 'Cheneyville Precinct Admission.'

**Lecompte Admission.**

'Same admission made as the Cheneyville admission, with the additional admission that the election was legally held and conducted, and returned and counted.'

**Rapides Parish Admission.**

'It is admitted by the counsel for the plaintiff and defendant, both that no ballot boxes were ever tampered with after they were handed in to the hands of Capt, Calvit, clerk of court, and that no ballot or tally sheet or return was altered or changed while in the possession of said clerk of court.'

\* \* \*

The same admissions, as in the cases of Cheneyville and Lecompte, were made as to Boyce, Echo, Forest Hill, Big Island, Alexandria, Weil, Quadrate, Glenmora, Union Church, Pineville, Welchton, Borland, Poland, and Hammond, thus including all the precincts in Rapides parish except Lamourie, Woodsworth, Elmer, Hinston, Gum, Horn's, Lena, Holloway, and Tioga; and, as the contestant, in opposing the approval of the report of the experts, alleged that the boxes from Holloway, Elmer, Horn's, Glenmora, Boyce, Weil, Lena, and Tioga were not in contest, the only boxes which are left in dispute (in Rapides parish), save as to matters not included in the admissions, are those from Lamourie, Woodsworth, Hinston, and Gum, with reference to which the evidence is about as follows:

\*362 Provision was made whereby the voter was afforded the means of preparing his ballot in secrecy. Thus, at Lamourie, he could go into an adjoining room; at Woodsworth, part of the room in which the voting took place was screened off with a curtain; at Hinston, there was a separate room; at Gum, one end of a gallery was separated from the other end, where the voting was done, by means of a suspended blanket. The testimony of all the witnesses, whether for contestant or contestee (and there are quite a number), practically concurs to the effect that there was no fraud, no intimidation, no overlooking of voters who were preparing their ballots; that the votes were counted and entered on the tally sheets; that the ballots were replaced in the boxes, with the tally sheets and poll lists; that the boxes, having been sealed, were delivered to the returning officers, and by them delivered to the clerk. But one witness (Lester Swan) testi-

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fies that any one saw how any voter marked his ballot, and, from his testimony, it appears that he made attempts of that kind at Gum precinct; but he was unable to name any voter whose ballot he had seen, or to say how any ballot was stamped or marked.

The contestant has alleged (in his opposition to the approval of the report of the experts) that the boxes at Colfax, Fairmount, Bagdad, Bruce's Mill, Dry Prong, Creed, and Buckelew, in Grant parish, are not in contest. The other precincts in that parish are Pollock, Simms, Antonio, Lincecum, Georgetown, Summerfield, Verda, and Montgomery, and, as to them, it is admitted (in the general admission with regard to Grant parish which has been quoted) that the ballots, after being counted, were placed in the ballot boxes, and that the boxes were then sealed and delivered by the commissioners to the proper returning officers and one commissioner (for each box), by whom they were delivered, '\*363 so sealed,' to the clerk of the court, in whose custody they remained; that said ballots had not been altered, changed, or tampered with from the time that they were counted and put in the boxes; that the elections were held at the usual polling places, and that no voter was deprived of his right to vote through ignorance of the polling place. We find no oral testimony in regard to Verda, though in view of the confused mass of papers of which the record is composed, and the short time allowed for this examination, it may have escaped our search. For the rest, the witnesses concur to the effect that there was no fraud, intimidation, overlooking of voters in the preparation of their ballots, or other unfair doings.

The total vote of the parish was cast as follows:

Total white ballots for contestant . . . .	246
Total yellow ballots for contestant . . .	118
Total white ballots for contestee . . . . .	307
Total yellow ballots for contestee . . . . .	94
Doubtful ballots	
.....	4

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Total . . . . .	769

H. P. Gray, a commissioner of the Pollock precinct, where 33 yellow ballots were cast for the contestant and 44 for the contestee, testifies that those ballots were received because the voters objected to the numbers on the detachable slips forming part of the white ballots, being under the impression, no doubt, that they would serve to identify the voter with his ballot, whereupon the commissioners, ignorantly, but innocently, told them that they could vote the other ballots, which had no numbers or slips attached to them. There was, however, no intention, either at Pollock or any other precinct, thereby to favor the one candidate or prejudice the other. And the same thing may be said of the failure of the commissioners to sign and swear to the tally sheets, and to forward one set of returns to the \*364 chairman of the judicial district committee, whether in Grant parish or Rapides; those omissions having occurred as well in cases where there were majorities for the contestant as where the majorities were in favor of the contestee. On the whole, we are \*\*772 satisfied that the election was fairly conducted; that the result as promulgated represents the declared wishes of a majority (by some 300) of the qualified electors who participated therein; that no one who desired to vote, and was entitled so to do, was deprived of that privilege by reason of any action of the officers conducting the election; and that, if all the errors shown to have been committed were corrected, and all the omissions supplied, the result would be the same--the contestee would still be entitled to the nomination.

Opinion.

[1] The general and long-established rule in this state, applicable to cases such as this, has been that it is casting of the ballots, by the legally qualified electors, unimpeded by force or fraud, which determines the result, and we do not find that rule to have been abrogated by the legislation of recent years regulating the conduct of primary elections. The parties concerned in a primary election, as in any other, are the community to be affected, the electors who participate,

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and the candidates. The officers charged with its conduct are merely agents, whose duty it is to facilitate the electors in the free and fair expression of their will, and where that has been accomplished it would be unreasonable to hold, in the absence of an express provision of law to that effect, that the interest of the community shall be sacrificed, the will of the electors set at naught, and the results, as to the candidates, defeated, because, in its accomplishment, or after its accomplishment, the agents under whose direction the election had been held, have failed to follow each \*365 and every formal direction prescribed for their guidance. The view thus expressed finds support in many adjudged cases, including among others, the following: [Moyer v. Van De Vanter](#), 12 Wash. 377, 41 Pac. 60, 29 L. R. A. 670, 50 Am. St. Rep. 900; [Lucky et al. v. Police Jury et al.](#), 46 La. Ann. 679, 15 South. 89; [Madere v. Sellers](#), 120 La. 812, 45 South. 735; [Ross v. Naff et al.](#), 130 La. 590, 58 South. 348; [City of New Orleans v. De St. Romes](#), 9 La. Ann. 573; [Burton v. Hicks](#), 27 La. Ann. 507; [Augustin v. Eggleston](#), 12 La. Ann. 366; [Webre v. Wilton](#), 29 La. Ann. 610; [Duson v. Thompson](#), 32 La. Ann. 861, 871; [McKnight v. Ragan](#), 33 La. Ann. 398. If the framers of the existing statutes regulating primary elections had intended that such elections should be decreed of no effect, notwithstanding that a free and honest expression of the will of the voters may have been obtained, merely because some election officers, either during the progress of the election or after the fact, failed to sign or forward a particular document in a particular manner, or because such officers failed to provide for the elector a booth of particular dimensions, particularly situated, or constructed of particular material, in which to prepare his ballot, they would, no doubt, have found language in which thus to provide a punishment of the innocent for the dereliction of the guilty; but we do not find such language in the existing statutes, and we have neither the authority nor the disposition to supply it.

[2] Section 2 of Act 198 of 1912, amends section 1 of Act 49 of 1906, so as to make it read (in part):

'That the dominant \* \* \* party \* \* \* shall make all nominations \* \* \* by a direct primary election. That any nomination, \* \* \* except as herein provided, shall be illegal, and the Secretary of State is prohibited \*366 from placing on the official ballot the name of any person, as a candidate for any political party, not nominated in accordance with

the provisions of this act.'

It seems to us, however, that the provision thus quoted has no bearing upon the question whether a primary election shall be avoided and annulled for the nonobservance of directory provisions of the law, when such nonobservance in no manner affects the fact that the electors entitled so to do have, in that manner, expressed their choice of a candidate. It would, perhaps, not be going to an extreme to say that, if no election is to be regarded as valid unless every person having any function to discharge in connection with it shall discharge such function according to the letter of the law, there will never be a valid election, unless it be confined to a very few well-informed persons. The learned counsel for the contestee, in his oral and printed argument, has presented a question of jurisdiction, based upon the proposition that, under the statute which we are now considering, the right to contest an election is conferred only upon a candidate 'who shall claim to have been nominated,' and that the contestant before the court, in view of the evidence adduced, has abandoned all such claim, and hence has no standing in court. The contestant has not, however, placed his abandonment of record, and the closing argument of his counsel was by no means definite to that effect. We have, therefore, thought it advisable to deal with the case as we have done, though regretting that we should be compelled to do so under pressure, by reason of the inadequacy of the time allowance imposed by the statute.

For the reasons thus assigned, the judgment appealed from is affirmed.

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Supreme Judicial Court of Maine.

Robert T. **BARBER**

v.

Joseph T. **EDGAR**, Secretary of the State of Maine and Rosaire Martel.

Sept. 6, 1972.

Candidate who had received second highest vote total in primary election for nomination for office of sheriff brought declaratory judgment complaint after governor, following death on election day of candidate who received highest number of votes, had declared that vacancy existed for the candidacy and directed county party committee to nominate a candidate for the office. On report from the Superior Court, Androscoggin County, the Supreme Judicial Court, Pomeroy, J., held that the votes for the deceased candidate were valid insofar as they prevented the election of candidate who came in second in the balloting, and vacancy in the candidacy existed following tabulation of vote, even though deceased was allegedly ineligible to receive election certificate.

Relief denied.

Defresne, C. J., did not sit.

West Headnotes

**[1] Elections**  **298(1)**

[144k298\(1\) Most Cited Cases](#)

Ineligibility to take, or hold, an office is a subject matter separate from, and, therefore, incapable of being controllingly dispositive of, independent question of legal effect to be given votes as they have been actually cast in an election duly held and completed in conformity with legal requirements directing the appropriate conduct of elections. [21 M.R.S.A. §§ 924, 1047, 1091, 1092, 1094.](#)

**[2] Elections**  **235**

[144k235 Most Cited Cases](#)

The objective results of elections conducted to actual completion, in accordance with legal directives prescribed for procedural course of election and tabulation of its outcome, shall be accorded, rather than denied, maximum possible legal effectiveness, so long as the courts may allow such

legal effectiveness on a rational basis consistent with realities of general experience and avoid speculation concerning subjective intentions of those who voted.

**[3] Elections**  **239**

[144k239 Most Cited Cases](#)

A person's ineligibility to take, or hold, office will not be permitted to vitiate absolutely and totally the legal effectiveness of votes actually cast for him in a lawfully conducted election; such votes are at least so far effectual as to prevent the election of a candidate who received a lesser number of votes.

**[4] Elections**  **126(7)**

[144k126\(7\) Most Cited Cases](#)

Where person who received largest number of votes for party nomination to office of sheriff at primary election died after polls had opened but prior to their closing, the votes for deceased candidate were valid insofar as they prevented the election of candidate who came in second in the balloting, and vacancy in the candidacy existed following tabulation of vote, even though deceased was allegedly ineligible to receive election certificate. [21](#)

[M.R.S.A. §§ 1093](#), subd. 1, 1095, subd. 1, 1474.

\***454** Berman, Berman & Simmons, P. A. by Jack H. Simmons, Lewiston, for plaintiff.

Charles R. Larouche, Asst. Atty. Gen., Augusta, for Joseph T. Edgar.

Marshall, Raymond & Beliveau by Laurier T. Raymond, Jr., Lewiston, for Rosaire Martel.

Before WEBBER, WEATHERBEE, POMEROY, WERNICK and ARCHIBALD, JJ.

POMEROY, Justice.

This Complaint seeking Declaratory Judgment is brought pursuant to the provisions of [14 M.R.S.A. ss 5951-5963](#). It is before us on report. On the Complaint and Answer we are to render such decision as the rights of the parties require.

The Answer admits all the allegations of fact in the Complaint. It is thus established that Plaintiff Robert Barber was a duly qualified candidate for nomination for the office of

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Sheriff of Androscoggin County in the Democratic Primary Election, June 19, 1972.

When the polls opened on that day Robert W. Bonenfant and Emile Roy were likewise qualified candidates for nomination to that office.

At approximately 12 o'clock noon on June 19, 1972, after the polls had opened but prior to their closing, Robert Bonenfant died. After the polls had closed it was determined that candidate Bonenfant had 6,135 votes cast for him; that the Plaintiff Barber had 2,884 and that Roy had 2,691 votes cast for him.

Nothing contrary appearing in the Complaint or Answer, we bow to the presumption of regularity and assume for the purposes of this decision the appropriate procedures were followed for the tabulation of votes and announcing the totals as is provided by [21 M.R.S.A. s 924](#) and [21 M.R.S.A. s 1047](#), [FN1] and that reports required by [21 M.R.S.A. s 1091](#)[FN2] and the tabulation provided \*455 by [21 M.R.S.A. s 1092](#)[FN3] were appropriately done.

[FN1. 21 M.R.S.A. s 924](#): The election officials shall count the ballots under the supervision of the warden, as soon as the polls are closed, except that if, in the opinion of the city or town clerk, the public interests will best be served, referendum ballots may be counted on the next day immediately following the election, provided such count is completed within 24 hours after the closing of the polls. If referendum ballots are counted subject to this exception, the city or town clerk shall have the responsibility for the security and safekeeping of such ballots until such time as the count has been completed.

1. Counted in public. The ballots must be counted publicly so that those present may observe the proceedings.

3. Results declared. As soon as the ballots are counted, the warden shall declare the results publicly at the voting place.

[21 M.R.S.A. s 1047](#): The following regulations outline the procedure for tabulating votes at an election in which voting machines are used:

2. Totals announced. The warden shall announce the total for each candidate in the order shown on the ballot label, for each referendum question, and for each write-in candidate. As each total is read, it shall be recorded by an election clerk from a political party other than that of the warden.

[FN2. 21 M.R.S.A. s 1091](#): Within 10 days after a general election, the registrar shall send a report to the Secretary of State stating the number of voters in each voting district of the municipality at the close of the polls on election day. Within 10 days after a primary election, the registrar shall report the total number of voters in each voting district of the municipality and the number of voters enrolled in each political party in each voting district of the municipality at the close of the polls on election day.

[FN3. 21 M.R.S.A. s 1092](#): Within 20 days after an election, the Secretary of State shall tabulate the election returns and submit the tabulation to the Governor and Council.

The Complaint alleges and the Answer concedes that in accordance with [21 M.R.S.A. s 1094](#) the Governor and Council met on July 5, 1972, and reviewed the tabulation of the vote.

The Complaint further recites that on the 5th day of July, 1972, the Governor of the State issued a proclamation purporting to have been authorized and commanded by [21 M.R.S.A. s 1474](#),[FN4] proclaiming:

[FN4. 21 M.R.S.A. s 1474](#): If a person nominated for an office other than United States Senator, Representative to Congress or Governor at a regular primary election dies, withdraws or becomes disqualified before the general election, the Governor shall issue a proclamation as provided in section 1473, and the procedure outlined in section 1442 must be followed.

(a) That Robert Bonenfant was nominated in the Primary Election of June 19, 1972;

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(c) That a vacancy exists for a candidate for election to the office of Sheriff.

The Governor by this proclamation then directed that the Androscoggin County Democratic Committee meet on July 20th to nominate a candidate for the office of Sheriff to be voted upon at the General Election to be held on Tuesday, the 7th of November, 1972. The proclamation then recited that a Certificate of the choice of said nominee was to be filed in the office of the Secretary of State forthwith.

This Petition for Declaratory Judgment initiated by Barber followed. It prayed for a Court adjudication

' . . . that Plaintiff was the duly nominated candidate of the Democratic Party for the office of Sheriff of Androscoggin County'

and for remedial relief that the Court

' . . . order the Secretary of State to place Plaintiff's name, and no other, on the ballot for the General Election as the said nominee of the Democratic Party.'

In this case, therefore, the only issue raised for decision in appropriately justiciable form is whether the legal effect to be assigned to the outcome of a primary election actually held and the votes actually cast is that the plaintiff, Barber, was

' . . . the person who receive(d) a plurality of the votes cast for nomination to . . . office, if the number equals or exceeds the number of signatures needed to place his name on the primary ballot by petition'

-thereby allowing the plaintiff, Barber, to be regarded 'as nominated' pursuant to the specification of [21 M.R.S.A. s 1093\(1\)](#).

Recognizing that in factual reality the votes as actually cast by the electorate failed to give him the plurality required by [21 M.R.S.A. s 1093\(1\)](#), plaintiff seeks to nullify entirely the legal effect of 6,135 ballots, of a total cast of 11,710, marked for another person, Robert W. Bonenfant, whose name appeared on the ballot and was thus offered to the voters during the course of the election as an ostensibly officially valid voting option; and in this manner plaintiff strives to have the 2,884 votes cast for him operate as the

plurality requisite under [21 M.R.S.A. s 1093\(1\)](#). The asserted ground for such total obliteration of the legal effectiveness of 6,135 votes cast is that the noontime death, while \*456 the primary election was in progress, of the person whose name was Robert W. Bonenfant for whom the 6,135 ballots had been marked suffices, ipso facto, to nullify absolutely all legal effectiveness of the total votes thus cast.[\[FN5\]](#)

[FN5.](#) Plaintiff is forced to such 'all or nothing' position since it is manifest that in the present circumstances only speculation is possible concerning the actual subjective state of mind of any voter at the time he cast his vote, e. g. whether he was voting with or without actual knowledge that Robert W. Bonenfant had already died and whether, if he had such knowledge, what his purpose might have been in continuing to mark his ballot in favor of the deceased person.

Further, there is no evidence in the case as to the number of persons who might have cast their ballots before or after a reasonable range of time surrounding the noon hour when Mr. Bonenfant died and on the basis of which a possible cut-off time might be attempted to be established on any rationally sustainable basis.

The theory is that the death of a person renders him legally ineligible to be the recipient of an election certificate under [21 M.R.S.A. s 1095\(1\)](#) and, therefore, ultimately, to take, or hold, the office involved.

The argument is untenable.

[\[1\]](#) Ineligibility to take, or hold, an office is a subject matter separate from, and, therefore, incapable of being controllingly dispositive of, the independent question of the legal effect to be given to votes as they have been actually cast in an election duly held and completed in conformity with the legal requirements directing the appropriate conduct of elections.

[\[2\]](#) This latter issue must be evaluated, and decided, on the basis of the unique public policy considerations which derive from governmental concern to respect the will of the

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electorate as it has been objectively manifested in votes which have been actually cast. These policy considerations dictate that the objective results of elections conducted to actual completion, in accordance with legal directives prescribed for the procedural course of the election and the tabulation of its outcome, shall be accorded, rather than denied maximum possible legal effectiveness-so long as a Court may allow such legal effectiveness on a rational basis consistent with the realities of general experience and avoiding speculation concerning the subjective intentions of those who voted.

[3] It is in light of this public policy that the overwhelming weight of authority in the United States has developed the principle that a person's ineligibility to take, or hold, office will not be permitted to vitiate absolutely and totally the legal effectiveness of the votes actually cast for him in a lawfully conducted election.

Such votes, as was said in [Heald v. Payson, 110 Me. 204, 85 A. 576 \(1913\)](#):

' . . . are at least so far effectual as to prevent the election of a candidate who received a less number of votes.' (p. 206, [85 A. p. 576](#))

In [Patton v. Haselton, 164 Iowa 645, 146 N.W. 477 \(1914\)](#) the Court recognized as 'quite uniformly held' (p. 478) the principle that should there be a majority vote for a candidate who might become ineligible to hold office before the election is completed

' . . . such majority vote is effective as an expression of the will of the voters, . . . sufficient to negative a claim of election as against the minority candidate.' (p. 479)

The Iowa Court stressed the irrationality, because of the high degree of conjecture and speculation involved, of any legal presumption that a voter, even if he knowingly votes for an ineligible candidate, intends \*457 that his vote should be entirely without legal effect-that he is deliberately throwing away his vote.

See: [State ex rel. Sheets v. Speidel, 62 Ohio St. 156, 56 N.E. 871 \(1900\)](#).

See the cases collected in the note in [133 A.L.R. 319](#) as an

accurate reflection of the great preponderance of American authority in support of the general principle above stated.

The principle is further enunciated in [Murtagh v. Registrar of Voters of Peabody, 340 Mass. 737, 166 N.E.2d 702 \(1960\)](#), in a statement qualifying the reasoning of [Madden v. Board of Election Com'rs., 251 Mass. 95, 146 N.E. 280 \(1925\)](#), even as it was applied to the special circumstances in Madden which are significantly distinguishable from the specific situation now before us.

In Murtagh the Court said of some of the reasoning of Madden, that it

' . . . is contrary to the great preponderance of American authority . . . '

and, further

' . . . it fails to give proper weight to the negative value of a vote for the dead man.' ([166 N.E.2d p. 704](#))

[4] On the facts established before us the conclusion is inescapable that there were 11,710 valid votes cast for the office of Sheriff of Androscoggin County at the June 19, 1972, Primary Election. Plaintiff Barber failed to receive a plurality of these votes. His claim that he was elected must fail.

We declare that, plaintiff, Robert Barber, was not the duly nominated candidate of the Democratic Party for the office of Sheriff of Androscoggin County at the June 19, 1972, Primary Election.

Accordingly, other prayers of the Complaint are denied.

DUFRESNE, C. J., did not sit.

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## H

### [Briefs and Other Related Documents](#)

Supreme Court of Florida.  
Gus **BECKSTROM**, Appellant,

v.

**VOLUSIA COUNTY CANVASSING BOARD** and Robert  
L. Vogel, Appellees.

No. 91642.

March 19, 1998.

Unsuccessful sheriff candidate challenged election results, alleging fraud and substantial failure on part of county election officials in complying with requirements of election laws pertaining to absentee ballots. The Circuit Court of the Seventh Judicial Circuit, Volusia County, [John V. Doyle](#), J., determined re-marking procedure used on unreadable absentee ballots was not in substantial compliance with statutes and officials were grossly negligent, but there was no fraud. Candidate appealed. The Fifth District Court of Appeal certified to the Supreme Court the issue of whether there could be a finding of gross negligence on part of election officials yet an election could be validated. The Supreme Court, [Wells](#), J., held that: (1) court can sustain certified election result even after court has found substantial noncompliance with elections statutes where court finds result reflects will of the people; (2) in cases of substantial noncompliance with election statutes caused by unintentional wrongdoing, court can only void election if it finds that the noncompliance resulted in doubt as to whether certified election reflected voters' will; (3) county's process of re-marking ballots was not in substantial compliance with statute even though it was widely used and recommended by manufacturer's representative; and (4) trial court had jurisdiction to decide issue presented in election contest.

Trial court affirmed.

West Headnotes

#### [\[1\] Elections](#) [227\(8\)](#)

[144k227\(8\) Most Cited Cases](#)

Trial court could find gross negligence in handling of absentee ballots but find there was no fraud and still sustain

the election result.

#### [\[2\] Elections](#) [227\(1\)](#)

[144k227\(1\) Most Cited Cases](#)

Trial court can sustain a certified election result, even after court has found substantial noncompliance with the election statutes, where court finds that result reflects the will of the people despite the substantial noncompliance.

#### [\[3\] Elections](#) [227\(1\)](#)

[144k227\(1\) Most Cited Cases](#)

If court finds substantial noncompliance with statutory election procedures and makes factual determination that reasonable doubt exists as to whether a certified election expressed the will of the voters, then court must void contested election even in the absence of fraud or intentional wrongdoing. [West's F.S.A. § 102.168](#).

#### [\[4\] Elections](#) [227\(1\)](#)

[144k227\(1\) Most Cited Cases](#)

Trial court's factual determination that contested certified election reliably reflects the will of the voters will outweigh finding of unintentional wrongdoing resulting in substantial noncompliance with election procedures, even if noncompliance is result of gross negligence.

#### [\[5\] Elections](#) [227\(1\)](#)

[144k227\(1\) Most Cited Cases](#)

In holding that trial court's factual determination that contested certified election reliably reflects the will of the voters outweighs a court's determination of "unintentional wrongdoing" by election officials, unintentional wrongdoing means noncompliance with statutorily mandated election procedures in situations in which noncompliance results from incompetence, lack of care, or election officials' erroneous understanding of the statutory requirements.

#### [\[6\] Elections](#) [227\(8\)](#)

[144k227\(8\) Most Cited Cases](#)

Term "gross negligence" as used in factors set out to be considered in determining effect of absentee ballot irregularities, considering presence or absence of fraud, gross negligence, or intentional wrongdoing, is not used as in a tort action and is not measurement of degree of care by election officials, but rather, means negligence that is so pervasive

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that it thwarts the will of the people.

**[7] Elections**  **227(1)**

[144k227\(1\) Most Cited Cases](#)

Court should not frustrate the will of voters by voiding election if failure by election officials to perform official election duties is unintentional wrongdoing and the will of the voters can be determined.

**[8] Elections**  **216.1**

[144k216.1 Most Cited Cases](#)

County process of re-marking defectively marked and thus unreadable ballots was not in substantial compliance with election statutes, even though process was widely used, recommended by manufacturer's representative, and approved by state Division of Elections. [West's F.S.A. § 101.5614\(5\)](#).

**[9] Elections**  **300**

[144k300 Most Cited Cases](#)

Trial court's finding of "gross negligence" on part of election officials, that re-marking of defective and unreadable ballots was not in compliance with election statutes and was opportunity for fraud, was measurement of culpability of election officials but was not finding that election failed to express the will of the voters; therefore, trial court was within its discretion in determining from evidence that election was a full and fair expression of the will of the people.

**[10] Elections**  **298(1)**

[144k298\(1\) Most Cited Cases](#)

Trial court had jurisdiction to consider and decide issue presented in election contest by unsuccessful sheriff candidate alleging fraud and substantial failure by county election officials to comply with requirements of election laws pertaining to absentee ballots. [West's F.S.A. §§ 102.166\(11\), 102.168](#).

\***721** [Donald W. Weidner](#) and [Jeanine H. Coris](#) of Weidner & Wortelboer, Jacksonville, for Appellant.

[Daniel D. Eckert](#), Volusia County Attorney, and [James R. Clayton](#), DeLand, for Appellees.

[WELLS](#), Justice.

We have for review a final judgment of the Circuit Court of the Seventh Judicial Circuit in Volusia County, which judg-

ment has been certified by the Fifth District Court of Appeal as presenting an issue of great public importance, having a great effect on the proper administration of justice throughout the state, and requiring immediate resolution by this Court. We have jurisdiction. [Art. V, § 3\(b\)\(5\), Fla. Const.](#)

This case arises out of the November 5, 1996, Volusia County election in which appellant Gus Beckstrom was an unsuccessful candidate for sheriff. On November 8, 1996, pursuant to [section 102.166\(11\), Florida Statutes \(1995\)](#), [\[FN1\]](#) appellant filed in the circuit \***722** court a protest of the election returns. The protest was based on allegations of fraud in the counting of absentee ballots by the staff of the Volusia County Supervisor of Elections. County election officials had tabulated the votes, and appellee Volusia County Canvassing Board [\[FN2\]](#) had subsequently certified the result to the Department of State, which declared incumbent Sheriff Robert L. Vogel, Jr. to be the winner of the election.

[FN1. Section 102.166\(11\), Florida Statutes \(1995\)](#), provides in relevant part:

Any candidate for nomination or election, or any elector qualified to vote in the election related to such candidacy, shall have the right to protest the returns of the election or the practices attendant thereto as being fraudulent by presenting to any circuit judge of the circuit wherein such fraud is alleged to have occurred a sworn, written protest.

[FN2.](#) A county canvassing board is composed of the county supervisor of elections, a county court judge, and the chair of the board of county commissioners. [§ 102.141\(1\), Fla. Stat. \(1995\)](#).

One month after filing the initial protest, appellant moved the court to order a manual re-count of the absentee ballots. The court granted the motion, and the clerk of the circuit court conducted a re-count, which was observed by representatives for both candidates. The clerk's re-count revealed that, despite miscounts in the initial ballot count, Vogel was the winner of the election. The re-count showed 79,902 total votes for Vogel and 77,012 total votes for Beckstrom. [\[FN3\]](#)

[FN3.](#) According to the vote counts initially tabu-

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lated by the elections supervisor's staff and certified by the canvassing board, Beckstrom received 52 percent of the precinct vote but just 40 percent of the absentee vote. According to the re-count, Beckstrom received 41 percent of the uncontested absentee votes and 37 percent of the contested overmarked absentee votes. Thus, Beckstrom received close to 40 percent of the total absentee votes in both the initial count and in the re-count. As appellant points out, the difference between the percentage of Vogel's precinct vote total and the percentage of his absentee vote total was 11 percentage points. However, we note that Vogel was not alone in receiving a significantly larger percentage of absentee votes than percentage of precinct votes. In the United States presidential election held the same day, another Republican Party candidate, Dole, showed a 9-percent margin between his percentage of absentee votes and percentage of precinct votes, and Republican Party congressional candidate Fields had a 15-percent margin between absentee and precinct vote percentage totals. A statistical expert who testified on behalf of Volusia County presented demographic explanations for the absentee voting percentage discrepancies.

On the same day appellant filed his motion for a re-count, he filed a second amended protest and complaint, again alleging fraud and adding allegations of substantial failure on the part of Volusia County election officials to comply with the requirements of the election laws pertaining to absentee ballots. The absentee ballots were of crucial importance in the sheriff's election because, although appellant received more votes than Vogel in the precincts, Vogel received a sufficient majority in the absentee votes to overcome appellant's precinct vote margin of victory. Appellant asked the court to declare all of the absentee votes to be invalid and to declare him the winner based on the precinct vote alone. Appellant argued that absentee ballots were tampered with and modified in violation of [section 101.5614\(5\), Florida Statutes \(1995\)](#), [FN4] in that at least 6500 absentee ballots contained votes which were marked over with a black felt-tip marker; and an additional 1000 absentee ballots were

similarly marked, but it was impossible to determine whether they were marked over or newly marked. [FN5] Appellant alleged that this \*723 process of re-marking with black markers was tainted with potential fraud. [FN6] The circuit court held a nonjury trial in which testimony was presented for seven days and argument of counsel was presented for one day.

[FN4. Section 101.5614\(5\), Florida Statutes \(1995\)](#), provides in relevant part:

If any ballot card ... is damaged or defective so that it cannot properly be counted by the automatic tabulating equipment, a true duplicate copy shall be made of the damaged ballot card in the presence of witnesses and substituted for the damaged ballot.... If any paper ballot is damaged or defective so that it cannot be counted properly by the automatic tabulating equipment, the ballot shall be counted manually at the counting center by the canvassing board.... After duplicating a ballot, the defective ballot shall be placed in an envelope provided for that purpose, and the duplicate ballot shall be tallied with the other ballots for that precinct. We construe "defective ballot" to include a ballot which is marked in a manner such that it cannot be read by a scanner.

[FN5. The method of counting absentee ballots used in Volusia County for the 1996 election was called "Accu-Vote," which is an optical scan tabulating system. Five other Florida counties also used this type of optical scan system. In using this system, absentee voters were instructed to mark their ballots with number two pencils. The optical scanner rejected ballots which were marked with instruments other than number two pencils. Election supervisors in three other counties (Leon, Putnam, and Monroe Counties) using this type of optical scanner testified that their procedures in respect to rejected ballots was the same as the procedure used in Volusia County. The procedure was to use a black felt-tip marker to re-mark ballots that the scanner could not read. The re-mark was placed on top of the voter's original mark, making it possible

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for the scanner to then record the vote. This was the procedure recommended by the manufacturer's representative of the company that sold the optical scanners to Volusia County. The Supervisor of Elections for Leon County testified that this re-marking procedure was approved for use in processing absentee ballots by the Division of Elections of the Department of State.

[FN6](#). Other vote-counting irregularities alleged by appellant included appellant's claims that absentee ballots were left unattended and accessible at the office of the elections supervisor; that absentee ballots were opened by various persons outside the presence of any member of the canvassing board; that sheriff's deputies had access to and participated in the opening of absentee ballots; that individuals who were not employees of the elections supervisor participated in the opening of absentee ballots; that doors of the elections office were locked and not open to the public when absentee ballots were being opened; that election officials began processing absentee ballots through electronic tabulating equipment at least four days prior to the election; that prior to opening absentee ballot mailing envelopes, election officials failed to compare the signature of the voter on each voter's certificate with the signature of the voter as shown in registration records; that election officials accepted as many as 1463 absentee ballots which were illegal because the voter certificates accompanying them lacked either the voter's signature or the signature and/or address of the witness; that a number of absentee ballots remained absent and unaccounted for; that election officials failed to properly preserve all absentee ballots for which duplicates were made, and a number of duplicate ballots were unaccounted for; that several voters who requested absentee ballots but who had not received them in time for the election were denied the right to vote in person; and that some absentee ballots were changed and/or misplaced, lost, or otherwise not counted as a result of fraud, gross negligence, or intentional wrongdoing. Appellant claimed that

these alleged irregularities violated subsections of chapter 101, Florida Statutes (1995) (providing requirements for voting methods and procedures), and chapter 102, Florida Statutes (1995) (providing requirements for conducting elections and ascertaining the results).

The trial court thereafter entered a detailed final judgment which contained a combination of findings of fact and conclusions of law. The trial court determined that the key issue in the election contest was the re-marking procedure used by election officials on many of the absentee ballots so as to enable those ballots to be counted by an electronic scanner. The trial court found that this re-marking procedure was not in substantial compliance with [section 101.5614\(5\), Florida Statutes \(1995\)](#), because the procedure provided no reasonable substitute means of verification of the results of the election. The trial court found this noncompliance with procedures mandated by the statute to be gross negligence. The trial court found that this noncompliance created an opportunity for fraud. However, the trial court found that, although there was an opportunity for fraud, no fraud was proven.

The trial court applied this Court's decision in [Boardman v. Esteva, 323 So.2d 259 \(Fla.1975\)](#), to these factual findings. The trial court concluded that there was a "full and fair expression of the will of the people. Vogel won it." The court entered judgment for the defendants, thereby affirming the election of Sheriff Vogel.

Beckstrom appealed this final judgment to the Fifth District Court of Appeal. In an order certifying the case to this Court, the Fifth District stated:

The trial judge ruled that the Canvassing Board acted with gross negligence but that there was no evidence of fraud in the process; thus the election was valid. Relying upon the analysis in *Boardman v. Esteva*, the trial court held that courts should not decide elections but should condone a "certain level of incompetence" by election officials, unless the level of incompetence, negligence or error reaches an intolerable level. Although the court found that the re-marking process used by election officials in this case irreparably harmed the sanctity and integrity of the election, attempting to apply *Boardman*, the trial court

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found a level of incompetence here acceptable. Further, the court found "there [was] a full and fair expression of the will of the people ..." \*724 and that the will of the people was not affected by the negligence of the Canvassing Board. The trial court also found substantial compliance with absentee voting laws sufficient to make the ballots legal. The trial court then held there was an accurate count of the absentee vote and dismissed the election protest with prejudice.

It is clear that the controlling authority in Florida is the *Boardman* decision and that, in *Boardman*, the supreme court intended to circumscribe the courts' involvement in the electoral process. The lower court suggested that since it was decided in 1975, the *Boardman* decision has become a "license for lawlessness by election officials." *Boardman* offers no guidance concerning the kind or degree of negligence that will warrant judicial intervention, absent fraud. This Court has found no case wherein the trial court has made a finding of gross negligence by a Canvassing Board and many technical violations of Chapter 102 by the supervisor of elections, yet validated the election. It appears that the validity of an election where there has been a finding of gross negligence, but no fraud, in the handling of absentee ballots and the use of the automatic tabulating equipment that is currently used in many counties in this state is an issue of great public importance whose resolution is required by the high court in light of the rule of *Boardman v. Esteva*.

(Citation omitted.)

In this appeal, appellant raises the following four claims: (1) that the trial court erred as a matter of law when it refused to invalidate the absentee ballots; (2) that the trial court erred when it concluded that there was no evidence of fraud in the absentee ballot process; (3) that the trial court erred in concluding that there was an accurate count of the votes; and (4) that the trial court erred in failing to invalidate the absentee returns after declaring 885 ballots illegal because they did not contain either voter signatures, witness signatures, or witness addresses. In respect to issues three and four, we conclude from our review of the record that the trial court did not abuse its discretion in the final judgment with respect to those issues. We therefore affirm the final judgment as to those issues but do not find that they merit

discussion.

Appellant's first and second issues encompass the issue certified to us by the district court which focuses upon our decision in *Boardman*. We begin our analysis of this issue by reiterating the statement of principle which we made in analyzing the *Boardman* election contest:

[T]he real parties in interest here, not in the legal sense but in realistic terms, are the voters. They are possessed of the ultimate interest and it is they whom we must give primary consideration. The contestants have direct interests certainly, but the office they seek is one of high public service and utmost importance to the people, thus subordinating their interests to that of the people. Ours is a government of, by and for the people. Our federal and state constitutions guarantee the right of the people to take an active part in the process of that government, which for most of our citizens means participation via the election process. The right to vote is the right to participate; it is also the right to speak, but more importantly the right to be heard. We must tread carefully on that right or we risk the unnecessary and unjustified muting of the public voice. By refusing to recognize an otherwise valid exercise of the right of a citizen to vote for the sake of sacred, unyielding adherence to statutory scripture, we would in effect nullify that right.

[\*Boardman\*, 323 So.2d at 263.](#)

In *Boardman*, we followed this statement with the history of cases in which we had addressed questions concerning compliance with election statutes. We then upheld the challenged election, in which an unsuccessful candidate for a judicial seat on the Second District Court of Appeal sought to be declared the winner, based solely on the precinct vote count because of alleged irregularities in the absentee ballot count. [\*Boardman\*, 323 So.2d at 261.](#) In upholding the election, we stated:

[R]ealizing as we do that strict compliance has been required by this Court in other \*725 cases, we now recede from that rule [and hold] to the effect that substantial compliance with the absentee voting laws is all that is required to give legality to the ballot.

*Id.* at 264.

We set forth in *Boardman* the following factors to be con-

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sidered in determining the effect of absentee ballot irregularities:

- (a) the presence or absence of fraud, *gross negligence*, or intentional wrongdoing;
- (b) whether there has been substantial compliance with the essential requirements of the absentee voting law; and
- (c) whether the irregularities complained of adversely affect the sanctity of the ballot and the integrity of the election.

*Id.* at 269 (emphasis added).

[1][2] The Fifth District and appellant question whether, under our holding in *Boardman*, the trial court could find gross negligence but no fraud and still sustain the election result. We recognize that underlying this question is the direct fundamental issue as to whether a trial court can sustain a certified election result after the court has found substantial noncompliance with the election statutes, but the court has also found that this result reflects the will of the people despite the substantial noncompliance. We answer the question in the affirmative.

[3] We stress, however, that we are *not* holding that a court lacks authority to void an election if the court has found substantial unintentional failure to comply with statutory election procedures. To the contrary, if a court finds substantial noncompliance with statutory election procedures and also makes a factual determination that reasonable doubt exists as to whether a certified election expressed the will of the voters, then the court in an election contest brought pursuant to [section 102.168, Florida Statutes \(1997\)](#), is to void the contested election even in the absence of fraud or intentional wrongdoing.

[4][5] We hold that there is a necessary distinction between an election contest with a judicial determination of fraud and an election contest with a judicial determination of substantial noncompliance with statutory election procedures, even if the noncompliance is determined to be a result of gross negligence by election officials. Such a distinction is required in order to respect the fundamental principle upon which we based our decision in *Boardman*. As the trial court in this case recognized, the essence of our *Boardman* decision is that a trial court's factual determination that a contested certified election reliably reflects the will of the

voters outweighs the court's determination of unintentional wrongdoing by election officials in order to allow the real parties in interest--the voters--to prevail. By unintentional wrongdoing, we mean noncompliance with statutorily mandated election procedures in situations in which the noncompliance results from incompetence, lack of care, or, as we find occurred in this election, the election officials' erroneous understanding of the statutory requirements. In sum, we hold that even in a situation in which a trial court finds substantial noncompliance caused by unintentional wrongdoing as we have defined it, the court is to void the election *only* if it finds that the substantial noncompliance resulted in doubt as to whether a certified election reflected the will of the voters.

[6] In direct answer to the district court's request for "guidance concerning the kind or degree of negligence that will warrant judicial intervention, absent fraud," we clarify that the term gross negligence as used in *Boardman* is not, as in a tort action, a measurement of the degree of care by election officials. Rather, in this context, gross negligence means negligence that is so pervasive that it thwarts the will of the people.

[7] We expressly state that our decision in *Boardman* is *not* to be read as condoning anything less than strict adherence by election officials to the statutorily mandated election procedures. Such adherence is vital to safeguarding our representative form of government, which directly depends upon election officials' faithful performance of their duties. Neither *Boardman* nor this case concerns potential sanctions for election officials who fail to faithfully perform their duties. It is for the legislature to specify what sanction should be available for enforcement against election officials who fail to \*726 faithfully perform their duties. We simply conclude that the court should not frustrate the will of the voters if the failure to perform official election duties is unintentional wrongdoing and the will of the voters can be determined.

[8] Turning to this issue in this case, we agree with the trial court that the Volusia County process of re-marking ballots was not in substantial compliance with [section 101.5614\(5\), Florida Statutes \(1995\)](#), even though the process was widely used, recommended by the manufacturer's representative,

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and approved by the state Division of Elections. To comply with the statute, ballots which were defectively marked and thus unreadable by the scanner had to be hand-counted or duplicated before being re-marked so that the original ballot marking could be preserved for verification. We agree with the trial court that the re-marking process was an opportunity for fraud. Our review of the record of evidence presented at the nonjury trial causes us to conclude, however, that the trial court was within its discretion in determining that, although the re-marking process was an opportunity for fraud, fraud did not occur. The trial court's specific findings were:

There are several allegations or assertions of fraud. The first is that somebody overmarked an undervote; basically, placed a mark on a blank ballot. I am not persuaded that that happened as a result of fraud because of the undervote statistics. The undervote statistics are not disputed and we have a greater undervote in the overmarked ballots than we had in the good pencil ballots. The difference in the undervote was really quite marked. We would expect statistical evidence to be the opposite if this had been happening in a systematic manner.

The next would be to overvote a Beckstrom vote by simply deliberately marking the Vogel oval in addition to the Beckstrom oval thereby inducing the reader to cancel the vote. If this had occurred, the overvote statistic would certainly be far greater than it is. It is minuscule at this time and I am not persuaded that this occurred on any systematic basis.

The next is the replacement of ballots cast by electors with the new ballots prepared through fraud. There is no inference--no evidence from which an inference can be drawn that this occurred.

The next method would have been simple erasure, simply erase the Beckstrom ballot and pencil in a Vogel ballot. The ballots were examined. The examiners looked at them and did not pull any out and point the finger of guilt at erasures. I did not notice any significant level of erasures in the absentee ballots. Many ballots were returned in very messy condition. I can draw no inference from their condition that there were erasures that were evident. There being no evidence of that, I am not persuaded that it occurred.

The next is simply not marking over a Beckstrom vote, simply leaving that as one that the reader did not read and

marking over other races on the ballot. This occurred on some occasions during the course of the election. I am not persuaded it occurred on a systematic basis. I am more comfortable with this thinking because the clerk's count of the votes would have detected this and counted all of those votes, so it could not have caused any harm.

I do not think that the machines rejected the ballots on a random basis. The statisticians agreed that a random selection is one in which each member of the class has an equal chance of selection. That was not the case here. Because of the nature of the automatic tabulating equipment, a ballot that had been improperly marked had a greater chance of selection than a ballot that was not improperly marked. So I do not find this to have a random selection of ballots.

The twenty-five ballots that were selected by the plaintiff for examination and as evidence of the interference of fraud lend themselves to an inference of fraud, but I find that they lend themselves equally to an inference of negligence in the overmarking process. I have examined large numbers of these ballots and these twenty-five were not the only ballots that were marked incorrectly. There were numerous \*727 ballots that had not been selected for presentation that were also marked incorrectly and there are incorrect markings on virtually every single race. I have examined ballots in which the back side of the ballot was not marked at all or numerous ballots inconsistently mismarked. I cannot draw an inference of fraud from that. I can, however, draw an inference of negligence in the marking process. I choose to draw the latter inference.

[9] We approve the trial court's findings in respect to fraud. We construe the trial court's finding of gross negligence in this instance to be a measurement of the culpability of the election officials but not a finding that the election failed to express the will of the voters. Therefore, we conclude that the trial court was within its discretion in determining from the evidence that the election was a "full and fair expression of the will of the people. Vogel won it."

[10] Based upon the foregoing analysis and upon our review of the record, we find no basis for reversal of the trial court's final judgment based upon appellant's issues one and two. Therefore, we affirm the final judgment of the trial court.

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We do disapprove from the final judgment the statement: "I do not have jurisdiction to set aside this election." The trial court clearly had jurisdiction to consider and decide the issue presented by appellant's complaint in this election contest pursuant to [sections 102.166\(11\)](#) and [102.168, Florida Statutes \(1995\)](#). Thus, the correct statement is that the trial court found no factual basis for requiring that the election be set aside. Accordingly, we affirm the trial court's decision.

It is so ordered.

[KOGAN](#), C.J., [OVERTON](#), [SHAW](#), [HARDING](#) and [AN-STEAD](#), JJ., and [GRIMES](#), Senior Justice, concur.

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**Briefs and Other Related Documents ([Back to top](#))**

- [1997 WL 33491045](#) (Appellate Brief) Answer Brief of Appellees Volusia County Canvassing Board and Robert L. Vogel, Jr. (Jul. 1997)
- [1997 WL 33491047](#) (Appellate Brief) Appellant's Reply Brief (Jul. 1997)
- [1997 WL 33491046](#) (Appellate Brief) Appellant's Initial Brief (1997)

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C

Supreme Court of Alabama.  
Clyde **BLOCKER**, Jr., et al.

v.

**CITY OF ROOSEVELT CITY**, Alabama, a municipal corporation; and the City of Birmingham, a municipal corporation.

**88-479.**

Aug. 25, 1989.

City voters initiated contest of annexation election alleging misconduct of election supervisors, among others. The Circuit Court, Jefferson County, Bessemer Division, Roger Halcomb, J., denied request to declare annexation election illegal and void, and contestants appealed. The Supreme Court, Adams, J., held that trial court's decision was supported by the evidence.

Affirmed.

West Headnotes

**[1] Elections** 🔑 **293(1)**

[144k293\(1\) Most Cited Cases](#)

Errors and irregularities of election officers that are shown not to have affected the election result will not be considered in an election contest. [Code 1975, §§ 11-46-69, 11-46-71.](#)

**[2] Elections** 🔑 **227(1)**

[144k227\(1\) Most Cited Cases](#)

Threats, violence, or disturbances not materially affecting the result of the election should not invalidate the election. [Code 1975, §§ 11-46-69, 11-46-71.](#)

**[3] Elections** 🔑 **295(1)**

[144k295\(1\) Most Cited Cases](#)

Denial of contest of annexation election was supported by the evidence, including evidence that annexation carried with 718 votes cast in favor and 404 cast against, even though those contesting election claimed election supervisors harassed and intimidated numerous voters in attempt to persuade them to vote in favor of annexing one city to another, where no proof was offered of illegal votes, rejected legal votes, or of failure of contestee to receive requisite

number of legal votes. [Code 1975, §§ 11-42-125, 11-46-55, 11-46-69, 11-46-71, 17-15-29.](#)

\***90** Arthur Green, Jr. of Green, Armstrong & Bivona, Bessemer, for appellants.

Michael Melton, Birmingham, for appellee City of Birmingham.

Kearney Dee Hutsler, Birmingham, for appellee City of Roosevelt City.

ADAMS, Justice.

This appeal arises from a challenge to an election regarding the annexation of Roosevelt City, Alabama, into the City of Birmingham, Alabama. The trial court denied the appellants' contest of the election. We affirm.

On July 12, 1988, a special election was held pursuant to a court order on the question of whether the citizens of Roosevelt City were in favor of being annexed into the City of Birmingham. The city clerk of Roosevelt City failed to canvass the election, and the city council of Roosevelt City did not act to declare the results of the election as required by [Ala.Code 1975, § 11-46-55](#). On August 17, 1988, pursuant to a court order, the election was certified by the city council of Roosevelt City, Alabama. The annexation carried by almost a two-to-one margin, with 718 votes cast in favor of annexation and 404 votes cast against the annexation.

On August 22, 1988, the appellants, qualified electors of Roosevelt City, Alabama, \***91** initiated a contest of the election, alleging various instances of misconduct. The appellants claimed that certain persons, including employees of the Jefferson County sheriff's department who supervised the election, harassed and intimidated numerous voters in an attempt to persuade them to vote in favor of the annexation. The appellants contend that if those persons' votes were excluded, then the number of legal votes cast for annexation would be below the number of legal votes cast against annexation.

The trial court held an expedited hearing, as required by [Ala.Code 1975, § 17-15-29](#), on September 7, 1988, and denied the appellants' request to declare the annexation election illegal and void. After a denial of a post-judgment mo-

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tion, appellants filed a notice of appeal to this Court.

This case was heard by the trial court sitting without a jury. Where the trial court has heard ore tenus testimony, its judgment based upon that testimony is presumed correct and will be reversed only if, after consideration of the evidence and all reasonable inferences to be drawn therefrom, the judgment is found to be plainly and palpably wrong. *Moore v. Williams*, 519 So.2d 1337 (Ala.1988); *Robinson v. Hamilton*, 496 So.2d 8 (Ala.1986).

The standards for contesting the results of an annexation election are found at [§ 11-42-125](#). That section provides:

"(a) The mayor of the city or town shall cause the ballots to be used in such election to be printed with the following words thereon: 'Shall the agreement for the annexation of [Roosevelt City] to [the City of Birmingham] be ratified?' and printed on the ballot with the above quoted words immediately thereunder the words 'Yes' and 'No,' and the elector shall designate his choice by marking with ink or pencil a cross mark (x) in a place to be left before the word expressing his wish. The ballots provided under the terms of this division need not be of any particular size, form or color.

"(b) The result of the election shall be ascertained in the same manner that the result of the election of city or town officers is ascertained, and the election may be contested in the same manner as is provided for the contest of the election of any city or town officers."

The appellants sought to have the election declared null and void. [Section 11-46-69](#) specifies five grounds upon which a qualified elector may contest an election:

"(1) Misconduct, fraud or corruption on the part of any election official, any marker, the municipal governing body or any other person;

"(2) The person whose election to office is contested was not eligible thereto at the time of such election;

"(3) Illegal votes;

"(4) The rejection of legal votes; or

"(5) Offers to bribe, bribery, intimidation or other misconduct calculated to prevent a fair, free and full exercise of the elective franchise."

Annulment of elections, however, is limited by the provi-

sions of [§ 11-46-71](#):

"No misconduct, fraud or corruption on the part of the election officers, the marker, the municipal governing body or any other person, nor any offers to bribe, bribery, intimidation or other misconduct which prevented a fair, free and full exercise of the elective franchise can annul or set aside any municipal election unless the person declared elected and whose election is contested shall be shown not to have received the requisite number of legal votes for election to the office for which he was a candidate thereby, nor must any election contested under the provisions of this article be annulled or set aside because of illegal votes given to the person whose election is contested unless it appears that the number of illegal votes given to such person, if taken from him, would reduce the number of votes given to him below the requisite number of votes for election. No election shall be annulled or set aside because of the rejection of legal votes unless it appears that such legal votes, if given to the person intended, would increase the number of his legal votes to or above the requisite number of votes for election."

\*92 [\[1\]\[2\]](#) The annulment of an election, under [§ 11-46-71](#), requires either proof of illegal votes, proof of rejected legal votes, or proof of the failure of the contestee to receive the requisite number of legal votes. Moreover, errors and irregularities of election officers that are shown not to have affected the election result will not be considered in an election contest. *Turner v. Cooper*, 347 So.2d 1339, 1344 (Ala.1977); *29 C.J.S. Elections § 249 (1966)*. Threats, violence, or disturbances not materially affecting the result should not invalidate an election.

[\[3\]](#) We have reviewed the record. The trial court, without making specific findings of fact, denied the appellants' contest of the annexation election. The annexation carried, with 718 votes cast in favor and 404 cast against. We cannot say that the trial court's decision was plainly and palpably wrong; the judgment is affirmed.

AFFIRMED.

HORNSBY, C.J., and MADDOX, ALMON and STEAGALL, JJ., concur.

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## H

Supreme Court of Florida.  
Edward F. **BOARDMAN**, Petitioner,  
v.  
Henry **ESTEVA**, Respondent.  
**No. 46282.**

Sept. 30, 1975.  
Rehearing Denied Jan. 6, 1976.

Candidate brought suit seeking to be declared winner of election on basis of machine vote only and to have election declared illegal in respect to absentee ballots cast. The Circuit Court, Leon County, dismissed and contestant appealed. The District Court of Appeal, First District, [299 So.2d 633](#) reversed and certiorari was filed. The Supreme Court, Adkins, C.J., held that, in absence of indication that absentee ballots were not cast by qualified registered voters who were entitled to vote absentee, presumption of correctness of election officials' returns counting such ballots stood, and that where circuit court required county canvassing board to assign a number to each absentee elector to maintain integrity of absentee ballots for judicial review, the order was entered subsequent to actual casting of absentee ballots, ballots were not invalidated on theory of violation of right of secrecy.

Decision of District Court of Appeal quashed and cause remanded with instructions to reinstate and affirm judgment of trial court.

Overton, J., concurred with an opinion.

England, J., concurred specially to conclusion with an opinion.

Williams, Circuit Judge, concurred specially with an opinion.

### West Headnotes

#### [1] Elections 216.1

[144k216.1 Most Cited Cases](#)

Substantial compliance with absentee voting laws is all that is required to give legality to the ballot. [West's F.S.A. §§ 101.62, 101.62\(3\), 101.64, 101.67\(3\), 101.68, 101.68\(1\).](#)

#### [2] Elections 216.1

[144k216.1 Most Cited Cases](#)

Accommodation of public is primary basis for privilege of absentee voting. [West's F.S.A. §§ 101.62, 101.62\(3\), 101.64, 101.67\(3\), 101.68, 101.68\(1\).](#)

#### [3] Elections 198

[144k198 Most Cited Cases](#)

Unless absentee voting law expressly declares that particular act is essential to validity of the ballot, or that its omission will cause ballot not to be counted, statute should be treated as directory, not mandatory, provided such irregularity is not calculated to affect integrity of the ballot or election. [West's F.S.A. §§ 101.62, 101.62\(3\), 101.67, 101.67\(3\).](#)

#### [4] Elections 227(8)

[144k227\(8\) Most Cited Cases](#)

Insignificant omissions or irregularities appearing on application form suggested by statute do not void absentee ballot if information appearing on application is sufficient to show qualifications of applicant to vote absentee and omissions or irregularities are not essential to sanctity of the ballot. [West's F.S.A. § 101.62.](#)

#### [5] Elections 198

[144k198 Most Cited Cases](#)

Absentee voting statutes, which are in derogation of common law, must be strictly construed, but strict construction does not necessarily mean strict compliance. [West's F.S.A. §§ 101.62, 101.64, 101.67\(3\).](#)

#### [6] Elections 198

[144k198 Most Cited Cases](#)

In interpreting absentee voter law, intention of legislature, as ascertained from consideration of law as a whole, prevails over literal meaning of any of terms used. [F.S.A. §§ 101.62, 101.64, 101.67\(3\).](#)

#### [7] Elections 216.1

[144k216.1 Most Cited Cases](#)

If statutory requirements with respect to absentee voting are complied with to extent that duly responsible election officials can ascertain that electors whose votes are being canvassed are qualified and registered to vote and that they do

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so in a proper manner, the absentee ballots are legal. [West's F.S.A. §§ 101.62, 101.64, 101.67\(3\), 101.68.](#)

**[8] Elections** 🔑227(8)

[144k227\(8\) Most Cited Cases](#)

Even if absentee ballots were invalid because of missing outer envelopes

containing statutorily required absentee voters' affidavits, that would not necessitate invalidation of all absentee ballots cast, even though number with missing envelopes would be more than enough to change result of election, where such ballots had been cast in this county and had not been commingled with ballots from other counties. [West's F.S.A. §§ 101.62, 101.64, 101.67\(3\), 101.68\(1\).](#)

**[9] Evidence** 🔑83(1)

[157k83\(1\) Most Cited Cases](#)

Generally, elected officials are presumed to perform their duties in proper and lawful manner in absence of sufficient showing to contrary.

**[10] Elections** 🔑247

[144k247 Most Cited Cases](#)

Returns certified by election officials are presumed to be correct.

**[11] Elections** 🔑227(8)

[144k227\(8\) Most Cited Cases](#)

Voters who have done all the statute requires them to do in casting absentee ballots will not be disfranchised solely because of failure of election officials to observe directory statutory instructions. [West's F.S.A. §§ 101.62, 101.64, 101.67\(3\), 101.68\(1\).](#)

**[12] Elections** 🔑227(8)

[144k227\(8\) Most Cited Cases](#)

Burden is on person contesting validity of absentee ballots to establish that such ballots were irregularly cast. [West's F.S.A. §§ 101.62, 101.62\(3\), 101.67, 101.67\(3\).](#)

**[13] Elections** 🔑247

[144k247 Most Cited Cases](#)

In absence of indication that absentee ballots were not cast by qualified registered voters who were entitled to vote absentee, presumption of correctness of election officials' returns counting such ballots stood.

[West's F.S.A. §§ 101.62, 101.62\(3\), 101.67, 101.67\(3\).](#)

**[14] Elections** 🔑216.1

[144k216.1 Most Cited Cases](#)

By voting absentee, elector waives secrecy of his ballot.

[West's F.S.A. §§ 101.62, 101.62\(3\), 101.67, 101.67\(3\).](#)

**[15] Elections** 🔑213

[144k213 Most Cited Cases](#)

Privilege of secrecy is personal to voter and, if he so desires, he may waive it.

**[16] Elections** 🔑227(8)

[144k227\(8\) Most Cited Cases](#)

Where circuit court required county canvassing board to assign a number to each absentee elector to maintain integrity of absentee ballots for judicial review and order was entered subsequent to actual casting of absentee ballots, absentee ballots cast were not invalidated on theory of violation of right of secrecy. [West's F.S.A. §§ 101.62, 101.62\(3\), 101.67, 101.67\(3\).](#)

**[17] Elections** 🔑227(8)

[144k227\(8\) Most Cited Cases](#)

Voter is only party who has standing to protest violation of right to vote in secret.

**[18] Elections** 🔑298(1)

[144k298\(1\) Most Cited Cases](#)

Primary consideration in election contest is whether will of people has been effected.

**[19] Elections** 🔑227(8)

[144k227\(8\) Most Cited Cases](#)

In determining effect of irregularities on validity of absentee ballots cast, the following factors shall be considered: presence or absence of fraud, gross negligence, or intentional wrongdoing, whether there has been substantial compliance with essential requirements of absentee voting law; and whether the irregularities complained of adversely affect sanctity of ballot and integrity of election. [West's F.S.A. §§ 101.62, 101.62\(3\), 101.64, 101.67, 101.67\(3\), 101.68, 101.68\(1\).](#)

\*261 J. Michael Hayes, Gregory, Cours, Paniello, Johnson & Hayes, Tampa, and Joseph C. Jacobs and Robert J.

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Angerer, Ervin, Varn, Jacobs & Odom, Tallahassee, for petitioner.

Leo Foster, Tallahassee, and Henry Esteva, in pro. per., for respondent.

ADKINS, Chief Justice.

On petition for certiorari, we have for review a decision of the First District Court of Appeal in [Esteva v. Hindman, 299 So.2d 633 \(Fla.App.1st, 1974\)](#), which allegedly conflicts with this Court's decision in [State ex rel. Hutchins v. Tucker, 106 Fla. 905, 143 So. 754 \(1932\)](#). The source of our jurisdiction is Fla.Const., art. V, s 3(b)(3), F.S.A.

This is a contest of the October 3, 1972, election for a seat on the Second District Court of Appeal, in which the petitioner, Boardman, was declared winner over respondent, Esteva. Although Esteva received 404 more machine or regular votes than did Boardman, the latter received 653 more absentee ballots, for an overall majority of 249 votes. This dispute solely involves the validity of the 3,389 absentee ballots cast in the election.

Esteva brought suit in the Circuit Court for the Second Judicial Circuit seeking to have the court declare him the winner of the election on the basis of the machine vote only, and to have the election declared illegal in respect to the absentee ballots cast. Although no fraud or wrongdoing was charged, Esteva alleged that there were some 1450 irregularities or errors in the absentee ballots. Therefore, since 250 votes for Esteva could change the result of the election and it was impossible to identify for whom the illegal ballots had been cast, the ballots being commingled, the absentee ballots should be thrown out. The trial judge, after considering the pleadings, admissions, affidavits and other matters on file, together with arguments of counsel for the respective parties and their briefs, granted summary judgment for Boardman, finding that of the 1450 alleged flaws, only 88 set forth a real basis to conclude that the ballots were illegal. Among these were 13 in which the application was not signed by the applicant, 17 in which return envelopes were not signed across the flap, 39 in which the official title of the subscribing witness was not indicated and 19 in which the names of the electors were not on record.

The trial court concluded that the remainder of the alleged irregularities involved \*262 a number of 'clerical misprisions or omissions, most of which are of so little real significance as to be fairly classified as unsubstantial.' For example, the court found:

'(d) There are shown 16 in which the reason for voting absentee was not specifically indicated on the application and 79 in which such reason was not indicated on the return envelope. Each of these forms contains the five categories of persons who may vote absentee with instructions to 'check appropriate reason'. Failure to put a check mark into one or more of those designations is not deemed fatal to the validity of the ballot. The signature of the elector is adequate to at least certify that one or more of the reasons is applicable and in the case of the certificate on the return envelope it is under oath. Even if these are to be counted illegal they would not change the results.

'(e) The other irregularities, such as address of attesting witness omitted, post office cancellation stamp not affixed, vague identification of witnesses, failure of deputies to record oath, and the other discrepancies are not of vital consequence and may be attributed more logically to human misunderstanding of minute technicalities than to lack of diligence to comply with essential requirements. Fraud, corruption or gross negligence are completely absent.

'(f) The plaintiff urges that all absentee votes of Hillsborough County, of which Esteva received 133 and Boardman 320, must be suppressed because they were counted and returns made in accordance with an injunction order of the Circuit Court of Hillsborough County in the case of *Levine, et al. v. Falsone, et al.*, constituting the Canvass Board, Case No. 213299. It is contended that such procedure ordered by the Court violated [F.S. 101.68](#) and other statutes and breached the fundamental requirement of secrecy. This Court does not interpret the Hillsborough Circuit Court order as having that effect and has not overlooked [Papy v. Englander, Fla.App. \(Third\) 267 So.2d 111](#). However, in any event this Court has no appellate supervision of the circuit court which rendered the injunctive order, and will make no judgment except to approve the obedience of the election officials to its commands and to accept their returns pursuant thereto.'

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On appeal, the District Court reversed, declaring Esteva the winner of the election. After concluding that the 'Florida courts have long maintained and restated the principle that strict compliance with the statutory requirements for absentee voting is mandatory,' the District Court held:

'Thus far, we have shown irregularities sufficient to invalidate 612 absentee votes cast in this election. These include the 88 found by the trial court, the 16 in which no reason for voting absentee was indicated on the application, the 79 in which no such reason was indicated on the return envelope, and the 429 in which the envelopes were lost in Polk, Hendry and Glades counties. There are numerous order errors and omissions shown by appellant, such as vague identification of witnesses and omission of post office cancellation stamps and addresses of witnesses. Furthermore we have grave doubts as to the validity of the Hillsborough County Canvass of absentee ballots which numbers 453, with regard to the fundamental requirement of the secrecy of the ballot. However, we do not deem it necessary to rule on these other alleged irregularities in light of our conclusion that the irregularities found are sufficient in number to affect the results of this election.'

At issue is whether the absentee voting law requires absolute strict compliance with all its provisions, or whether substantial compliance is sufficient to give validity to the ballot.

\*263 We first take note that the real parties in interest here, not in the legal sense but in realistic terms, are the voters. They are possessed of the ultimate interest and it is they whom we must give primary consideration. The contestants have direct interests certainly, but the office they seek is one of high public service and of utmost importance to the people, thus subordinating their interests to that of the people. Ours is a government of, by and for the people. Our federal and state constitutions guarantee the right of the people to take an active part in the process of that government, which for most of our citizens means participation via the election process. The right to vote is the right to participate; it is also the right to speak, but more importantly the right to be heard. We must tread carefully on that right or we risk the unnecessary and unjustified muting of the public voice. By refusing to recognize an otherwise valid exercise

of the right to a citizen to vote for the sake of sacred, unyielding adherence to statutory scripture, we would in effect nullify that right.

Notably existent in this dispute is the complete absence of any allegation of fraud, gross negligence or even the hint of intentional wrongdoing, either on the part of the voters or of the election officials. Assuming that the absentee ballots counted in the election were cast by qualified, registered electors, who were otherwise entitled to vote absentee, notwithstanding the alleged defects, a majority of the voters in the Second District preferred Mr. Boardman over Mr. Esteva in October, 1973. This must not be overlooked. If we are to countenance a different result, one contrary to the apparent will of the people, then we must do so on the basis that the sanctity of the ballot and the integrity of the election were not maintained, and not merely on the theory that the absentee ballots cast were in technical violation of the law.

In 1932 we first considered the construction of the absentee voting law. In *State ex rel. Hutchins v. Tucker*, supra, we held that several ballots had been illegally rejected and should have been counted where there had been a substantial compliance with the provisions of the absent voting statute.

Tucker was apparently overlooked seven years later when we made the statement in [State ex rel. Whitley v. Rinehart](#), [140 Fla. 645, 192 So. 819 \(1939\)](#), that the rigidity of its (absent voting statute, Ch. 16986, Acts of 1935) enforcement is an open question in this State. We held in Rinehart that, being in derogation of the common law, the absentee voting laws should be strictly construed. At issue in Rinehart, was the validity of certain absentee ballots allegedly cast by electors who were in the city on election day and other ballots cast by unregistered and unqualified citizens of some other state. These alleged defects directly affected the sanctity of the ballot, and would indeed have been held invalid under Tucker's substantial compliance test.

[Frink v. State ex rel. Turk](#), [160 Fla. 394, 35 So.2d 10 \(1948\)](#), held that the absentee voting statute must have a strict interpretation. We said that the failure to comply with the clear language of the statute to the effect that the elector must swear in his application for absentee ballot that he ex-

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pected to be absent from the county and not just the city on election day rendered the ballot of no effect. We also said that the Legislature did not merely suggest a form of affidavit, but specifically stated in detail the substance and manner of its execution in Fla.Stat. s 101.07, 1941, F.S.A.[FN1]

[FN1](#). It is interesting to note that [Fla.Stat. s 101.07](#), 1941, F.S.A., strictly interpreted in *Frink*, was amended in the legislative session immediately following our rendering of *Frink*. See s 1, Ch. 25385, 1949 Laws of Florida. At the time *Frink* was decided [s 101.07](#) required the county clerks to furnish a ballot which, *Inter alia*, included an oath to be taken and subscribed to by the elector. The oath was spelled out in the text of the statute. The amended version, s 1, Ch. 25385, 1949, in addition to other changes in the statute, prescribed a new form of oath for the application. However, instead of requiring the specific oath prescribed in the statute, as we determined was the legislative intent in *Frink*, the new version simply required the execution of an oath in Substantially the same form prescribed therein. This part of the statute remains unchanged.

\*264 The strict interpretation rule was reaffirmed in the subsequent cases before this Court,[\[FN2\]](#) however, not without exceptions. In [State ex rel. Titus v. Peacock, 125 Fla. 810, 170 So. 309 \(1936\)](#), decided after *Hutchins* but before *Frink*, we held that an erroneous or unlawful handling of otherwise valid absentee ballots by election officials will not void the ballots, provided the votes were legal in their inception and still capable of being given proper effect as such. This principle was reaffirmed in *Jolley*, *supra*, in 1952, thus etching an exception to the general rule of strict interpretation of absentee voting laws.[\[FN3\]](#)

[FN2](#). [Jolley v. Whatley, 60 So.2d 762 \(Fla.1952\)](#); [Griffith v. Knoth, 67 So.2d 431 \(Fla.1953\)](#); [Wood v. Diefenbach, 81 So.2d 777 \(Fla.1955\)](#); [Parra v. Harvey, 89 So.2d 870 \(Fla.1956\)](#); [McDonald v. Miller, 90 So.2d 124 \(Fla.1956\)](#).

[FN3](#). In *Titus*, we cited 9 R.C.L. s 102, pp.

1093--1095, as well as *Hutchins*, for support of the exception we mention here. Although the cited paragraph does not refer to absentee ballots or statutes, it does make the pertinent observation that:

'In short, a fair election and honest return should be considered as paramount in importance to minor requirements which prescribe the formal steps to reach that end, and the law should be so construed as to remedy the evil against which its provisions are directed and at the same time not to disenfranchise voters further than is necessary to attain that object.' 9 C.R.L. s 102, pp. 1093--1095.

[\[1\]](#) Without further analysis of the case law, and realizing as we do that strict compliance has been required by this Court in other cases, we now recede from that rule and hereby reaffirm the rule adopted in *Tucker* to the effect that substantial compliance with the absentee voting laws is all that is required to give legality to the ballot. We offer no opinion as to the validity of the ballots found to be invalid in the prior decisions had they been measured by the substantial compliance standard.

[\[2\]](#) Originally absentee voting statutes were directed at making the voting privilege available to those engaged in military service. *Rinehart*, *supra*. Therefore, absentee voting was considered a privilege granted to electors, not an absolute right. *Frink* *supra*. The purpose of the enactment of absentee voter statutes, therefore, was to enable a qualified voter to vote at a general election in the precinct of his domicile were he temporarily absent therefrom. Times obviously have changed, however, since the absentee voting laws were first enacted in Florida in 1917. We are no longer in the horse and buggy age. Society is much more mobile today and in fact depends to a great extent upon its mobility for survival. Regardless of the original reasons for the enactment of the absentee voter laws, they must be interpreted in light of modern conditions. This does not require a full scale re-enactment of the law. That is for the Legislature to do, and in fact that statute has been amended several times over the years. But the mere fact that a statute was enacted in 1917 does not require us to interpret it with a turn-of-the-century perspective. Although the convenience of the voter may not have been one of the considerations for the

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enactment of the absentee voting law (Rinehart), it would be naive of us to fail to recognize that the accommodation of the public has become the primary basis for the privilege of voting absentee. The Legislature of Florida recognized this when it amended the statute to provide absentee voting for persons who may be absent from the county on election day or who are physically unable to make it to the polls, or who may be prevented by their religious beliefs from voting on a particular day. See Fla.Stat. [s 101.62\(3\), F.S.A.](#)

**\*265 [3][4]** In developing a rule regarding how far irregularities in absentee ballots will affect the result of the election, A fundamental inquiry should be whether or not the irregularity complained of has prevented a full, fair and free expression of the public will. Unless the absentee voting laws which have been violated in the casting of the vote expressly declared that the particular act is essential to the validity of the ballot, or that its omission will cause the ballot not to be counted, the statute should be treated as directory, not mandatory, Provided such irregularity is not calculated to affect the integrity of the ballot or election. [Fla.Stat. s 101.67\(3\), F.S.A.](#), for example, declares that the absentee ballot shall be counted only where the 'application for absentee elector's ballot' is properly executed and placed in an envelope separate from the absentee ballot. It is clear, therefore, that the Legislature intended that any application not so properly executed and separated from the ballot must not be counted. This does not mean, however, that insignificant omissions or irregularities appearing on the application form suggested in Fla.Stat. [s 101.62, F.S.A.](#), must void the ballot where the information that does appear on the application is sufficient to determine the qualifications of the applicant to vote absentee, and the omissions or irregularities are not essential to the sanctity of the ballot. The Legislature did not define what it meant by the term 'properly executed,' nor did it say that the application form suggested in Fla.Stat. [s 101.62, F.S.A.](#), had to be strictly complied with.**[FN4]** To the contrary, [Fla.Stat. s 101.62, F.S.A.](#), states that the application shall be in substantially the same form as that found in the statute. On the other hand, the Legislature has clearly mandated that if the absent elector's ballot is not placed in an envelope separate from the absentee ballot, as required by [Fla.Stat. s 101.67\(3\), F.S.A.](#), the ballot will in no event be counted.

**FN4.** Although not controlling here, we note that in the Legislative session subsequent to this contested election, [Fla.Stat. s 101.67, F.S.A.](#), was amended in two interesting particulars. First, the elector is no longer required to restate on the elector's certificate his reason for voting absentee, although the elector must state that he or she is voting absentee for the reason stated in the application for absentee ballot. Second, no longer is the elector required to fill in the number of the precinct in which he or she is registered to vote on the elector's certificate. That is now the duty of the election official. At the very least the Legislature has by these amendments recognized the repetitiousness of the information appearing on the two forms for the application and elector's certificate. We feel that the Legislature has also recognized that certain items previously required to be complied with are not essential to the sanctity of the ballot.

Absolute strict compliance, even with mandatory provisions in every case, however, could reach absurd proportions. For example, under a former version of [Fla.Stat. s 101.64, F.S.A.](#), an elector who certified that he would be absent from the State on election day would not have strictly complied with the statutory requirement that the elector certify his intention to be absent from the county on election day. Could it seriously be doubted that such an elector failed to state his intention to be absent from the county? Yet, his ballot would have been void under the strict compliance rule. Frink, *supra*.

**[5][6]** It is true that the absentee voting statutes are in derogation of the common law and therefore must be strictly construed. Strict construction, however, does not necessarily mean strict compliance. In [Brown v. Grzeskowiak, 230 Ind. 110, 101 N.E.2d 639 \(1951\)](#), the Supreme Court of Indiana agreed that absentee voting laws are generally strictly construed. The Court then said:

'Even though such statutes do, under certain circumstances, extend a special privilege to those who may be away from their voting place on election day, It must be kept in mind, even when applying the rules of strict construction, **\*266** in ascertaining the meaning of the lan-

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guage used together with the intent of the Legislature, that the will of the majority of those who have legally voted is the thing to be most desired. (Emphasis ours.)

"The purpose of the law and The efforts of the court are to secure to the elector an opportunity to freely and fairly cast his ballot, and to uphold the will of the electorate and prevent disenfranchisement. In the absence of fraud, actual or suggested, statutes will be liberally construed to accomplish this purpose." [State ex rel. Harry v. Ice, 207 Ind. 65 at 71, 191 N.E. 155, at 157 \(1934\)](#). (Emphasis theirs.)

'Since the Legislature has extended the privilege to certain voters who may be absent from their voting places on election day, to cast their ballots, even though absent from the polling place, the same effort must be made to extend to them an opportunity to freely and fairly cast their ballots and to prevent their disfranchisement as is made to protect the ballots and prevent the disfranchisement of those voters who are present at their voting place and cast their vote in person.

'The ultimate question for determination in an election contest is, who has received the highest number of legal votes? (citation omitted.)' [101 N.E.2d at 647](#).

In applying a liberal interpretation to the absentee voter law, the Indiana Court noted that the intention of the Legislature, as ascertained from a consideration of the Act as a whole, would prevail over the literal meaning of any of the terms used in the statute. We agree. Consistent with the Indiana Court's reasoning is our decision in [Wilson v. Revels, 61 So.2d 491 \(Fla.1952\)](#), where we considered the legality of certain machine votes and a group of absentee ballots. The contested machine votes were not signed by the electors as required by law, but their names were written on the ballot stubs by the election officials, and the absentee ballots had been mistakenly placed in the wrong ballot box, although they were easily distinguishable from the other absentee ballots. Justice Terrell wrote for the Court:

'There is no charge of fraud or intended wrong in handling the ballots. The ground of appellant's contention is, that the absentee ballots were void because of irregularities pointed out in handling them, and that the regular ballots were void because the electors failed to sign stub number 1. The chancellor found, and the record discloses, that Liberty is a small county, that at least one of the electors (sic) knew personally each elector whose vote is chal-

lenged; that the names of the electors were written on the stub by members of the election Board after the elector was identified, and that the registration of all electors was checked before the ballot was delivered. No elector asked to sign stub number 1 and both the electors and the Canvassing Board acted without fraud, deception or purpose to conduct other than a fair election.

'It is not suggested or contended that the result of the election would have been different if the law had been tracked to the letter, nor is it suggested that the integrity of the election was affected by the way the ballots were handled. It is contended that to permit such practice to go unchallenged, opens the door for fraud and corruption of the ballot. This court is not unmindful of the truth of this contention, and, if there were any suggestion whatever of fraud or that the irregularities were purposely done to foul the election or corrupt the ballot, it would not be permitted to stand.' [61 So.2d 491, at 492](#).

This result was reasonable and proper. The facts are similar in some degree to the situation Sub judice. Here we are dealing with several small counties in which the \*267 record shows that the election officials personally knew many of the voters whose ballots were allegedly invalid because of complained irregularities, such as lack of complete address of the voter on the application or return envelope, or lack of a precinct number. The record also shows that in many cases the voter simultaneously made application for the absentee ballot and cast his vote while in the office of the election officials, and that many of the voters were well known to the election officials. Although we recognize that we were dealing primarily with regular machine votes in Wilson, it would be stretching the law to unreasonable lengths to conclude that the result should be different in this case simply because we are dealing with absentee ballots. What is important in both cases is the absence of fraud or any wrong suffered from the irregularities complained of, and the fact that the will of the people was affected. Wilson, supra.

[7] In expanding the privilege of voting to those citizens who may not be able to vote in person on election day, the Florida Legislature has prescribed statutory requirements which are intended to insure that those who vote are qualified and registered to vote and that they do so in a proper

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manner. There is no magic in the statutory requirements. If they are complied with to the extent that the duly responsible election officials can ascertain that the electors whose votes are being canvassed are qualified and registered to vote, and that they do so in a proper manner, then who can be heard to complain that the statute has not been literally and absolutely complied with? Strict compliance is not some sacred formula nothing short of which can guarantee the purity of the ballot. See reference to the case of [Attorney General ex rel. Miller v. Miller, 266 Mich. 127, 253 N.W. 241](#), quoted with approval by this Court in Jolley, supra. See also, [Anderson v. Budzien, 12 Wis.2d 530, 107 N.W.2d 496 \(1961\)](#), where the Wisconsin Supreme Court, holding that the legislative intent in enacting the absentee voter statutes is to encourage and assist qualified voters to cast their ballots for candidates of their choice, recognized that in order to prevent fraud the Legislature specifically stated that in some instances there must be strict compliance with the statute or a ballot cannot be counted. However, the Court said that where the Legislature has not so expressly provided for strict compliance, any provisions are directory and strict compliance therewith is not required. Accord, [McMaster v. Wilkinson, 145 Neb. 39, 15 N.W.2d 348 \(1944\)](#), where the court cited our decision in Rinehart, supra, for the rule of strict construction of absentee voting laws, and then held:

'It is the policy of the law to prevent as far as possible the disfranchisement of electors who have cast their ballots in good faith, and while the technical requirements set forth in the absentee voting law are mandatory, yet in meeting these requirements laws are construed so that a substantial compliance therewith is all that is required.' [15 N.W.2d, at 353](#).

Some of the errors alleged in McMaster were similar to some of those alleged here. Although some of the ballots were invalidated as a result of the errors, in other cases the court held that although the statute had not been strictly complied with, where there had been substantial compliance the absentee ballots were valid. For example, 21 ballots were held to be valid although the title of the election officer did not appear on the ballot next to the officer's signature as required by law. However, a ballot was declared void where the notary failed to fill out the elector's certificate identifying the voter.

[8] Having decided that substantial compliance with the requirements of the absentee voting statute is all that is required to give legality to the absentee ballots, we now turn to the remaining issues. First, there is the question of the 429 missing \*268 outer envelopes containing the statutorily required absentee voters' affidavits, which were either lost or destroyed by the canvassing boards in Glades, Hendry and Polk counties. It is not alleged that any of the ballots were in fact defective, rather it is contended that since the return envelopes containing the ballots cast by the voters were not preserved by the election officials as required by [Fla.Stat. s 101.68\(1\)](#), F.S.A., thus defeating any judicial review of the ballots, then all the ballots should be thrown out. But even if we agreed with this contention and required all the ballots to be thrown out, it would not necessitate the invalidation of all the absentee ballots cast, even though the number (429) would be more than enough to change the result of the election. The general rule is that where the number of invalid absentee ballots is more than enough to change the result of the election, then the election shall be determined solely upon the basis of the machine vote. Frink, supra. The reason for the rule is that since all the ballots have been commingled and it is impossible to distinguish the good ballots from the bad, because all ballots are required by law to be unidentifiable, then in fairness all the ballots must be thrown out. In other words, it is impossible to tell for whom the invalid ballots were cast since they were commingled with the valid ballots. The rule is not applicable here because the outer envelopes for All of the absentee ballots in these three counties were lost. Therefore, assuming that all the ballots were invalid due to the missing envelopes, there is no problem with distinguishing the good ballots from the bad because they all would be bad. Therefore, even if we invalidated all 429 ballots because of missing envelopes, we would only be required to reduce the total number of votes cast for petitioner and respondent rather than throw out all the absentee ballots cast. These 429 have not been commingled with ballots from other counties. The result would be that the 292 votes Boardman received in those three counties would be subtracted from his total and the 137 votes Esteva received from those three counties would also be deducted from his total, still leaving Boardman with an overall majority of 94 votes.

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[9][10][11][12][13] As to the actual validity of the ballots whose return envelopes are missing, we first point out that as a general rule elected officials are presumed to perform their duties in a proper and lawful manner in the absence of a sufficient showing to the contrary, [City of Miami Beach v. Kaiser](#), 213 So.2d 449, 453 (Fla.App.3d, 1958), and also that there is a presumption that returns certified by election officials are presumed to be correct. [Burke v. Beasley](#), 75 So.2d 7 (Fla.1954). This is because the canvassing of returns, including absentee ballots, is vested in canvassing boards in the respective counties who make judgments on the validity of the ballots. When the voters have done all that the statute has required them to do, they will not be disfranchised solely on the basis of the failure of the election officials to observe directory statutory instructions. *Titus v. Peacock*, supra. It is not contended by respondent that the absentee ballots in question were illegally cast or that they were cast by voters who were unqualified to vote absentee. The burden is clearly on the contestor to establish that the ballots have been irregularly cast. *Burke*, supra. There is nothing in the record to indicate that the absentee ballots in question were not cast by qualified registered voters who were entitled to vote absentee, therefore, the presumption of the correctness of the election officials' returns stands. [FN5]

[FN5] We agree with the trial court's observations that:

' . . . The election process is subject to legislative prescription and constitutional command and is committed to the executive branch of government through duly designated officials all charged with specific duties. The canvassing of returns, including absentee ballots, is vested in canvassing boards in the respective counties who make judgments on the validity of the ballots. Those judgments are entitled to be regarded by the courts as presumptively correct and if rational and not clearly outside legal requirements should be upheld rather than substituted by the impression a particular judge or panel of judges might deem more appropriate. It is certainly the intent of the constitution and the legislature that the results of elections are to be efficiently, honestly and promptly ascertained by election officials to whom some latitude of judgment is

accorded, and that courts are to overturn such determinations only for compelling reasons when there are clear, substantial departures from essential requirements of law. Such is not the case here and this Court deems action by it to change the result which the proper officers have reached would be meddlesome interference not sanctioned by proper judicial functions.' Final Summary Judgment, *Esteva v. Hindman*, Case No. 72--1481, opinion filed October 2, 1973, Second Judicial Circuit.

\*269 [14][15][16][17] Turning to the question whether the procedure utilized in canvassing and counting the absentee ballots in Hillsborough County violates the requirement of secrecy, thus invalidating all the absentee ballots cast in that county, we hold that it does not. It has long been recognized in this State that by voting absentee the elector waives the secrecy of his ballot *Hutchins*, supra. Likewise in *McDonald v. Miller*, supra, we held that the privilege of secrecy is personal to the voter, and if he so desires may waive it. Although we do not suggest that there has been a personal waiver of an individual voter's right to secrecy here, we make the following two observations. First, it is not contended that the privilege of secrecy was violated in the actual casting of the ballots by the voters. Rather, it is contended that the order entered by the Hillsborough County Circuit Court in *Levine, et al. v. Falsone, et al.*, Case No. 213299, opinion filed October 7, 1972, requiring the Hillsborough County Canvassing Board to assign a number to each absentee elector for purposes of maintaining the integrity of the ballots and votes for purposes of judicial review, which order was entered subsequent to the actual casting of the absentee ballots on October 3, 1972, enabled the election officials to determine which voter voted for which candidate. We emphasize that it has not been contended that the voters were in any way influenced in their voting by the order in question or that they even were aware of it. Nor is there any allegation that a violation of secrecy has actually occurred. This was nothing more than an honest attempt to preserve the integrity of the ballot in case the election was contested. Our second observation is that we are not at all convinced that either petitioner or respondent has standing to raise the issue of violation of secrecy of the ballot. Being personal to

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the voter, the right of secrecy may be waived by the voter and it would appear that the voter himself is the only party who has standing to protest a violation of the right to vote in secret. We therefore conclude that the absentee ballots cast in Hillsborough County were not invalidated by reason of a violation of the right of secrecy of the ballot.

[18][19] In summary, we hold that the primary consideration in an election contest is whether the will of the people has been effected. In determining the effect of irregularities on the validity of absentee ballots case, the following factors shall be considered:

- (a) the presence or absence of fraud, gross negligence, or intentional wrongdoing;
- (b) whether there has been substantial compliance with the essential requirements of the absentee voting law; and
- (c) whether the irregularities complained of adversely affect the sanctity of the ballot and the integrity of the election.

The underlying concern of the election officials in making the initial determination as to the validity of the absentee ballots is whether they were cast by qualified, registered voters, who were entitled to vote absentee and who did so in a proper manner. The substantial compliance test used by the \*270 trial judge comports with our conclusion that strict compliance with the statutory requirements for absentee balloting is not required to validate the ballots. Since the trial court found only 88 ballots to be invalid, petitioner Edward F. Boardman is hereby declared the winner of the October 3, 1972, election for the Second District Court of Appeal by a total of 161 votes.

Therefore, the decision of the District Court of Appeal, First District, is quashed. This cause is remanded to the District Court of Appeal with instructions to reinstate and affirm the judgment of the trial court.

It is so ordered.

ROBERTS, J., and CHAPPELL, Circuit Judge, concur.

OVERTON, J., concurs with an opinion.

ENGLAND, J., concurs specially to conclusion with an opinion.

WILLIAMS, Circuit Judge, concurs specially with an opinion.

OVERTON, Justice (concurring).

I have been strict in the exercise of our conflict jurisdiction. A reading of the election contest cases concerning absentee ballots reveals a maze of confusing doctrines and rules. There are cases to sustain the position of both sides. The following are cases which may be asserted to sustain the validity of the critical absentee ballots: [McDonald v. Miller, 90 So.2d 124 \(Fla.1956\)](#); [Burke v. Beasley, 75 So.2d 7 \(Fla.1954\)](#); [Jolley v. Whatley, 60 So.2d 762 \(Fla.1952\)](#); [State ex rel. Hutchins v. Tucker, 106 Fla. 905, 143 So. 754 \(1932\)](#). On the other hand, the following cases may be asserted to invalidate the absentee ballots: [Parra v. Harvey, 89 So.2d 870 \(Fla.1956\)](#); [Wood v. Diefenbach, 81 So.2d 777 \(Fla.1955\)](#); [Griffin v. Knoth, 67 So.2d 431 \(Fla.1953\)](#); [Frink v. State ex rel. Turk, 35 So.2d 10 \(Fla.1948\)](#); [State ex rel. Whitley v. Rinehart, 140 Fla. 645, 192 So. 819 \(1940\)](#); [Spradley v. Bailey, 292 So.2d 27 \(Fla.App.1st 1974\)](#); [Papy v. Englander, 267 So.2d 111 \(Fla.App.3d 1972\)](#).

Our role in conflict jurisdiction is to stabilize the law by a review of decisions which form patently irreconcilable precedents. [Florida Power & Light Co. v. Bell, 113 So.2d 697 \(Fla.1959\)](#). The aforementioned cases are impossible to reconcile.

In my opinion, we also have jurisdiction because the instant decision of the District Court accepts earlier decisions of this Court as controlling precedent in a situation which is materially at variance with the instant case. See [McBurnette v. Playground Equipment Corp., 137 So.2d 563 \(Fla.1962\)](#). The instant case concerns an 18-county election. The District Court decision invalidates all absentee ballots in all 18 counties by applying the rule that: ' . . . (W)here the number of illegal absentee ballots cast is sufficient to change the result of an election, none of the absentee ballots cast in the election will be accepted and counted. . . .' [FN1]

[FN1. Esteva v. Hindman, 299 So.2d 633, 637 \(Fla.App.1st 1974\)](#).

In all the cases cited for this rule, invalid ballots were com-

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mingled with valid absentee ballots and the elections concerned only a single county or municipality. Neither of these facts is present in the instant case. In my opinion, this is a material variance.

The strict application of the District Court's decision could have a devastating effect on the inclusion of absentee ballots in close statewide races. I am deeply concerned, as is Judge Williams, that the practical application of the District Court's decision would void all absentee ballots in every close multi-county election which had the result changed by absentee ballots. A \*271 candidate who won a close election on the machine vote but lost when absentee ballots were counted would only have to find defective election procedures in one or two counties involving enough total ballots to change the result in order to void All absentee ballots.

In conclusion, I agree with the trial judge that common sense and a reasonable application of the statute requirements in absentee ballots must be applied. It is important to recognize that in the instant case there is no allegation or suggestion of any fraud, corruption, or other intentional misconduct on the part of either candidate or the election officials in the several counties and districts involved. Purity of the ballot must be maintained, and opportunities for fraud and interference with the ballot must be discouraged. Strict application of the rule adopted by the District Court might well encourage absentee ballot interference.

I concur in the majority opinion.

ENGLAND, Justice (concurring specially):

I agree with Chief Justice Adkins that the trial court's judgment should be affirmed.

WILLIAMS, Circuit Judge (concurring specially).

In the consideration of this cause, I was concerned to find that the most recent decisions in Florida appeared to resolve the law on questioned absentee ballots in favor of strict compliance of the statutes, even on some insignificant details, and further in favor of discounting all absentee ballots where the number of illegal ballots are sufficient to change an election, even in a large multi-county or multi-district election where the various counties' ballots are kept separ-

ately and not commingled. I agree with the observations of the trial judge in this case wherein he observed in Paragraph 5 of his judgment that if the pronouncements in the Woods and Parra cases are to be applied without regard to the particular facts in those cases it is doubtful that any close election which is decided by absentee vote in an area equal to or larger than the Second District court be sustained.

I am particularly concerned that if the decision of the First District Court of Appeal in this case were to stand as the law of Florida in elections, corruption might be encouraged. Fortunately, in this case there is no hint of corruption or evil intent on the part of any one involved in this case. I only speak of possibilities in the future. Almost all elections, to all intents and purposes, are decided by the machine vote which is usually counted on the evening of the election or in the early hours of the following morning. The absentee ballots are not counted until at least many hours after the machine vote has been counted and announced. Therefore, the counting of the absentee ballots usually becomes a mere formality. Only in close elections may the absentee ballots make the difference in the election results, and then as a kind of proceeding after the fact of the 'regular' election.

Let us consider a hypothetical situation as follows: in which there is an election for a judgeship in a district or circuit encompassing several counties; in which an election worker or official is involved in processing or counting votes; in which such official or worker is interested in one of the candidates in the election either through friendship, politics, or other close relationship; in which such official or worker's candidate appears to be the winner by a close vote after the count of the precinct or machine ballots. In such a situation it would appear to me that it might be very easy for such an official or worker to immediately destroy a sufficient number of ballots, destroy the outer envelopes of a sufficient number of ballots, or do any one of a number of acts which would involve a number of absentee ballots; such number comprising more than \*272 the margin by which his favorite candidate has apparently won the machine count. Thereby, without even knowing the contents of the ballots or caring, he immediately makes certain that his candidate has won the election. He has thus, personally and at very little risk, disenfranchised all persons who voted by absent-

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ee ballots and has thereby possibly himself decided the outcome of the election. It is bad enough that one such person is able to disenfranchise the voters in his particular county, but being able thereby to disenfranchise the voters in all of the counties in the election is unconscionable.

In the case before us there were 3,389 absentee ballots counted and returned by the Canvassing Boards of 18 counties. In each of 4 counties there were enough absentee ballots that, if invalidated, could invalidate all absentee ballots in all the counties, under the decision of the District Court of Appeal, and some prior decisions upon which its ruling was based. Such interpretation of law should be repudiated by this Court.

On one point I disagree with the trial judge and agree with the District Court of Appeal. I am not in favor of going too far in the substantial compliance application. Certain of the statutory requirements must be complied with and to be too generous in the application of the substantial compliance theory would again encourage corruption by inclusion of bad ballots. In addition to the 88 ballots found to be illegal by the trial court, I would agree with the District Court of Appeal, that all of those ballots in which the reason for voting absentee was not specifically indicated either on the application or on the return envelope should be barred.

Such a requirement goes to the very eligibility of the voter to cast an absentee ballot, and, if deemed reasonable to the legislature, should not be voted by us, which we in effect would do by overlooking the omission of the voter. These ballots add up to at most 95. (The record does not indicate whether or not the reason for voting absentee was indicated on one but not the other. It would be sufficient if the reasons were indicated in either place.)

For reasons stated by the trial judge and by Justice Adkins in his Opinion, I agree that the 453 absentee ballots of Hillsborough County and the 429 absentee ballots from Glades, Hendry and Polk Counties, are valid. The substantial compliance rule is even more applicable to actions of public officials than to the errors or omissions of the voters themselves. Voters should not be disenfranchised by the actions of public officials after proper count and certification and before a contest of the election. The improper ruling of the

court in Hillsborough County which resulted in a breach of the secrecy of the ballots should not disenfranchise the electors of Hillsborough County even though instigated by one of the parties who, for ought that appears in the record, did so in good faith, in attempting to protect his interest and to preserve a true count of ballots.

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C

Supreme Court of Oklahoma.  
Henry **BOEVERS**, Petitioner,

v.

The **ELECTION BOARD OF CANADIAN COUNTY**,  
State of Oklahoma, Consisting of Wilbur  
Owen, Chairman, Peyton W. Churn, and Don Arnold, Sec-  
retary, and Wayne Kremeier,  
Respondents.  
**No. 57416.**

Nov. 17, 1981.

Election contestant sought prerogative writ for corrective relief from announced election results in primary election for nomination to office of county commissioner. The Supreme Court, Opala, J., held that: (1) where judge regularly assigned to judicial service in county in which election contest petition was filed was asked by party to disqualify himself without cause, the judge was required to do so, and it was then incumbent upon counsel in the case to request the chief judge in the county that the chief justice assign a nonresident judge to hear the contest; (2) statutory language that "The county election board shall supervise each counting and its decision shall be final in all cases" merely indicates that there is no remedy by appeal from the board's decision, and results of election recount were not impervious to challenge on pure and unmixed question of law; and (3) in view of examination revealing that neither contested ballot bore improper marks and revealing that both clearly designated voter's intention to favor contestant, the two ballots were not void and should have been included in announced results of primary election for office of county commissioner.

Writ granted commanding that contestant be declared his party's nominee.

Hodges, J., dissented and filed opinion in which Simms, J., concurred.

West Headnotes

[\[1\] Courts](#)  **70**  
[106k70 Most Cited Cases](#)

[\[1\] Judges](#)  **51(4)**

[227k51\(4\) Most Cited Cases](#)

Where judge regularly assigned to judicial service in county in which election contest petition was filed was asked by party to disqualify himself without cause, the judge was required to do so, and it was then incumbent upon counsel in the case to request the chief judge in the county that the chief justice

assign a nonresident judge to hear the contest. [26 O.S.Supp.1980, §§ 1-101](#) et seq., [8-114](#), [8-119](#), [8-120](#).

[\[2\] Elections](#)  **260**

[144k260 Most Cited Cases](#)

Statutory language that "The county election board shall supervise each counting and its decision shall be final in all cases" merely indicates that there is no remedy by appeal from the board's decision, and results of election recount were not impervious to challenge on pure and unmixed question of law. [26 O.S.Supp.1980, §§ 1-101](#) et seq., [8-114](#), [8-118](#), [8-119](#), [8-120](#); Const.Art. 7, § 4.

[\[3\] Elections](#)  **186(4)**

[144k186\(4\) Most Cited Cases](#)

In view of examination revealing that neither contested ballot bore improper marks and revealing that both clearly designated voter's intention to favor contestant, the two ballots were not void and should have been included in announced results of primary election for office of county commissioner. Const.Art. 7, § 4; [26 O.S.Supp.1980, §§ 7-127](#), subds. 1, 3, [8-114](#), [8-118](#), [8-120](#).

**\*1333** Original proceeding for a prerogative writ.

Petitioner invokes this court's original jurisdiction to (1) secure the assignment of an out-of-county judge to hear his contest of the announced election results and (2) command the Canadian County Election board to certify him as his party's nominee for the office of county commissioner in District 1, Canadian County.

JURISDICTION ASSUMED; WRIT GRANTED.

William D. Graves, Oklahoma City, for petitioner.

**\*1334** Richard M. Fogg, Fogg, Fogg & Howard, El Reno, for respondent Wayne kremeier.

Bill James, Asst. Dist. Atty., El Reno, for respondent Cana-

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Canadian County Election Bd.

OPALA, Justice.

Henry Boevers, petitioner (contestant) seeks prerogative writ for corrective relief from the announced election results in a primary election in which he was a candidate for the Republican Party's nomination to the office of county commissioner from District 1, Canadian County. After a recount he had requested, the certified results gave contestant 227 votes, while Wayne Kremeier, the nominee (contestee) received 228 votes. Contestant challenged the correctness of the results by petition alleging irregularities sufficient in number to entitle him to a certificate of nomination.

The issues presented to us are: (1) May a party to an election contest disqualify a resident judge or judges without cause? (2) Are the announced results of an election recount impervious to any challenge on a pure and unmixed question of law? and (3) Did the county election board err as a matter of law in declaring void two ballots cast for contestant? We answer the first and last questions in the affirmative and the second in the negative.

After an unsuccessful recount, contestant sought to disqualify both of the judges regularly serving the district court in the county where the election was held from hearing his contest petition. The district judge immediately stepped down. He then "assigned" to the case the local associate district judge who refused to recuse himself. Following an adverse decision before that judge, contestant sought, in the instant proceeding, to have this court assign a nonresident judge to rehear the contest. We acceded to the request. An out-of-county judge took charge of the case and presided over the contest proceedings.

There was manifest error in the assignment of the contest by the local district judge to his resident associate. [Rule 9, Rules on Administration of Courts](#), 20 O.S.Supp.1980, Ch. 1, App. 2, provides in subdivision (d) that no disqualified judge "... shall participate in the selection of another judicial officer for assignment to that case." There was also clear error in the associate district judge's view that he was not subject to recusal without cause. The provisions of [26 O.S.Supp.1980 s 8-121 \[FN1\]](#) clearly mandate that the res-

ident judge in the county in which the contest petition is filed disqualify himself when he is challenged "by either party". The terms of [26 O.S.Supp.1980 ss 8-119](#) and [8-120 \[FN2\]](#) unmistakably anticipate that, should another judge be sought upon a local district judge's recusal, the Supreme Court shall provide the needed replacement.

[FN1](#). The terms of [s 8-121](#) are: "It shall be mandatory, whenever a petition to disqualify is filed by either party, for the district judge to disqualify himself."

[FN2](#). The pertinent provisions of [s 8-119](#) are: "If such petition is filed in the manner herein provided, the district judge of the county in which the alleged fraud occurred, or such other judge as may be assigned by the Supreme Court, shall hear and determine said issue ..." (Emphasis added).

The pertinent provisions of [s 8-120](#) are: "If said petition is filed in the manner herein provided, the district judge of the county or such other judge as may be assigned by the Supreme Court shall hear and determine said issue ..." (Emphasis added).

(1) We therefore hold that when the judge regularly assigned to judicial service in the county where a contest petition is filed is asked by either party to disqualify himself without cause, he must do so. It shall then be incumbent upon counsel in the case to request the chief judge in the county that the Chief Justice assign a nonresident judge to hear the contest.

(2) The nonresident judge assigned by the Chief Justice to preside at the contest expressed the opinion that he was powerless to effect a change in the announced results because by the provisions of s 8-114 [\[FN3\]](#) the \*1335 county election board's recount decision must be treated as "final in all cases". In this view the judge was incorrect. The quoted phrase merely indicates that there is no remedy by appeal from the board's decision. The law does not preclude a later review if the remedy invoked by the contestant is one that is authorized by the provisions of the applicable statutes, [ss 8-119](#) and [8-120](#). Nor can the reference in s 8-114 to the finality of the board's decision be regarded as a bar to our own re-examination of any question of law which arises

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from a statutorily sanctioned election contest. The power of this court stems not from legislation but from fundamental law. [Art. 7 s 4 Okl.Const.](#) In the exercise of that constitutional authority-known as our "general superintendent control" over all courts and administrative agencies-this court is empowered to re-examine the correctness of any board ruling on an issue of law which may affect the ultimate outcome of an election. [Stover v. Alfalfa County Election Board, Okl., 530 P.2d 1020, 1021 \(1975\)](#); [Sparks v. State Election Board, Okl., 392 P.2d 711, 712 \(1964\)](#).

[FN3](#). Unless the contrary is indicated, all statutory citations which follow in the text and in the footnotes are to 26 O.S.Supp.1980.

The pertinent provisions of s 8-114 are: " \* \* \* The county election board shall supervise such counting and its decision shall be final in all cases. \* \* \* " (Emphasis added).

(3) What remains to be decided here are the "pure and un-mixed" questions of law tendered, but not resolved, in the contest hearing before the assigned judge. At issue is the correctness of the election board's decision that two of the ballots cast for contestant were void and could not be included in the announced results. In the mistaken belief that the alleged miscount of votes contestant sought to rectify by his petition below did not constitute an "irregularity" within the meaning of [s 8-120](#), and that s 8-114 hence commanded him to accord absolute finality to the board's action, the assigned judge categorically declined to resolve the dispute over the two votes.

While "irregularity" is indeed difficult to dress in an all-inclusive definitional garb,[\[FN4\]](#) the broad language of [ss 8-118](#) and [8-120 \[FN5\]](#), construed together, makes it apparent that what the legislature doubtless intended is that a [s 8-120](#) contestant be free to raise any departure from, or violation of, the prescribed course of the law-other than fraud-which, when corrected, would establish either "that the contestant is lawfully entitled to be certified" as the winner or "that it is impossible to determine with mathematical certainty which candidate" is the victor.

[FN4](#). See e.g. [Hatfield v. Hatfield, 59 Okl., 132, 158 P. 942, 944 \(1916\)](#); [Duncan v. Wilkins, 103](#)

[Okl., 221, 229 P. 801, 802 \(1924\)](#); [Nation v. Savely, 127 Okl., 117, 260 P. 32, 34 \(1927\)](#) and [Babb v. City of Wichita, 172 Kan. 416, 241 P.2d 755, 759 \(1952\)](#).

[FN5](#). The pertinent provisions of [s 8-118](#) are: "In the event a candidate contests the correctness of the announced results of an election by alleging fraud or any other irregularities ..." (Emphasis added).

The pertinent provisions of [s 8-120](#) are: "When a petition alleging irregularities other than fraud is filed, said petition must allege a sufficient number of irregularities and of such nature as to:

1. Prove that the contestant is lawfully entitled to be certified ...
2. Prove that it is impossible to determine with mathematical certainty which candidate is entitled to be certified ...".

The essential parts of the two ballots in contest are shown in reproduction immediately below.

**OFFICIAL REPUBLICAN BALLOT \*1336 The**

Primary Election, September 1, 1981  
CANADIAN COUNTY

COMMISSIONER DISTRICT 1  
(Vote for One)

contestee  WAYNE KREMEIER  
contestant  HENRY BOEVERS

**OFFICIAL REPUBLICAN BALLOT**

Primary Election, September 1, 1981  
CANADIAN COUNTY

COMMISSIONER DISTRICT 1  
(Vote for One)

contestee  WAYNE KREMEIER  
contestant  HENRY BOEVERS

upper ballot in contest was rejected because it was believed to have a "distinguishing mark". The terms of s 7-127(1) do provide that such a ballot "shall not be counted for any office or question thereon". The statutory provisions which invalidate ballots bearing a "distinguishing mark" have a long legislative history. They are also declaratory of the common

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law. [FN6] The term is one of art. It does not include every form of excess material penned on the ballot but not needed to show the voter's designated intention. Under the proscribed rubric fall only those marks-not used in an attempt to indicate a voter's choice-which show on the face of the ballot, or from evidence aliunde, a deliberate intent of having been placed there to set the ballot apart from others.[FN7] The upper ballot in contest here does not evince any such unlawful design. The lines drawn across contestee's name are all compatible with the designated intent of the voter to favor contestant's candidacy. They are plainly consistent with the choice indicated by the vote cast. Contrary proof is absent.

[FN6. McClelland v. Erwin, 16 Okl., 612, 86 P. 283, 287 \(1906\); Moss v. Hunt, 47 Okl. 1, 145 P. 760, 163 \(1915\).](#)

[FN7. A ballot bearing distinguishing marks is capable of being identified. The purpose of the rule making such ballots void is to protect the secrecy of elections and to discourage bribery, fraud or corruption. Gentry v. Reinhardt, 350 Ill. 582, 183 N.E. 631 \(1932\).](#)

The lower ballot in contest here does no more than evince the voter's designated intention to favor contestant's candidacy. It is manifestly valid. The provisions of s 7-127(3) clearly include, among "valid markings", "a circle or square which has been blackened in ink, even if the entire circle or square is not filled and even if the blackened portion may extend beyond the boundaries of the circle or square." (Emphasis added). The markings used are within the permissible limits of the statutory language in s 7-127(3).

Neither ballot in contest here bears improper marks and both clearly designate the voter's intention to favor contestant.

Writ granted commanding respondent-board to declare contestant to be his party's nominee.

IRWIN, C. J., BARNES, V. C. J., and LAVENDER, DOOLIN and HARGRAVE, JJ., concur.

HODGES and SIMMS, JJ., dissent.

HODGES, Justice, dissenting.

I would allow the count of the upper ballot but would disallow the lower ballot, resulting in a tie vote to be governed by [26 O.S.Supp.1977 s 8-105](#).

The markings on the lower ballot, in my opinion, completely distort the intention of the voter.

I am authorized to state that Justice SIMMS concurs in the views herein expressed.

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## H

Supreme Court of Connecticut.  
Steven BORTNER  
v.  
TOWN OF WOODBRIDGE et al.  
No. 16114.

Argued June 11, 1999.  
Decided Aug. 17, 1999.

Unsuccessful write-in candidate for elementary board of education brought action against town, registrars of voters, and successful candidates, challenging election results based on alleged voting machine malfunctions. The Superior Court, Judicial District of New Haven, [Pittman, J.](#), ordered new election. Defendants appealed. The Supreme Court, [Borden, J.](#), held that: (1) trial court abused its discretion in refusing to open evidence to consider election records offered by defendants, and (2) new election was not warranted.

Reversed and remanded with direction.

[Berdon, J.](#), concurred and filed opinion.

### West Headnotes

#### [1] Elections 8.1

[144k8.1 Most Cited Cases](#)

Purpose of election statutes is to ensure the true and most accurate count possible of votes for candidates in the election.

#### [2] Elections 227(8)

[144k227\(8\) Most Cited Cases](#)

When individual ballot is questioned, no voter is to be disfranchised on a doubtful construction, and statutes tending to limit exercise of ballot should be liberally construed in his or her favor.

#### [3] Elections 298(1)

[144k298\(1\) Most Cited Cases](#)

Election laws generally vest primary responsibility for ascertaining intent and will of voters on election officials, subject to court's appropriate scope of re-

view when officials' determination is challenged in a judicial proceeding.

#### [4] Elections 227(1)

[144k227\(1\) Most Cited Cases](#)

No losing candidate is entitled to the electoral equivalent of a "mulligan," which is a free shot sometimes awarded to a golfer in nontournament play when preceding shot was poorly played.

#### [5] Elections 298(3)

[144k298\(3\) Most Cited Cases](#)

(Formerly [144k227\(1\)](#))

To secure judicial order for new municipal election, challenger is not required to establish that, but for irregularities that he has established as a factual matter, he would have prevailed in election; instead, court must be persuaded that (1) there were substantial errors in rulings of election official or officials, or substantial mistakes in count of votes, and (2) as a result of those errors or mistakes, reliability of result of election, as determined by election officials, is seriously in doubt. [C.G.S.A. § 9-328](#).

#### [6] Elections 305(2)

[144k305\(2\) Most Cited Cases](#)

Although underlying facts are to be established by a preponderance of evidence and are subject on appeal to the clearly erroneous standard, ultimate determination of whether, based on underlying facts, a new municipal election is called for, that is, whether there were substantial violations of statute authorizing court to order new election that render reliability of result of election seriously in doubt, is a mixed question of fact and law that is subject to plenary review on appeal. [C.G.S.A. § 9-328](#); [Practice Book 1998, § 60-5](#).

#### [7] Statutes 181(1)

[361k181\(1\) Most Cited Cases](#)

#### [7] Statutes 188

[361k188 Most Cited Cases](#)

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Process of statutory interpretation involves a reasoned search for intention of legislature; in other words, Supreme Court seeks to determine, in a reasoned manner, the meaning of statutory language as applied to facts of case, including question of whether language actually applies.

#### [8] Statutes 188

[361k188 Most Cited Cases](#)

In seeking to determine meaning of statute, Supreme Court looks to words of statute itself, to legislative history and circumstances surrounding its enactment, to legislative policy it was designed to implement, and to its relationship to existing legislation and common law principles governing same general subject matter.

#### [9] Trial 68(1)

[388k68\(1\) Most Cited Cases](#)

Whether or not a trial court will permit further evidence to be offered after the close of testimony in case is a matter resting within its discretion.

#### [10] Trial 66

[388k66 Most Cited Cases](#)

#### [10] Trial 71

[388k71 Most Cited Cases](#)

In ordinary situation where trial court feels that, by inadvertence or mistake, there has been a failure to introduce available evidence upon material issue in case of such a nature that in its absence there is serious danger of a miscarriage of justice, court may properly permit that evidence to be introduced at any time before case has been decided, or after decision has been rendered.

#### [11] Elections 293(1)

[144k293\(1\) Most Cited Cases](#)

Town, registrars of voters, and successful candidates for elementary board of education were entitled to open the evidence to present election record documents in support of their opposition to unsuccessful write-in candidate's action for a new election on basis of alleged voting machine malfunctions; documents offered conclusively demonstrated that it

was impossible for voting machine to have been out of paper for write-in votes since early morning, as found by trial court, there was no special need for speed and finality in case at time evidence was offered, which was nearly one month before new election was to be held. *C.G.S.A. § 9-328*.

#### [12] Elections 227(1)

[144k227\(1\) Most Cited Cases](#)

"Ruling of election official" that, if erroneous, can form basis for order of new municipal election must involve some act or conduct by official that: (1) decides a question presented to the official, or (2) interprets some statute, regulation, or other authoritative legal requirement, applicable to election process. *C.G.S.A. § 9-328*.

#### [13] Elections 227(8)

[144k227\(8\) Most Cited Cases](#)

Any failure on part of election officials to continue throughout the day to inspect voting machines in use for purpose of ensuring that there were not mechanical problems with those machines was not an erroneous "ruling of election official" that could form basis for grant of new election, in action brought by unsuccessful write-in candidate for elementary board of education; such a failure, if it existed, did not decide, either explicitly or implicitly, a question presented to officials regarding election process, it did not interpret any statute, regulation, or other authoritative legal statement or requirement applicable to that process, and it could not be regarded as anything more than exercise of election day discretion regarding proper mechanical functioning of voting machines. *C.G.S.A. § 9-328*.

#### [14] Elections 227(8)

[144k227\(8\) Most Cited Cases](#)

Mechanical failure of a voting machine properly to record write-in votes may constitute a mistake in count of votes which, if substantial, could justify grant of new municipal election. *C.G.S.A. § 9-328*.

#### [15] Elections 227(8)

[144k227\(8\) Most Cited Cases](#)

Any mechanical failure of voting machines prop-

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erly to record write-in votes for unsuccessful candidate for elementary board of education did not justify grant of new election; mistakes in count of vote were not substantial, and, even if substantial, evidence fell short of establishing that those mistakes rendered reliability of result of election, as reported by election officials, seriously in doubt. C.G.S.A. § 9-328.

\*\*105 \*243 William C. Longa, Woodbridge, and Donald W. Celotto, Jr., New Haven, for the appellants (defendants).

\*\*106 Barbara L. Cox, New Haven, with whom was William F. Gallagher, Syracuse, NY, for the appellee (plaintiff).

Before CALLAHAN, C.J., and BORDEN, BERDON, NORCOTT and KATZ, JJ.

BORDEN, J.

This appeal concerns a contested municipal election for the elementary board of education for the town of Woodbridge. The trial court rendered a judgment ordering a new election to be held, and we expedited the defendants' [FN1] appeal. Following the filing \*244 of simultaneous briefs and oral argument before this court, we announced the decision of this court from the bench on June 11, 1999, reversing the judgment of the trial court and ordering that the results of the election were to stand, with a written opinion to be filed in due course. [FN2] Hence, this opinion.

FN1. The defendants in the trial court were: the town of Woodbridge; the four successful candidates in the election in question, namely, Bonna M. Greene, James M. Carolan, Eleanor Sanders Sheehy and Marianne Vahey; Mary Lou Winnick, the head moderator of the election; Stephanie Ciarleglio, the town clerk of Woodbridge; Pamela Blessinger, the Democratic registrar of voters of Woodbridge; and L. Christine Laydon, the Republican registrar of voters of Woodbridge. All of the de-

fendants, with the exception of Vahey, have appealed.

FN2. The decision of the this court announced from the bench was as follows: "The judgment of the trial court is reversed. The results of the election of May 3, 1999, stand, and a written opinion will follow shortly."

The principal issue in this appeal involves the standard to be applied under General Statutes § 9-328 [FN3] for \*245 a trial court to order a new election. The defendants \*\*107 appeal [FN4] from the judgment of the trial court ordering a new election, in response to the complaint of the plaintiff, Steven Bortner, the sole unsuccessful candidate in the election. [FN5] The defendants claim that the trial court improperly: (1) found that one of the voting machines was out of paper for write-in voting during a significant part of the voting hours; (2) refused to open the evidence, after its decision, to admit certain election records regarding that machine; (3) determined that a new election was justified pursuant to § 9-328; and (4) ordered a new election at which all of the candidates \*246 would be required to run, rather than just the plaintiff and the successful candidate with the next closest number of votes to him. We reverse the judgment of the trial court and remand the case with direction to render judgment for the defendants.

FN3. General Statutes § 9-328 provides: "Any elector or candidate claiming to have been aggrieved by any ruling of any election official in connection with an election for any municipal office or a primary for justice of the peace, or any elector or candidate claiming that there has been a mistake in the count of votes cast for any such office at such election or primary, or any candidate in such an election or primary claiming that he is aggrieved by a violation of any provision of sections 9-355, 9-357 to 9-361, inclusive, 9-364, 9-364a or 9-365 in the casting of

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absentee ballots at such election or primary, may bring a complaint to any judge of the Superior Court for relief therefrom. In any action brought pursuant to the provisions of this section, the complainant shall send a copy of the complaint by first-class mail, or deliver a copy of the complaint by hand, to the State Elections Enforcement Commission. If such complaint is made prior to such election or primary, such judge shall proceed expeditiously to render judgment on the complaint and shall cause notice of the hearing to be given to the Secretary of the State and the State Elections Enforcement Commission. If such complaint is made subsequent to such election or primary, it shall be brought within fourteen days of such election or primary to any judge of the Superior Court, in which he shall set out the claimed errors of the election official, the claimed errors in the count or the claimed violations of said sections. Such judge shall forthwith order a hearing to be had upon such complaint, upon a day not more than five nor less than three days from the making of such order, and shall cause notice of not less than three nor more than five days to be given to any candidate or candidates whose election or nomination may be affected by the decision upon such hearing, to such election official, the Secretary of the State, the State Elections Enforcement Commission and to any other party or parties whom such judge deems proper parties thereto, of the time and place for the hearing upon such complaint. Such judge shall, on the day fixed for such hearing and without unnecessary delay, proceed to hear the parties. If sufficient reason is shown, he may order any voting machines to be unlocked or any ballot boxes to be opened and a recount of the votes cast, including absentee ballots, to be made. Such judge shall thereupon, if he

finds any error in the rulings of the election official or any mistake in the count of the votes, certify the result of his finding or decision to the Secretary of the State before the tenth day succeeding the conclusion of the hearing. Such judge may order a new election or primary or a change in the existing election schedule. Such certificate of such judge of his finding or decision shall be final and conclusive upon all questions relating to errors in the ruling of such election officials, to the correctness of such count, and, for the purposes of this section only, such claimed violations, and shall operate to correct the returns of the moderators or presiding officers, so as to conform to such finding or decision, except that this section shall not affect the right of appeal to the Supreme Court and it shall not prevent such judge from reserving such questions of law for the advice of the Supreme Court as provided in section 9-325. Such judge may, if necessary, issue his writ of mandamus, requiring the adverse party and those under him to deliver to the complainant the appurtenances of such office, and shall cause his finding and decree to be entered on the records of the Superior Court in the proper judicial district."

**FN4.** The defendants purported to appeal directly to this court pursuant to [General Statutes § 51-199\(b\)\(5\)](#), which, insofar as it might apply to the present case, provides for a direct appeal to this court in "any election ... dispute brought to the Supreme Court pursuant to ... section 9-325...." Technically, however, this is not an appeal pursuant to [General Statutes § 9-325](#) because such an appeal involves a certification, by the trial court to the Chief Justice of this court, of the trial court's findings of fact and rulings of law, followed by a special session of this court, none of which

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occurred in this case. Cf. *Wrinn v. Dunleavy*, 186 Conn. 125, 130-31, 440 A.2d 261 (1982). Nonetheless, we treat this appeal, which is from the final judgment of the trial court, as if it had been filed in the Appellate Court and we had transferred it from that court pursuant to § 51-199(c).

**FN5.** There was also a registered write-in candidate for the Amity regional board of education, who was unsuccessful but did not challenge the results of that election.

On May 13, 1999, the plaintiff filed the complaint in this case challenging the result of the election held on May 3, 1999. The case was tried to the trial court on May 19 and 21, 1999, and on May 21, the trial court issued an oral memorandum of decision ordering a new election to be held on June 22, 1999. This appeal followed.

Certain facts are undisputed. In the May 3, 1999 election, there were five candidates for four available positions on the Woodbridge elementary board of education (board). **FN6** The plaintiff was one of the five candidates, and was the only registered write-in candidate pursuant to [General Statutes § 9-373a](#). **FN7** Prior to the election, **\*\*108** all **\*247** of the voting machines had been inspected and certified by the office of the secretary of the state in accordance with state law, and all of the machines had been inspected and serviced by the town's election machine mechanic. In addition, prior to the election, all of the candidates had been afforded the opportunity to inspect the machines. The plaintiff took that opportunity, and did not make any complaint to any election official. Furthermore, prior to the election, all of the machines were tested and were functioning properly, including the recording of write-in votes.

**FN6.** In addition to the contest for the board, the municipal election determined the following offices: first selectman; selectmen; board of assessment appeals; zoning board of appeals; zoning board of ap-

peals alternate; and regional board of education.

**FN7.** [General Statutes § 9-373a](#) provides: "Any person desiring to be a write-in candidate for any state, district or municipal office to be filled at any regular election shall register his candidacy with the Secretary of the State on a form prescribed by the secretary. The registration shall include the candidate's name and address, the designation and term of the office sought, a statement of consent to the candidacy, and any other information which the secretary deems necessary. In the case of a write-in candidacy for the office of Governor or Lieutenant Governor, the registration shall include a candidate for each of those offices, or shall be void. The registration shall not include a designation of any political party. The registration shall be filed with the secretary not more than ninety days prior to the election at which the office is to be filled and not later than four o'clock p.m. on the fourteenth day preceding the election, or the registration shall be void. No person nominated for an office by a major or minor party or by nominating petition shall register as a write-in candidate for that office under the provisions of this section, and any registration of a write-in candidacy filed by such a person shall be void. Notwithstanding any provision of this section to the contrary, any person desiring to be a write-in candidate for the municipal office of town meeting member in any town having a representative town meeting which has seventy-five or more members shall register his candidacy with the town clerk of such town not later than the last business day preceding such election."

The polling place was open from 6 a.m. to 8 p.m. There were eight voting machines operating at the

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opening, plus one replacement machine. Each elector was entitled to cast one vote for each of any two of the five candidates for the board. A total of 3057 electors cast their ballots in the election. The election returns showed the following votes for the various candidates for the board: (1) 1250 votes for James M. Carolan; (2) 1142 votes for Marianne Vahey; (3) 1081 votes for Eleanor Sanders Sheehy; (4) 987 votes for Bonna M. Greene; and (5) 931 votes for the plaintiff. [FN8] Therefore, according to the vote count, Carolan, Vahey, Sheehy and Greene would have been elected, and the plaintiff would have lost to Greene, the next closest successful candidate, by fifty-six votes. The plaintiff did not request a recanvass pursuant to [General Statutes § 9-311](#), [FN9] and **\*\*109 \*248** none was required by law pursuant to **\*249**[General Statutes § 9-311a](#). [FN10]

**FN8.** Of the 931 votes cast for the plaintiff, 872 resulted from write-in votes on the voting machines, and 59 votes were cast by electors using absentee ballots.

**FN9.** [General Statutes § 9-311](#) provides: "(a) If, within three days after an election, it appears to the moderator that there is a discrepancy in the returns of any voting district, such moderator shall forthwith within said period summon, by written notice delivered personally, the recanvass officials, consisting of the mechanic or mechanics, at least two checkers of different political parties and at least two absentee ballot counters of different political parties who served at such election, and the registrars of voters and the clerk of the municipality in which the election was held. Such written notice shall require such clerk to bring with him the depository envelopes required by section 9-150a, the package of write-in ballots provided for in section 9-310, the absentee ballot applications, the list of absentee ballot applications, the registry list and the moderators'

returns and shall require such recanvass officials to meet at a specified time not later than the fifth business day after such election to recanvass the returns of a voting machine or voting machines or absentee ballots or write-in ballots used in such district in such election. If any of such recanvass officials are unavailable at the time of the recanvass, the registrar of voters of the same political party as that of the recanvass official unable to attend shall designate another elector having previous training and experience in the conduct of elections to take his place. Before such recanvass is made, such moderator shall give notice, in writing, to the chairman of the town committee of each political party which nominated candidates for the election, and, in the case of a state election, to the Secretary of the State, of the time and place where such recanvass is to be made; and each such chairman may send two representatives to be present at such recanvass. Such representatives may observe, but no one other than a recanvass official may take part in the recanvass. If any irregularity in the recanvass procedure is noted by such a representative, he shall be permitted to present evidence of such irregularity in any contest relating to the election.

"(b) The moderator shall determine the place or places where the recanvass shall be conducted and, if such recanvass is held before the machines are boxed and collected in the manner required by section 9-266, the moderator may either require that such recanvass of such machines be conducted in each place where the machines are located, or he may require that they be removed to one central place, where such recanvass shall be conducted. All recanvassing procedures shall be open to public observation. Such recanvass officials shall, in the presence of such

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moderator and clerk, make a record of the number on the seal and the number on the protective counter, if one is provided, on each voting machine specified by such moderator. Such clerk in the presence of such moderator shall turn over the keys of each such machine to such recanvass officials, and such recanvass officials, in the presence of such clerk and moderator, shall immediately proceed to open the counter compartment of each such machine and, without unlocking such machine against voting, recanvass the vote cast thereon, and shall then open the package of absentee ballots and recanvass the vote cast thereon. In the course of the recanvass of the absentee ballot vote the recanvass officials shall check all outer envelopes for absentee ballots against the inner envelopes for such ballots and against the registry list to verify postmarks, addresses and registry list markings and also to determine whether the number of envelopes from which absentee ballots have been removed is the same as the number of persons checked as having voted by absentee ballot. The write-in ballots shall also be recanvassed at this time. All of the recanvass officials shall use the same forms for tallies and returns as were used at the original canvass and the absentee ballot counters shall also sign the tallies.

"(c) The votes shall be announced and recorded in the manner prescribed in section 9-309 on return forms provided by the municipal clerk and appended thereto shall be a statement signed by the moderator indicating the time and place of the recanvass and the names, addresses, titles and party affiliations of the recanvass officials. The write-in ballots shall be replaced in a properly secured sealed package. Upon the completion of such recanvass, such machine shall be locked and sealed, the keys thereof shall immediately be returned to

such clerk and such machine shall remain so locked until the expiration of fourteen days after such election or for such longer period as is ordered by a court of competent jurisdiction. The absentee ballots shall be replaced in their wrappers and be resealed by the moderator in the presence of the recanvass officials. Upon the completion of such recanvass, such moderator and at least two of the recanvass officials of different political parties shall forthwith prepare and sign such return forms which shall contain a written statement giving the result of such recanvass for each machine and each package of absentee ballots whose returns were so recanvassed, setting forth whether or not the original canvass was correctly made and stating whether or not the discrepancy still remains unaccounted for. Such return forms containing such statement shall forthwith be filed by the moderator in the office of such clerk. If such recanvass reveals that the original canvass of returns was not correctly made, such return forms containing such statement so filed with the clerk shall constitute a corrected return. In the case of a state election, a recanvass return shall be made in duplicate on a form prescribed and provided by the Secretary of the State, and the moderator shall file one copy with the Secretary of the State and one copy with the town clerk not later than ten days after the election. Such recanvass return shall be substituted for the original return and shall have the same force and effect as an original return.

"(d) As used in this section, (1) 'moderator' means, in the case of municipalities not divided into voting districts, the moderator of the election and, in the case of municipalities divided into voting districts, the head moderator of the election, and (2) 'registrars of voters', in a municipality where there are different registrars of voters for

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different voting districts, means the registrars of voters in the voting district in which, at the last-preceding election, the presiding officer for the purpose of declaring the result of the vote of the whole municipality was moderator."

**FN10. General Statutes § 9-311a** provides: "For purposes of this section, state, district and municipal offices shall be as defined in section 9-372 except that the office of presidential elector shall be deemed a state office. Forthwith after a regular or special election for municipal office, or forthwith upon tabulation of the vote for state and district offices by the Secretary of the State, when at any such election the plurality of an elected candidate for an office over the vote for a defeated candidate receiving the next highest number of votes was either (1) less than a vote equivalent to one-half of one per cent of the total number of votes cast for the office but not more than two thousand votes, or (2) less than twenty votes, there shall be a recanvass of the returns of the voting machine or voting machines and absentee ballots used in such election for such office unless such defeated candidate or defeated candidates, as the case may be, for such office file a written statement waiving this right to such canvass with the municipal clerk in the case of a municipal office, or with the Secretary of the State in the case of a state or district office. In the case of state and district offices, the Secretary of the State upon tabulation of the votes for such offices shall notify the town clerks in the state or district, as the case may be, of the state and district offices which qualify for an automatic recanvass and shall also notify each candidate for any such office. When a recanvass is to be held the municipal clerk shall promptly notify the moderator, as defined in [section 9-311](#), who

shall proceed forthwith to cause a recanvass of such returns of the office in question in the same manner as is provided in said [section 9-311](#). In addition to the notice required under [section 9-311](#), the moderator shall before such recanvass is made give notice in writing of the time when, and place where, such recanvass is to be made to each candidate for a municipal office which qualifies for an automatic recanvass under this section. Nothing in this section shall preclude the right to judicial proceedings on behalf of a candidate under any provision of chapter 149. For the purposes of this section, 'the total number of votes cast for the office' means in the case of multiple openings for the same office, the total number of electors checked as having voted in the state, district, municipality or political subdivision, as the case may be. When a recanvass of the returns for an office for which there are multiple openings is required by the provisions of this section, the returns for all candidates for all openings for the office shall be recanvassed. No one other than a recanvass official shall take part in the recanvass. If any irregularity in the recanvass procedure is noted by a candidate, he shall be permitted to present evidence of such irregularity in any contest relating to the election."

**\*\*110 \*250** In his complaint, the plaintiff, relying on [§ 9-328](#), [\[FN11\]](#) alleged that voters desiring to vote for him were prevented from doing so by voting machine malfunctions, which included the following: one or more of the machines ran out of paper for casting write-in ballots; on one or more of the machines, the sections for write-in candidates were not accessible because the metal **\*251** doors would not open; on one or more of the machines, the paper for the write-in candidates did not advance properly; and on one or more of the machines, the write-in slots were not readily visible to or accessible for voters of short stature. The

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plaintiff alleged further that, as a result of these irregularities and malfunctions, and "various ... rulings of election officials, there has been a failure to record votes and, consequently, a mistake in the count of the votes cast at [the] election...." The plaintiff also alleged that, "[b]ut for the improper actions of the elected officials and the irregularities which occurred, there is a substantial likelihood that the result of said election would have been different."

**FN11.** The plaintiff also made certain allegations regarding purported failures "to conform to hardware standards imposed by state regulation, including [§ 9-241-20 of the Regulations of Connecticut State Agencies]." The trial court made no findings or legal conclusions regarding this claim, and the plaintiff has not pursued it on appeal. We therefore disregard it.

On the basis of these allegations, the trial court held an expedited trial **FN12** on May 19 and 21, 1999. At the conclusion of the trial, the court issued an oral memorandum of decision vacating the results of the election, and ordering a new election, to be held on June 22, 1999, for *all* candidates for the board in the May 3, 1999 election. **FN13** The court found "that there were complaints throughout the day to election officials, not all of which were properly recorded and to which not all were attended in an expeditious and appropriate fashion." In support of this general finding, the court made the following "underlying factual findings." On voting machine number 143719, the paper for write-in candidates was not advancing at 6:50 a.m. Although that machine was taken out of service and replaced at that \*252 time, "that issue that early in the day affecting certainly one candidate more than others--in other words, there was only one candidate that depended on paper at that point or that kind of paper **FN14** ... should have served as some sort of notice to the election officials that scrutiny of the mechanics of all of the machines needed to be undertaken throughout the day with some care."

**FN12.** Because of the expedited nature of the proceedings, the defendants did not file an answer to the complaint.

**FN13.** On appeal, the town claims that, if a new election were to be required, it should be confined to a run-off between the plaintiff and Greene, the candidate who received the next closest number of votes. The plaintiff agrees with this contention. The other defendants, however, who are represented by separate counsel, claim that a run-off election would not be appropriate. In view of our conclusion that a new election is not warranted, we need not reach this issue.

**FN14.** The evidence was undisputed that, in addition to the plaintiff, there was one other write-in candidate, who was competing for a position on the regional board of education. In view of this evidence, we regard the statement of the trial court as referring only to the candidates for the elementary board of education.

The trial court also found that voting machine number 150231 had a significant \*\*111 problem throughout the day, in that there were reports to election officials concerning that machine at 1:40 p.m., 2:50 p.m. and 3 p.m., and the 1:40 p.m. report involved a perceived inability to cast a write-in vote for the plaintiff. The court further found that this machine "never continued to function adequately," and that it was not checked at 3 p.m., although there was a complaint regarding it at that time.

The trial court also found that voting machine number 106949 had a paper jam at 4:45 p.m., when it was taken out of service. The court noted that "the only candidate that depended upon paper of this kind was the write-in candidate," namely, the plaintiff. See footnote 5 of this opinion.

The trial court found further that, at 6:30 p.m., voting machine number 107017 had no paper and was

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taken out of service. The court also found "as a fact that [this machine] had been out of paper since at least 8:30 a.m."

On the basis of these specific findings, the trial court concluded "that there were mistakes in the count and that to the extent that election officials in a de facto manner ruled throughout the day that they did not need to continue to inspect the voting machines in use in \*253 order to ensure that there were not problems with the mechanics, in particular of the write-in votes, [there] were errors." The court also concluded that, "[g]iven the close vote, the court [felt] it has really no mandate in this situation other than to order a new election."

On May 27, 1999, the defendants moved to open the evidence to permit them to introduce certain official records of the election that, according to their representations, contained an accurate count of the number of voters who had entered each voting machine on an hourly basis, and that would demonstrate conclusively that one of the trial court's findings, namely, that voting machine number 107017 had been out of paper since at least 8:30 a.m., was incorrect. The defendants attached copies of those records to their motion, represented that the records constituted "business record evidence," and asserted that the records had been omitted from the evidence by inadvertence or mistake, and that their absence would result in a serious danger of a miscarriage of justice. The plaintiff opposed the motion, pointing out to the court that, among other reasons, the defendants had produced the records at trial in response to the plaintiff's subpoena, but had not offered them. The court denied the defendants' motion.

The defendants raise a number of claims on appeal. We conclude that: (1) the trial court abused its discretion in refusing to open the evidence to consider the election records offered by the defendants; and (2) the record does not support the conclusion that a new election was warranted under § 9-328. Accordingly, we reverse the judgment of the trial court.

## I

Section 9-328 cannot be read in a vacuum. It must be read against its fundamental governmental background. That background counsels strongly that a court should be very cautious before exercising its power under the \*254 statute to vacate the results of an election and to order a new election.

[1][2][3] First, under our democratic form of government, an election is the paradigm of "the democratic process designed to ascertain and implement the will of the people." *In re Election for Second Congressional District*, 231 Conn. 602, 625, 653 A.2d 79 (1994). The purpose of the election statutes "is to ensure the true and most accurate count possible of the votes for the candidates in the election." *Id.*, at 633, 653 A.2d 79. Those statutes rest on "the bedrock principle that the purpose of the voting process is to ascertain the intent of the voters." *Id.*, at 621, 653 A.2d 79. In implementing that process, moreover, when an individual ballot is questioned, "no voter is to be disfranchised on \*\*112 a doubtful construction, and statutes tending to limit the exercise of the ballot should be liberally construed in his [or her] favor." (Internal quotation marks omitted.) *Id.*, at 653, 653 A.2d 79. Our election laws, moreover, generally vest the primary responsibility for ascertaining that intent and will on the election officials, subject, of course, to the court's appropriate scope of review when the officials' determination is challenged in a judicial proceeding. See *id.*, at 658, 653 A.2d 79. We look, therefore, first and foremost to the election officials to manage the election process so that the will of the people is carried out.

Second, § 9-328 authorizes the one unelected branch of government, the judiciary, to dismantle the basic building block of the democratic process, an election. Thus, "[t]he delicacy of judicial intrusion into the electoral process"; *Lobsenz v. Davidoff*, 182 Conn. 111, 124, 438 A.2d 21 (1980) (*Peters, J.*, dissenting); strongly suggests caution in undertaking such an intrusion. As we have indicated, therefore, § 9-328 provides for remedies

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only "under narrowly defined circumstances"; *Scheyd v. Bezrucik*, 205 Conn. 495, 496-97, 535 A.2d 793 (1987); and for "limited types of claims...." *Id.*, at 502, 535 A.2d 793.

\*255 Third, § 9-328 requires a court, in determining whether to order a new election, to arrive at a sensitive balance among three powerful interests, all of which are integral to our notion of democracy, but which in a challenged election may pull in different directions. One such interest is that each elector who properly cast his or her vote in the election is entitled to have that vote counted. Correspondingly, the candidate for whom that vote properly was cast has a legitimate and powerful interest in having that vote properly recorded in his or her favor. When an election is challenged on the basis that particular electors' votes for a particular candidate were not properly credited to him, these two interests pull in the direction of ordering a new election. The third such interest, however, is that of the rest of the electorate who voted at a challenged election, and arises from the nature of an election in our democratic society, as we explain in the discussion that follows. That interest ordinarily will pull in the direction of letting the election results stand.

An election is essentially--and necessarily--a snapshot. It is preceded by a particular election campaign, for a particular period of time, which culminates on a particular date, namely, the officially designated election day. In that campaign, the various parties and candidates presumably concentrate their resources--financial, political and personal--on producing a victory on that date. When that date comes, the election records the votes of those electors, and only those electors, who were available to and took the opportunity to vote--whether by machine lever, write-in or absentee ballot--on that particular day. Those electors, moreover, ordinarily are motivated by a complex combination of personal and political factors that may result in particular combinations of votes for the various candidates who are running for the various offices.

[4] \*256 The snapshot captures, therefore, only the results of the election conducted on the officially designated election day. It reflects the will of the people as recorded on that particular day, after that particular campaign, and as expressed by the electors who voted on that day. Those results, however, although in fact reflecting the will of the people as expressed on that day and no other, under our democratic electoral system operate nonetheless to vest power in the elected candidates for the duration of their terms. That is what we mean when we say that one candidate has been "elected" and another "defeated." No losing candidate is entitled to the electoral equivalent of a "mulligan." [FN15]

FN15. A "mulligan" is "a free shot sometimes awarded a golfer in nontournament play when the preceding shot has been poorly played." Webster's Third New International Dictionary (1971).

\*\*113 Moreover, that snapshot can never be duplicated. The campaign, the resources available for it, the totality of the electors who voted in it, and their motivations, inevitably will be different a second time around. Thus, when a court orders a new election, it is really ordering a *different* election. It is substituting a different snapshot of the electoral process from that taken by the voting electorate on the officially designated election day.

Consequently, all of the electors who voted at the first, officially designated election--3057 electors in the present case--have a powerful interest in the stability of that election because the ordering of a new and different election would result in *their* election day disfranchisement. The ordering of a new and different election in effect disfranchises all of those who voted at the first election because their validly cast votes no longer count, and the second election can never duplicate the complex combination of conditions under which they cast their ballots.

\*257 All of these reasons strongly suggest that, although a court undoubtedly has the power to order a new election pursuant to § 9-328 and should do so

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if the statutory requirements have been met, the court should exercise caution and restraint in deciding whether to do so. A proper judicial respect for the electoral process mandates no less. With these principles in mind, therefore, we turn to the dispositive issues of this appeal.

## II

We next address the burden that § 9-328 places on a plaintiff who seeks to secure a new election. The defendants claim that the plaintiff was obligated to establish that, as a result of any proven irregularities cognizable by the statute, he would have won the election, that is, he would have received at least fifty-seven more votes than he did receive and, therefore, would have received more votes than Greene. The plaintiff, although not offering on appeal [FN16] any standard under the statute, [FN17] claims that the trial court was justified on the facts of this case in ordering a new election.

**FN16.** In his complaint in the trial court, the plaintiff alleged that but for the various electoral improprieties, "there is a *substantial likelihood* that the result of [the] election would have been different." (Emphasis added.) On appeal, however, the plaintiff does not revive this standard, claiming instead that "the malfunctions of the voting machines' write-in functions so compromised the integrity of the voting process that it was *impossible to make an accurate count* of the votes intended to be cast for [the plaintiff]." (Emphasis added.)

**FN17.** The defendant relies, instead, on the language found in a *different* statute, namely, [General Statutes § 9-329a](#), which governs challenges to primary elections. The plaintiff argues that the legislature, by including a mandate in § 9-329a that a new election may be ordered only when the court determines that "the result of such primary might have been different," and not including similar language in § 9-328, "has clearly signaled that the challenger to

the municipal election need not prove that the result would have been different without the mistake in the count or erroneous rulings." We need not decide in the present case whether the two statutes contain the same or different standards. Instead, we decide the question of the plaintiff's burden by focusing on the language and legislative history of the statute at issue in this case, namely, § 9-328, as well as the role that this statute plays in the overall electoral process.

[5][6] \*258 We conclude that § 9-328 does not require a challenger, in order to secure a judicial order for a new election, to establish that, but for the irregularities that he has established as a factual matter, he would have prevailed in the election. We conclude instead that, in order for a court to overturn the results of an election and order a new election pursuant to § 9-328, the court must be persuaded that: (1) there were substantial violations of the requirements of the statute, which we discuss in more detail in parts IV and V of \*\*114 this opinion; and (2) as a result of those violations, the reliability of the result of the election is seriously in doubt. We conclude further that, although the underlying facts are to be established by a preponderance of the evidence and are subject on appeal to the clearly erroneous standard; see [Practice Book § 60-5](#); the ultimate determination of whether, based on those underlying facts, a new election is called for--that is, whether there were substantial violations of the statute that render the reliability of the result of the election seriously in doubt--is a mixed question of fact and law that is subject to plenary review on appeal.

[7][8] The determination of the standard to be applied under the statute presents a question of statutory interpretation. "The process of statutory interpretation involves a reasoned search for the intention of the legislature. *Frillici v. Westport*, 231 Conn. 418, 431, 650 A.2d 557 (1994). In other words, we seek to determine, in a reasoned manner,

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the meaning of the statutory language as applied to the facts of this case, including the question of whether the language actually does apply. In seeking to determine that meaning, we look to the words of the statute itself, to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and common law principles governing the same general subject matter. \*259 ... *Id.*; *Carpenteri-Waddington, Inc. v. Commissioner of Revenue Services*, 231 Conn. 355, 362, 650 A.2d 147 (1994); *United Illuminating Co. v. Groppo*, 220 Conn. 749, 755-56, 601 A.2d 1005 (1992)." (Internal quotation marks omitted.) *United Illuminating Co. v. New Haven*, 240 Conn. 422, 431-32, 692 A.2d 742 (1997).

We begin, as we ordinarily do in interpreting statutes, with the statutory language. Section 9-328 provides in relevant part: "Such judge shall, on the day fixed for such hearing [on the plaintiff's complaint] and without unnecessary delay, proceed to hear the parties. If sufficient reason is shown, he may order any voting machines to be unlocked or any ballot boxes to be opened and a recount of the votes cast, including absentee ballots, to be made. Such judge shall thereupon, *if he finds any error in the rulings of the election official or any mistake in the count of the votes*, certify the result of his finding or decision to the Secretary of the State before the tenth day succeeding the conclusion of the hearing. *Such judge may order a new election or primary or a change in the existing election schedule. ...*" (Emphasis added.) The italicized language makes clear that, as a predicate for the ordering of a new election under § 9-328, there must be either (1) an error or errors "in the rulings of" an election official, or (2) a "mistake in the count of the votes." [FN18] See also *Scheyd v. Bezrucik*, supra, 205 Conn. at 503, 535 A.2d 793; *Wrinn v. Dunleavy*, 186 Conn. 125, 134 n. 10, 440 A.2d 261 (1982). That language does not make clear, however, what standard must be met in order for the court to order a new election. Indeed, it does not state, either directly or by implication, how sig-

nificant the errors in the rulings or the mistakes in the count must be, and how likely it \*260 was that the errors or mistakes affected the result of the election.

FN18. We discuss in greater detail in parts IV and V of this opinion, whether, in the present case, there was either an erroneous ruling of an election official or a mistake in the count of the votes.

The genealogy and legislative history of the statute, however, offer guidance on this question. Until 1978, § 9-328 did not authorize a judge to order a new election. See General Statutes (Rev. to 1977) § 9-328. [FN19] In 1978, \*261 the legislature enacted \*\*115 No. 78-125 of the 1978 Public Acts. Section 9 of Public Act 78-125 amended General Statutes (Rev. to 1977) § 9-328 by, among other things, adding the language: "Such judge may order a new election or primary or a change in the existing election schedule...." The legislative history regarding this amendment, however, is unilluminating. [FN20]

FN19. General Statutes (Rev. to 1977) § 9-328 provides: "Any person claiming to have been elected to any municipal office, or nominated at a primary to the office of justice of the peace, but not to have been declared so elected or nominated, or any candidate for any such office claiming to have been aggrieved by any ruling of the moderator at an election for any such office or a primary for justice of the peace, or any such candidate claiming that there has been a mistake in the count of votes cast for any such office at any such election or primary, may, within ten days after the date of the election or primary, bring his complaint to any judge of the superior court, in which he shall set out the claimed errors of the moderator or the claimed errors in the count. Such judge shall forthwith order a hearing to be had upon such complaint, upon a day not more than five

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nor less than three days from the making of such order, and shall cause notice of not less than three nor more than five days to be given to any candidate or candidates whose election or nomination may be affected by the decision upon such hearing, and to any other party or parties whom such judge deems proper parties thereto, of the time and place for the hearing upon such complaint. Such judge or, in case of his inability, a judge designated by the chief judge of the superior court, shall, on the day fixed for such hearing and without unnecessary delay, proceed to hear the parties. If sufficient reason is shown, he may order any voting machines to be unlocked or any ballot boxes to be opened and a recount of the votes cast, including absentee ballots, to be made, and he shall thereupon, if he finds any error in the rulings of the moderator or any mistake in the count of the votes, certify the result of his finding or decision to the secretary of the state before the tenth day succeeding the conclusion of the hearing. Such certificate of such judge of his finding or decision shall be final and conclusive upon all questions relating to errors in the ruling of such moderators and to the correctness of such count, and shall operate to correct the returns of such moderators or presiding officers, so as to conform to such finding or decision, except that this section shall not affect the right of appeal to the supreme court for the reservation of questions arising thereon, and it shall not prevent such judge from reserving such questions of law, by consent of all parties, for the advice of the supreme court. Such judge may, if necessary, issue his writ of mandamus, requiring the adverse party and those under him to deliver to the complainant the appurtenances of such office, and shall cause his finding and decree to be entered on the records of the superior court in the

proper county."

**FN20.** The only reference in the legislative history of Public Act 78- 125 to the newly added judicial power was the following: "Sections 6 through 12 of the bill clarify the provisions of the election laws with respect to access to the courts by persons aggrieved by rulings of election officials. In general, they make it clear that any voter, including of course, the candidates themselves may apply to an appropriate court for relief from a ruling of an election official either before or after an election or primary. The sections further make clear that the court may order appropriate remedies including a new election or primary, where warranted by the facts." 21 H.R. Proc., Pt. 4, 1978 Sess., p. 1456, remarks of Representative Elmer W. Lowden.

In 1987, the legislature again amended § 9-328 as part of an omnibus election law bill entitled, "An Act concerning Judicial Hearings concerning Absentee Ballots." See Public Acts 1987, No. 87-545. Section 3 of Public Act 87-545 amended § 9-328 by adding language that specifically brought within its terms fraudulent conduct and other improprieties in the casting of absentee ballots. **FN21** The legislative debate in the House of Representatives directly addressed the standard that must be met under § 9- 328 in order for a judge to order a new election. **FN22** That debate **\*\*116** indicates a legislative intent **\*262** that, although a candidate who challenges an election need not necessarily prove that he would have won the election but for the improprieties that he established, **\*263** he would be required, in the language of the debate, to prove that there were "substantial violations [that] ... might change the results, and ... if unclear, but ... substantial, the judge could order a new election ... if he believed that the election was so compromised that that was the best ... remedy." 30 H.R. Proc., Pt. 30, 1987 Sess., pp. 11,023-24, re-

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marks of Representatives Robert F. Frankel and Martin M. Looney; see footnote 22 of this opinion.

**FN21.** Section 3 of Public Act 87-545 added to § 9-328 provisions permitting a candidate to claim that he was "aggrieved by a violation of any provision of sections 9-355, 9-357 to 9-361, inclusive, 9-364, 9-364a or 9-365 in the casting of absentee ballots at such election or primary...."

**FN22.** The following colloquy took place between Representatives Robert F. Frankel and Martin M. Looney during the legislative debate in the House of Representatives: "[Representative Frankel]: Mr. Speaker, just one, perhaps two questions for legislative intent. As I understand the existing statutes, which we are about to act on amending, one can use this procedure where the outcome of an election may be at stake, and now we are going to provide that any alleged violation of these other sections would also be reason to go to court. The operative language ... when under these new areas, the judges may order a new election.

"Through you, Mr. Speaker, if the violation were to be found by the judge, but it was not of a substantial nature such that the election results would change, and I will give you an example. Is it our intent to have a judge order a new election in instances such as I am about to outline, where they are minimal, that they may make other findings, but would be advised not to order a new election?

"And let me give you an example. If, for example, an allegation under one of these sections was brought that someone had voted three or four times, and indeed, it is a violation of one of these sections. And, after a hearing, a judge found out indeed that was, in his belief, the case, but the outcome of the election wouldn't be affected,

because perhaps the final result was say: 500 votes difference, and the fraud that was found involved only three or four difference. Under those circumstances, I trust that we are not directing the judge to order a new election.

"Through you, Mr. Speaker.

"[Speaker Irving J. Stolberg]: Representative Looney.

"[Representative Looney]: Yes, Mr. Speaker, through you to the Majority Leader, for purposes of legislative intent. The Majority Leader is correct. It is not the intent of this amendment that a judge would overturn an election or primary unless the violation was major. It would not be the intent to have the remedy far outstrip the events.

"[Representative Frankel]: Through you, Mr. Speaker, just a follow-up on that. Obviously, we are in areas where there would be substantial violations where, perhaps, might change the results, and I would assume that if unclear, but they were substantial, the judge could order a new election.

"Through you, Mr. Speaker.

"[Speaker Stolberg]: Representative Looney.

"[Representative Looney]: Through you, Mr. Speaker, to the Majority Leader. Yes, that is correct. If the violations were substantial, the judge could order a new election, if he believed that the election was so compromised that that was the best and approved and most equitable remedy.

"[Representative Frankel]: Thank you, Mr. Speaker." 30 H.R. Proc., Pt. 30, 1987 Sess., pp. 11,021-24.

Although this was not the legislature that enacted the original provision for a judicially ordered new election, and although we ordinarily do not regard subsequent legislative debate on the intent of earlier enacted legislation as particularly persuasive

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regarding that intent, we do regard this colloquy as relevant to the meaning of § 9-328. First, this colloquy took place in the context of an enacted amendment to the statute at issue. Second, the judicial power provided by that amendment bore directly on the scope of that power, albeit enacted in an earlier year. Third, it is apparent from the pointed language of the colloquy that the participants intended it to be used as indicative of legislative intent regarding the scope of that power.

Finally, in interpreting § 9-328, we are cognizant of the delicate balance of interests at stake in the electoral process. Taking into account the legislative language, its genealogy and history, and the balance of interests involved, we glean the following standard that must be met in order for a court to order a new election pursuant to § 9-328. The court must be persuaded that: (1) there were substantial errors in the rulings of an election official or officials, or substantial mistakes in the count of the votes; and (2) as a result of those errors or mistakes, the reliability of the result of the election, as determined by the election officials, is seriously in doubt.

We next address our scope of review regarding a decision by a trial court to order, or to decline to order, a new election pursuant to § 9-328. We conclude that the underlying historical facts as found by the trial court are, of course, subject on review to the clearly erroneous standard. See [Practice Book § 60-5](#). Beyond that, however, we conclude that **\*\*117** whether any rulings of an election official or mistakes in the count of votes were substantial, and whether the result of the election is seriously in doubt, are questions that call for plenary review on appeal.

These questions are most accurately characterized, not as either questions of fact or as questions of law, but as the hybrid mixed questions of fact and law. Although **\*264** throughout the law there are various mixed questions that call for differing scopes of appellate review and, therefore, applying

the label does not necessarily yield the answer; see, e.g., *Copas v. Commissioner of Correction*, 234 Conn. 139, 152-53, 662 A.2d 718 (1995) (mixed question of law and fact yielding plenary review); *Plastic Tooling Aids Laboratory, Inc. v. Commissioner of Revenue Services*, 213 Conn. 365, 369, 567 A.2d 1218 (1990) (mixed question of law and fact yielding review under clearly erroneous standard); the question of whether to give such a mixed determination by a trial court deferential or plenary review is really a question of judicial policy. *Miller v. Fenton*, 474 U.S. 104, 114, 106 S.Ct. 445, 88 L.Ed.2d 405 (1985) (when "the issue falls somewhere between a pristine legal standard and a simple historical fact, the fact/law distinction at times has turned on a determination that, as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question"). The importance of the democratic interests at stake, the importance of seeing that the balance of those interests is struck properly in any given case, and the delicacy of the question of judicial intrusion into the electoral process, persuade us that a plenary scope of review is appropriate.

### III

With these background principles and standards in mind, we turn to the defendants' specific claims on appeal. We first consider their claim that the trial court abused its discretion in denying their motion to open the evidence. We agree with the defendants. We conclude that, under the circumstances of this case, the court should have opened the evidence to consider the documentary evidence that the defendants sought to offer. We further conclude that the undisputed facts disclosed by those documents wholly undermine a critical finding of the trial court regarding voting machine **\*265** number 107017, namely, that this machine, which was taken out of service at 6:30 p.m., had been out of paper since at least 8:30 a.m. on election day, and that, therefore, that finding must be disregarded.

[9][10][11] "Whether or not a trial court will per-

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mit further evidence to be offered after the close of testimony in the case is a matter resting within its discretion. *State v. Levy*, 103 Conn. 138, 145, 130 Atl. 96 [1925]; *State v. Chapman*, 103 Conn. 453, 479, 130 Atl. 899 [1925]; *King v. Spencer*, 115 Conn. 201, 203, 161 Atl. 103 [1932]; *State v. Swift*, 125 Conn. 399, 405, 6 A.2d 359 [1939]. *Hauser v. Fairfield*, 126 Conn. 240, 242, 10 Atl. (2d) 689 [1940]. In the ordinary situation where a trial court feels that, by inadvertence or mistake, there has been a failure to introduce available evidence upon a material issue in the case of such a nature that in its absence there is serious danger of a miscarriage of justice, it may properly permit that evidence to be introduced at any time before the case has been decided.... *State v. Holmquist*, 173 Conn. 140, 152, 376 A.2d 1111, cert. denied, 434 U.S. 906, 98 S.Ct. 306, 54 L.Ed.2d 193 (1977)." (Internal quotation marks omitted.) *Doe v. Doe*, 244 Conn. 403, 421, 710 A.2d 1297 (1998). The same principles apply to a request to offer evidence after a decision has been rendered. *Stocking v. Ives*, 156 Conn. 70, 72, 238 A.2d 421 (1968). The trial court abused its discretion in denying the defendants' motion.

First, the documents offered by the defendants, which were attached to the motion, [FN23] conclusively demonstrate that it was **\*\*118** impossible for voting machine number 107017 to have been out of paper "since at least 8:30 a.m.," as the trial court had found. Other evidence in the case established that, when the machine was **\*266** taken out of service at 6:30 p.m., the plaintiff had received 115 write-in votes on that machine. The documents that the defendants offered were the official tally sheets for each voting machine used in the election. They constituted the official record, taken from the counting mechanism of each machine, of the number of electors who had entered that machine to vote on an hour-by-hour basis. These documents establish that: as of 8 a.m., 52 electors had entered that machine; as of 9 a.m., 80 electors had entered that machine; and as of 10 a.m., only 109 electors had entered that machine. Thus, it is simply impossible for this machine to have been

out of paper for the purpose of recording write-in votes at 8:30 a.m., and also to have recorded 115 write-in votes for the plaintiff as of 6:30 p.m. [FN24]

**FN23.** In opposing the motion in the trial court, the plaintiff did not contest the authenticity or accuracy of the documents, and has not done so in this appeal. The documents on their face demonstrate their authenticity. We therefore consider them as authentic and accurate.

**FN24.** The fatal frailty of the trial court's finding in this regard is further demonstrated by a comparison of the total number of write-in votes cast for the plaintiff on voting machine number 107017 and on the other machines. As we have indicated, 115 electors cast their write-in votes for the plaintiff on that machine. The range of write-in votes for the plaintiff on the other machines--excluding voting machine number 143719, which was taken out of service early in the voting hours, at 6:50 a.m., with one such vote cast--was from a low of 79 on voting machine number 106949, which was taken out of service at 4:45 p.m., to a high of 137 on voting machine number 76264, and included totals of 90, 105, 110, 112, 115 and 123. It is wholly improbable, therefore, that 115 write-in votes would have been cast for the plaintiff by 8:30 a.m. on that one machine, and none thereafter, while the other machines in service throughout most or all of the day recorded a range of similar totals for the plaintiff.

Second, the caution with which a court should approach the decision of whether to order a new election strongly suggests that the trial court should have entertained the proffered evidence, notwithstanding its lateness. Appropriate judicial respect for the election process requires that, when the two factors of accuracy and speed conflict, it is better

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for the court to be correct on its facts than to be prompt and final in its decision. These documents conclusively establish that the trial court was incorrect in at least one of its critical factual findings.

\*267 Third, there was no special need for speed and finality in this case at the time that the evidence was offered. Only six days had elapsed since the trial court's decision ordering a new election for June 22, 1999, nearly one month away. Furthermore, there was nothing magical about that date for the new election. No critical interests would have been undermined had the proffered evidence required some further delay in the ultimate decision and, consequently, in a postponed new election date. We consider the merits of this appeal, therefore, shorn of the trial court's finding that voting machine number 107017 was out of paper for purposes of recording write-in votes for the plaintiff since 8:30 a.m.

#### IV

The defendants also claim that the trial court improperly concluded that there had been an erroneous ruling or rulings by an election official or officials within the meaning of § 9-328. We agree.

We have not heretofore defined the meaning of "rulings of the election official" as used in § 9-328. Moreover, neither § 9-328 nor any of the closely associated election statutes defines that phrase, nor does any of the legislative history of § 9-328 give any indication that it was intended to have some specialized meaning. We may presume, therefore, that the legislature intended it to have its ordinary meaning \*\*119 in the English language, as gleaned from the context of its use.

The dictionaries of the English language constitute compendiums of the commonly accepted meanings of words, depending on their contexts. Those dictionaries offer the following consistent meanings of the word "ruling," when it is used in the context of an act of a governmental official. A "ruling," according to Webster's Third New International Dictionary (1971), is "an official or authoritative de-

cision, decree, or statement ... a decision or rule of a judge or a court ... an \*268 interpretation by an administrative agency of the law under which it operates applicable to a given statement of facts...." Similarly, The American Heritage Dictionary of the English Language (1969) defines a "ruling" as an "authoritative or official decision." In addition, Black's Law Dictionary (6th Ed.1990), which may be considered as a compendium of the accepted usages of words in the law, depending on their contexts, defines a "ruling," consistently with the non-legal dictionaries, as "[a] judicial or administrative interpretation of a provision of a statute, order, regulation, or ordinance...."

[12] The common thread of these definitions is that, at the least, a ruling of an election official must involve some act or conduct by the official that (1) decides a question presented to the official, or (2) interprets some statute, regulation or other authoritative legal requirement, applicable to the election process. Given that common thread, and given the notion that we should not interpret § 9-328 beyond its narrowly defined circumstances and its limited types of claims, we conclude that the phrase "rulings of the election official" as used in § 9-328 has that meaning. Moreover, there must be an "error in the rulings of the election official" in order to supply a basis for a new election under § 9-328. (Emphasis added.) To summarize, therefore: as one of the statutory predicates of a judicial order for a new election under § 9-328, namely, "error in the rulings of the election official," election officials must have engaged in conduct that incorrectly either (1) decided a question presented to them applicable to the election process, or (2) interpreted some statute, regulation or other authoritative legal statement or requirement applicable to that process. Applying that definition, we conclude that the trial court's determination that there were erroneous rulings of election officials cannot stand.

[13] \*269 The trial court determined that the errors in the rulings of election officials were "that election officials in a de facto manner ruled throughout

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the day that they did not need to continue to inspect the voting machines in use in order to ensure that there were not problems with the mechanics, in particular of the write-in votes...." Thus, in the view of the trial court, the election officials' failure throughout the day to continue to inspect the voting machines in use for the purpose of ensuring that there were not mechanical problems with those machines, constituted an erroneous ruling. [FN25]

FN25. That this was a basis of the trial court's determination that there had been erroneous rulings by the election officials is reinforced by the following passage in the court's memorandum decision: "The paper was not advancing on [voting] machine number 143719. The decision at that point was to take that machine out of service and replace it, but that issue that early in the day affecting certainly one candidate more than others--in other words, there was only one candidate that depended on paper at that point or that kind of paper--it seems to me should have served as some sort of notice to the election officials that scrutiny of the mechanics of all of the machines needed to be undertaken throughout the day with some care."

Such a failure, if it existed, however, did not constitute an erroneous ruling. It did not decide, either explicitly or implicitly, a question presented to the election officials regarding the election process, and it did not interpret any statute, regulation or other authoritative legal statement or requirement applicable to that process. It \*\*120 cannot be regarded as anything more than the exercise of election day discretion regarding the proper mechanical functioning of the voting machines, a subject that is committed in the first instance to the authority of the election officials. Given the broad and plenary powers of those officials under our statutes generally, and given the narrow and circumscribed bases for judicial intervention under § 9-328, the exercise of that discretion must be given a wide berth. Al-

though judicial hindsight regarding whether that discretion was properly exercised might in an extreme case provide the \*270 basis for a conclusion that votes were miscounted, it cannot convert its exercise into a ruling by the officials.

The plaintiff's reliance on *Wrinn v. Dunleavy*, supra, 186 Conn. at 138-39, 440 A.2d 261, is misplaced. In that case, the election officials improperly counted twenty-six absentee ballots that were invalid because they had been improperly mailed. *Id.*, at 130, 440 A.2d 261. We held that the "ruling" was the counting of those improper ballots. *Id.*, at 139, 440 A.2d 261. In that case, however, by counting those invalid ballots, the election officials implicitly had interpreted the provisions of General Statutes § 9-146 regarding the casting and mailing of absentee ballots. See *id.*, at 145, 440 A.2d 261. Thus, *Wrinn* does not, as the plaintiff's argument suggests, stand for the proposition that any act or failure to act by election officials that is relevant to the election process will suffice as a "ruling" within the meaning of § 9-328. Cf. *In re Election for Second Congressional District*, supra, 231 Conn. at 607, 653 A.2d 79 (election officials ruled, on recanvass, that absentee ballot envelopes not originally opened should be opened and ballots counted); see also *Lobsenz v. Davidoff*, supra, 182 Conn. at 113, 438 A.2d 21 (interpretation of minority representation statutes by election moderator constituted ruling by that official). Indeed, such a suggestion is foreclosed by our decision in *Scheyd v. Bezrucik*, supra, 205 Conn. at 503, 535 A.2d 793, wherein we stated: "[T]he review provided by [General Statutes] § 9-325 is available only when the original complaint actually states a cause of action cognizable under [General Statutes] §§ 9-324, 9-328, or 9-329a. Such a complaint must concern a ruling of an election official or a mistake in the count of votes.... A plaintiff may not use these sections to challenge a law or regulation under which the election or primary election is held by claiming aggrievement in the election official's obedience to the law. In such a case the plaintiff may well be aggrieved by

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the law or regulation, but he or she is not aggrieved by the election official's rulings which are in conformity \*271 with the law." (Citation omitted; internal quotation marks omitted.)

### V

Erroneous rulings by election officials do not, however, constitute the only predicate for a judicial order for a new election under § 9-328. The other predicate is that there was a "mistake in the count of the votes." The trial court determined that there was such a mistake. We next address, therefore, the propriety of that determination and whether it justified a new election.

The basis for that determination by the trial court was that there were several voting machines that did not function properly in recording write-in votes for the plaintiff. Specifically, the court found that at 6:50 a.m., on voting machine number 143719, the paper for recording write-in votes was not advancing. It is undisputed, however, that, upon being informed of this problem and checking the complaint, the election officials took this machine out of service and replaced it with alternate voting machine number 76263. The court also found that voting machine number 150231 had a significant problem throughout the day. This problem included reports to election officials concerning this machine at 1:40 p.m., 2:50 p.m. and 3 p.m., with the first of these complaints involving "a perceived inability to cast a write-in \*\*121 vote" for the plaintiff. The court also found that at 3 p.m., this machine was not checked despite a complaint concerning it, and that "[n]otwithstanding the evidence that the machine was checked ... it never continued to function adequately." In addition, the court found that voting machine number 106949 had a paper jam at 4:45 p.m., and was then taken out of service. Finally, with respect to voting machine number 107017, shorn of the improper finding that we already have discussed, the court found that at 6:30 \*272 p.m. the machine had no paper for write-in candidates and was taken out of service. [FN26]

FN26. When we inquired at oral argument before this court, the parties could not explain to us how a voting machine could have "no paper" for purposes of recording write-in votes. It is undisputed that, mechanically, the write-in process takes place as follows. In the back of the machine there is a continuous roll of paper on which such votes are recorded. It is undisputed that each machine was equipped with such a roll of paper. When a voter wished to cast a write-in vote, he lifted a metal slot cover, causing the paper behind the cover to advance to, presumably, a blank place on the roll. He then wrote in the name of the candidate, and closed the slot cover. Given this mechanism, we were able to understand how a machine, because of a malfunction, could fail to advance the paper to a blank place. It was difficult to understand, however, how there could be *no* paper behind the metal slot cover. The transcript discloses, however, that, when the election officials discovered, with respect to a particular machine, that there was "no paper" behind the slot cover, they assumed that there was a paper jam that had produced that circumstance. This may account for the mechanical conundrum of "no paper" where there is a continuous roll of paper. In any event, the defendants have not raised this apparent conundrum as a ground of appeal.

[14][15] We agree with the plaintiff that a mechanical failure of a machine properly to record write-in votes may constitute a "mistake in the count of the votes," within the meaning of § 9-328. [FN27] We conclude, however, that these mistakes were not substantial, and that as a result of them the reliability of the result of the election was not placed seriously in doubt.

FN27. We reject, therefore, the defendants' argument that the statutory language only

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covers a situation in which votes that were cast were improperly counted, but does not cover a situation in which votes were *not* cast, for whatever reason. First, the statutory language is broad enough to cover both situations. If otherwise validly cast ballots were not counted, the resulting total number of votes for each candidate may be regarded as a "mistake in the count of the votes." Second, one of the purposes of the statute, namely, to ensure accuracy in the election process, suggests the broader interpretation.

Voting machine number 143719 was taken out of service at 6:50 a.m., less than one hour after the polls had opened, because it was discovered that the write-in paper was not advancing properly. The evidence regarding this event was that, as a result of that mechanical \*273 failure, two write-in votes were lost. There was no evidence, however, and it could not be determined, whether either or both of those write-in votes were for the plaintiff or for the write-in candidate for the regional board of education. Thus, any factual finding that these two lost votes harmed the plaintiff would rest on nothing more than speculation.

The evidence regarding voting machine number 150231 was as follows. At 1:40 p.m., there was a complaint regarding write-in votes, namely, that the paper was not advancing properly. The election officials entered the machine, tested the write-in mechanism, determined that the paper was advancing properly, initialed the paper, and left the machine in service. At that time, it also was discovered that one vote for the plaintiff had been crossed out. The significance of that cross-out was not explained. There is no basis in the evidence, however, for an inference that any mechanical failure of the machine could have crossed out a vote that had been cast for the plaintiff. [FN28] At 2:50 p.m., there was \*\*122 another complaint about the write-in mechanism of this machine. The record indicates that the public counter on the machine

was off by two digits. [FN29] The record also indicates, however, that the election \*274 officials entered the machine and determined that the mechanism was working properly. There also was evidence that at 3 p.m., there was another complaint about the write-in mechanism, but the election officials did not check the machine at that time. In addition, there was undisputed evidence that this machine was checked twice at 6:35 p.m., and found to be functioning properly.

FN28. In this connection, the trial court found that "[t]he moderator of the election specifically recalls that the first of [the complaints regarding voting machine number 150231] had to do with a perceived inability to cast a write-in vote for [the plaintiff]; that is not specifically recorded by her but I credit her testimony in that regard." The transcript indicates, however, that the moderator simply acknowledged that line five, the line with the crossed out vote, was one of the two lines on which an elector could have voted for the plaintiff. We have examined fully the testimony of Mary Lou Winnick, the moderator of the election, and can find no other testimony regarding her recollection of a perceived inability by an elector to vote for the plaintiff. We therefore disregard that portion of the finding.

FN29. This meant that there was a discrepancy of two between the total number of electors who had entered the machine, and the total number of votes cast on the machine. The evidence indicates a number of reasons unconnected with any malfunction of the write-in mechanism that would account for such a discrepancy, such as an official entering the machine to check its functioning. On the basis of the evidence in the record, it would be speculative to infer that this discrepancy was connected to lost votes for the plaintiff.

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This evidence simply is inadequate to support a finding that this machine "never continued to function adequately." The evidence amounts to three complaints, two of which were determined by the election officials at the scene to have been unfounded, and a third complaint that, for unexplained reasons, was not pursued, all in a fourteen hour period of voting. In addition, the voting records indicate a total of 110 write-in votes cast for the plaintiff on this machine, which is fully consistent with the spectrum of such votes cast for the plaintiff on all of the other machines. [FN30] It is wholly improbable that a machine that never functioned adequately with respect to recording write-in votes, nonetheless, would have registered a number of votes that was so close to the numbers registered by the other machines that were functioning adequately for all or most of the day.

**FN30.** Those records indicate the following votes for the plaintiff on the other voting machines: (1) 1 vote on voting machine number 143719, which was taken out of service at 6:50 a.m.; (2) 79 votes on voting machine number 106949, which was taken out of service at 4:45 p.m.; (3) 90 votes on voting machine number 76263, which was in service from 6:50 a.m. until 8 p.m.; (4) 105 votes on voting machine number 76265, which was in service all day; (5) 115 votes on voting machine number 107017, which was taken out of service at 6:30 p.m.; (6) 123 votes on voting machine number 161427, which was in service all day; (7) 112 votes on voting machine number 160117, which was in service all day; and (8) 137 votes on voting machine number 76264, which was in service all day.

**\*275** The evidence regarding voting machine number 106949 was that at 4:45 p.m., its paper jammed and it was taken out of service. There was no evidence of any malfunctioning of the write-in mechanism before that time. Although there was

evidence that when the write-in paper was removed from the machine at the end of the voting day it was partially torn vertically, the evidence was also that seventy-nine write-in votes had been recorded on that machine throughout the day. Moreover, this number of write-in votes was consistent with the numbers recorded on the other machines, given that this machine was in service for only eleven of the fourteen voting hours.

Finally, the evidence regarding voting machine number 107017 was that at 6:30 p.m., in response to a complaint, its write-in mechanism was found not to be functioning properly, and it was then taken out of service. Moreover, by that time 115 write-in votes had been cast for the plaintiff on this machine.

**\*\*123** There also was evidence that, prior to that time, three voters were unsuccessful, because of a mechanical malfunction, in casting their write-in votes for the plaintiff on that machine. Elizabeth Phillips Marsh testified that at approximately 8:15 a.m., she lifted the slot cover and wrote the plaintiff's name on metal, not paper. Jean Bortner, the plaintiff's wife, testified that at approximately 9 a.m., she lifted the slot cover and wrote the plaintiff's name on what appeared to be metal or clear computer-type paper, not white paper. Michelle Greengarden testified that at approximately 4 p.m., she lifted the slot cover and wrote the plaintiff's name on metal, not paper. Neither Marsh, Bortner nor Greengarden, however, reported her difficulty to any election official.

The sum of this evidence, therefore, was that of the total of nine voting machines in use during the election, **\*276** three were taken out of service at some point, and one was questioned three times. Although these facts, considered alone, might give rise to a conclusion that there were substantial mistakes in the count of the votes, that conclusion is not justified when the facts are analyzed more closely.

First, one of the three machines was taken out of

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service less than one hour into the voting day, and there is no evidence that it contributed to any identifiable mistake in the count of the votes for the plaintiff. Second, two of the three complaints on the questioned machine were found to be unfounded, and it was checked twice thereafter and found to be working properly. Third, one machine was not questioned until 4:45 p.m., when it was promptly taken out of service. There is no evidence that, prior to that time, it contributed to any identifiable mistake in the count of the votes for the plaintiff. Fourth, one machine was taken out of service at 6:30 p.m. The only evidence that this machine contributed to identifiable mistakes in the count of votes for the plaintiff was that it did not record the votes of three voters, who did not at any time register complaints with the election officials when those complaints could have been addressed. Furthermore, the undisputed evidence regarding all of the machines in question was that they registered total numbers of write-in votes that were consistent with the numbers registered on the machines that were never questioned. There was no basis, therefore, for an inference that these particular malfunctions were a surrogate for other, unidentified malfunctions of the process of write-in votes for the plaintiff, either on the machines in question or on the other machines in use during the election. Applying our plenary scope of review to this evidence, therefore, we conclude that it falls short of establishing substantial mistakes in the count of the votes in the election.

\*277 We also conclude that even if we were to regard these mistakes in the count as substantial, the evidence falls short of establishing that those mistakes rendered the reliability of the result of the election, as reported by the election officials, seriously in doubt. The margin between the plaintiff and Greene was fifty-six votes. Giving the plaintiff the full benefit of any mistakes in the count established by the evidence, we cannot conclude that those mistakes would have brought the plaintiff's number of votes significantly closer to that of Greene so as to cast doubt on the reliability

of the result of the election.

The judgment is reversed and the case is remanded with direction to render judgment for the defendants.

In this opinion [CALLAHAN](#), C.J., and [NORCOTT](#) and [KATZ](#), JJ., concurred.

[BERDON](#), J., concurring.

I agree with my colleagues in the majority that the trial court should order a new election pursuant to [General Statutes § 9-328](#) only when the following two criteria have been satisfied: (1) the party challenging the election has proven that it is more likely than not that "there were substantial \*\*124 violations of the requirements of [[§ 9-328](#)] ... and (2) as a result of those violations, the reliability of the result of the election is seriously in doubt." I also agree that the ultimate determination of whether these criteria have been satisfied "is a mixed question of fact and law that is subject to plenary review on appeal." Applying this analytic framework to the facts before us, I join my colleagues in the majority in holding that the trial court in the present case improperly ordered a new election. I write separately for two reasons.

First, I believe that part I of the majority opinion is dangerously misleading, and I write to set the record straight. The text of [§ 9-328](#) authorizes a trial court to order a new election if it "finds *any error* in the rulings \*278 of the election official or *any mistake* in the count of the votes...." (Emphasis added.) I fear that the lopsided tone of part I of the majority opinion will intimidate trial courts and deter them from vacating elections that do not embody the will of the people. Although the majority is certainly correct to emphasize that "all of the electors who voted at [an] officially designated election ... have a powerful interest in the *stability* of that election," the voters have an even more powerful interest in the integrity and the accuracy of that election. (Emphasis added.) Pursuant to the legislative mandate contained in [§ 9-328](#), it is

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the duty of the trial court to elevate integrity and accuracy over stability. To the extent that the majority opinion contains innuendo to the contrary, it should be disregarded.

I also write separately in order to take several steps back from the facts of the controversy that is presently before us. In the context of § 9-328, the majority adopts a plenary standard of review, pursuant to which we do not defer to the trial court's determination regarding the integrity and accuracy of an election. Viewed in isolation, this is a perfectly sensible decision; indeed, it is one that I join without reservation. Viewed alongside other recent decisions, however, it makes absolutely no sense.

The majority correctly observes that "the question of whether to give ... a trial court deferential or plenary review is really a question of judicial policy." As a matter of judicial policy, I agree that vacating an election is serious business, and that we should scrutinize rigorously a trial court's determination that it is appropriate to do so. I also believe, however, that we should scrutinize rigorously other judicial rulings that implicate fundamental rights under the constitution. My colleagues in the majority disagree with me, for reasons that they are unable to explain to my satisfaction.

\*279 I will limit myself to a single, illustrative example. "The conventional wisdom among African-Americans and other minorities is that they are not treated fairly throughout the judicial system because of their race. To put it plainly, minorities believe that the judicial system is stacked against them. This perception is heightened when the state eliminates minorities from juries by exercising peremptory challenges based upon the race of venirepersons. The United States Supreme Court recognized this fact when it stated: '[W]e have not questioned the premise that racial discrimination in the qualification or selection of jurors offends the dignity of persons and the integrity of the courts. Despite the clarity of [constitutional] commands to eliminate the taint of racial discrimination in the

administration of justice, allegations of bias in the jury selection process persist.' [FN1] \*\*125 *Powers v. Ohio*, 499 U.S. 400, 402, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991)." *State v. Hodge*, 248 Conn. 207, 269-70, 726 A.2d 531 (1999) (*Berdon, J.*, dissenting).

FN1. "[T]his court and the Appellate Court have reviewed claims of purposeful discrimination in the exercise of peremptory challenges in [twenty] cases. Neither court, however, has ever found impermissible discrimination in the exercise of a peremptory challenge, a statistical fact that lends credence to the public perception that our judicial system fosters discrimination." *State v. Hodge*, 248 Conn. 207, 272-73, 726 A.2d 531 (1999) (*Berdon, J.*, dissenting); see *State v. King*, 249 Conn. 645, 691 n. 2, 735 A.2d 267 (1999) (*Berdon, J.*, dissenting).

Oblivious to the perception of injustice along the vector of race, the majority of this court has determined that--as a matter of judicial policy--it will review *Batson/Holloway* claims [FN2] with "great deference," and will not disturb a trial court's ruling "unless it is clearly \*280 erroneous." *Id.*, at 224, 726 A.2d 531. In the present case, however, the majority has decided to scrutinize rigorously the trial court's ruling, pursuant to the robust standard of plenary review. Apparently, my colleagues in the majority believe that a new election for the Woodbridge elementary school is more important than the perception among African-Americans that the overwhelmingly white legal system--which once enforced and legitimized both slavery and segregation--continues to discriminate against them. I am simply bewildered.

FN2. By raising a *Batson/Holloway* claim, the defendant asserts that the trial court improperly permitted the state to exclude a venireperson from the jury on the basis of race. See *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986),

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as modified by state law in *State v. Holloway*, 209 Conn. 636, 645-46, 553 A.2d 166, cert. denied, 490 U.S. 1071, 109 S.Ct. 2078, 104 L.Ed.2d 643 (1989).

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**C**

Court of Appeals of Texas,  
 Tyler.  
 Dan DEFFEBACH, et al., Appellants,  
 v.  
 CHAPEL HILL INDEPENDENT SCHOOL DISTRICT,  
 Appellee.  
 No. 12-82-0124-CV.

March 10, 1983.

In a school bond election contest, the 241st District Court of Smith County, Glenn Phillips, J., entered judgment in favor of school district, and the contestants appealed. The Court of Appeals, Colley, J., held that the contestants failed to prove by a preponderance of the evidence that there were any illegal votes sufficient to change the result of the election, or that a determination of the true will of the majority of the qualified voters participating in said election was impossible.

Affirmed.

West Headnotes

**[1] Appeal and Error**  **1010.1(4)**  
[30k1010.1\(4\) Most Cited Cases](#)

Findings of fact supported by competent evidence are binding on the Court of Appeals.

**[2] Elections**  **10**  
[144k10 Most Cited Cases](#)

Election laws will be strictly enforced to prevent fraud, but liberally construed to effectuate the will of voters at the election being contested.

**[3] Elections**  **10**  
[144k10 Most Cited Cases](#)

Purpose of the election code and election laws in general is to prohibit serious error, fraud, mistake and corruption, and "not be used as an instrument of disfranchisement for irregularities of procedure."

**[4] Elections**  **10**  
[144k10 Most Cited Cases](#)

Absent a showing of fraud or a reliable indication that the

will of the majority has not been expressed in a fair manner, the court liberally construes and enforces as directory only the provisions of the election code and other election laws which are not by their own terms clearly mandatory.

**[5] Schools**  **97(4)**  
[345k97\(4\) Most Cited Cases](#)

Although, in regard to school bond election, absentee voting commenced on the day that notice of the election was published in newspaper, such voting was commenced in accordance with statute providing, in pertinent part, that whenever any election lawfully calls for a date which does not permit the full period for absentee voting, the voting shall begin as soon as possible after the ballots become available. V.A.T.S. Election Code, art. 5.05, subd. 4c.

**[6] Schools**  **97(4)**  
[345k97\(4\) Most Cited Cases](#)

Complaint about the "home made" paper absentee ballots that were voted by the first six absentee voters in school bond election was unavailing in that those ballots clearly set forth the proposition and gave an opportunity to vote both for and against the issuance of the bonds.

**[7] Elections**  **212**  
[144k212 Most Cited Cases](#)

In regard to provision of the Texas Election Code requiring voters to present to the election officials a current voter registration certificate, compliance with the provisions of that article are directory and not mandatory. V.A.T.S. Election Code, art. 8.07.

**[8] Schools**  **97(4.5)**  
[345k97\(4.5\) Most Cited Cases](#)

(Formerly 345k97(41/2), 345k97(4), 345k97, 345k97(1/2))

Parties contesting school bond election have the burden of establishing that, because of the election irregularities shown, the true result of the election was changed.

**[9] Schools**  **97(4.5)**  
[345k97\(4.5\) Most Cited Cases](#)

(Formerly 345k97(41/2), 345k97(4), 345k97, 345k97(1/2))

Parties contesting school bond election failed to prove by a

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preponderance of the evidence that there were any illegal votes sufficient to change the result of the election, or that a determination of the true will of the majority of the qualified voters participating in said election was impossible.

\*511 Willis Jarrel, Goodwin, Jarrel & Britain, Tyler, for appellants.

COLLEY, Justice.

This is a school bond election contest.

On November 23, 1981, the Board of Trustees of Chapel Hill Independent School District, in a specially called meeting, adopted a resolution and issued an order for a bond election for the issuance of \$10,100,000 in bonds for the District, pursuant to the provisions of the Texas Education Code, Articles 20.01 and 20.04, V.T.C.A., for school buildings, equipment and sites. The Board's order called the election for December 8, 1981, and a copy of said order was published on November 25, 1981, in the *Tyler Morning Telegraph*, a newspaper of general circulation in the area. Absentee voting began on November 25, 1981, as contemplated by Article 5.05 Subdivision 4c, Texas Election Code, V.A.C.S. Following the closing of the polls, a recount of the votes showed the result to be 881 for issuance of the bonds and 871 against issuance of the bonds, a majority of just ten votes.

A contest was timely filed by appellants and the trial judge voided eight "illegal" votes for and twelve "illegal" votes cast against the bonds, thus judicially determining the true results of the bond election to be 873 votes for, and 859 votes against, issuance of the bonds, being a majority of fourteen. The trial court, without the intervention of a jury, denied the contest of appellants and made and filed findings of fact and conclusions of law as discussed later in this opinion.

Appellant brings three points of error as follows:

1.

The error of the trial court in concluding that "Irregularities in the conduct of the election did not invalidate the election" and "The School Bond Election was a legal and valid election."

2.

The error of the Court in concluding that "Irregularities in the conduct of the election did not affect or change the result of the election" and "Irregularities in the conduct of the election were not such \*512 as to render a determination of the true will of the majority of the voters in the bond election impossible."

3.

The trial court erred in not ordering a new election when the undisputed evidence showed that the election officials made no effort to comply with the law for conducting an election.

Appellants, in their argument, claim certain irregularities occurred in the conduct of the election because of the failure of the election officials to enforce certain provisions of the Texas Election Code. Chief among appellants' complaints are:

- (1) that absentee voting commenced on the day (November 25, 1981) that notice of the election was published in the Tyler newspaper;
- (2) "home made" ballots were used by the first six persons voting absentee on November 25, 1981;
- (3) the signature and poll list used had no captions showing the election to which they pertained;
- (4) voters who appeared to vote without their voter registration certificates were not sworn as to their qualifications to vote;
- (5) that 425 persons voted at said election without presenting to the election officials current voter registration certificates;
- (6) the election judge failed to insure that "electioneering" signs were not placed within prohibited areas adjacent to the polling place;
- (7) that the election judge reported to certain "school officials" before the polls closed that "the vote is close"; and
- (8) that 425 voters were permitted to vote at the election without presenting a current voter registration certificate and without making an affidavit as to their respective qualifications.

[1] As stated earlier, the trial court made and filed findings of fact and conclusions of law in this case. Neither party to this appeal challenges the same. From our examination of

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the record we conclude that such findings of fact are supported by competent evidence and are therefore binding on this court. [City Bank of Wellington v. Wellington I.S.D., et al.](#), 173 S.W.2d 738 (Tex.Civ.App.--Amarillo 1943) affirmed, 142 Tex. 344, 178 S.W.2d 114 (Tex.1944); [Vandyke v. Austin I.S.D.](#), 547 S.W.2d 354 (Tex.Civ.App.--Austin 1977, no writ); [Redman v. Bennett](#), 401 S.W.2d 891 (Tex.Civ.App.--Tyler 1966, no writ).

The appellants do not allege nor complain on appeal of any fraudulent conduct on the part of either the election officials or voters in the election.

[2][3][4] It is our duty here to examine the record to determine whether the will of the majority of the qualified electors of said District participating in the election was thwarted by the irregularities found to exist in the election process. It is clear that the election laws will be strictly enforced to prevent fraud, but liberally construed to effectuate the will of the voters at the election being contested. [Prado v. Johnson](#), 625 S.W.2d 368 (Tex.Civ.App.--San Antonio 1981, writ *dism'd*). Indeed, it has been stated that the purpose of the election code and election laws in general is to prohibit serious error, fraud, mistake and corruption, and "... not be used as an instrument of disfranchisement for irregularities of procedure." [Fugate v. Johnson](#), 251 S.W.2d 792 (Tex.Civ.App.--San Antonio 1952, no writ). The general rule is that, absent a showing of fraud or a reliable indication that the will of the majority has not been expressed in a fair manner, the court liberally construes and enforces as *directory* only the provisions of the election code and other election laws which are not by their own terms clearly *mandatory*. *Id.* at 793; [Prado v. Johnson](#), *supra* at 370.

[5] The trial court's unchallenged findings demonstrate that notice was properly given in accordance with Article 20.04(e), Texas Education Code, and that absentee voting was commenced as contemplated by Subdivision 4c of Article 5.05, Texas Election \*513 Code. Subdivision 4c provides in pertinent part: "Whenever ... any election ... lawfully called for a date which does not permit the full period for absentee voting, (see generally, Article 5.05) the voting shall begin as soon as possible after the ballots become available ...."

[6] Appellants complain that "home made" paper absentee ballots were voted by the first six absentee voters. We have examined one of these ballots (plaintiff's exhibit No. 19) and find no merit to the complaint. It clearly sets forth the proposition and gives an opportunity to vote both for and against the issuance of the bonds.

[7] In our opinion the most serious complaint urged by appellants is that 425 voters who appeared at the polls without presenting to the election officials a current voter registration certificate were permitted to vote without being required to make the affidavit required by Article 8.07 of the Texas Election Code. However, compliance with the provisions of that article have also been held to be *directory* and not *mandatory*. [Walker v. Theftford](#), 418 S.W.2d 276 (Tex.Civ.App.--Austin 1968, writ *ref'd n.r.e.*). The former version of Article 8.07, Texas Election Code, referred to poll tax receipts rather than voter registration certificates, but in all other respects was virtually identical with the present Article 8.07, and hence we believe that [Walker v. Theftford](#), *supra*, is still authority for the proposition just stated.

[8][9] Appellants have the burden of establishing that, because of the irregularities shown, the true result of the election was changed. [Wright v. Board of Trustees](#), 520 S.W.2d 787 (Tex.Civ.App.--Tyler 1975, writ *dism'd*); [Frias v. Board of Trustees](#), 584 S.W.2d 944 (Tex.Civ.App.--El Paso 1979, no writ). We have considered each complaint presented by the appellants in their brief and conclude that they have failed to prove by a preponderance of the evidence: (1) that there were any illegal votes sufficient to change the result of said election; and (2) that a determination of the true will of the majority of the qualified voters participating in said election is impossible.

Appellants also argue that the decision in [Peek v. Harvey](#), 599 S.W.2d 674 (Tex.Civ.App.--Texarkana 1980, writ *dism'd*), is controlling here, and that the trial court should have followed [Peek](#) and declared the bond election void because of the irregularity that 425 citizens were permitted to vote in the bond election who did not present current voter registration certificates and who were not sworn as to their qualification by the election officials. We do not agree that [Peek v. Harvey](#), *supra*, supports the position of the appel-

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lants here. In that case, as here, the trial court made and filed findings of fact. Among such findings was that 19 illegal votes were cast and that since the majority voting for the proposition presented in a local option election was only by four votes, the 19 illegal votes constituted such an irregularity as to make it impossible to determine the true results of the election. *Peek v. Harvey, supra*, at 675. No challenge on appeal was made to such findings and the court in *Peek* followed the well-established rule of appellate review that such findings were binding upon it. *Peek v. Harvey, supra* at 675. The roles are reversed here, that is, the trial court denied the contest based on findings of fact which support the judgment below, and in *Peek* the trial court voided the election based on the findings mentioned above which supported that judgment. Applying *Peek v. Harvey* here, we reach a result contrary to the position of the appellants. The holding in *Peek v. Harvey, supra*, was simply that where the trial court's findings are not challenged on appeal, the same are binding on the appellate court.

On submission of this case we permitted counsel to cite additional authorities. Appellants cited Article 9.38b of the Texas Election Code in support of their argument that the trial court should have declared the bond election void. Such article provides in essence that the trial court *may* compel a voter who voted illegally at a special election to reveal the way he voted on any question at said election, or the court *may* declare the election void if the number of illegal votes is sufficient to change the outcome\*514 of the election. In construing Article 9.38b, the Corpus Christi Court of Civil Appeals in [Goodman v. Wise, 620 S.W.2d 857, 859 \(1981, writ ref'd n.r.e.\)](#), said: "This statute provides the trial court with wide discretion in this regard, and we will not overrule the trial court's decision unless a clear abuse of discretion has occurred (citations omitted)."

We conclude that the trial court did not abuse its discretion in denying the contest based on the unchallenged findings of fact made by it. Therefore, we overrule appellants' points of error and affirm the judgment of the trial court.

McKAY, J., not participating.

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**C**

Supreme Court of Iowa.  
 Francis P. **DEVINE**, Appellant,  
 v.  
 Raymond James **WONDERLICH**, Appellee.  
**No. 60823.**

June 28, 1978.

In election contest between write-in candidate and incumbent county board supervisor, the Keokuk District Court, Ira F. Morrison, J., entered judgment in favor of incumbent, and write-in candidate appealed. The Supreme Court, McCormick, J., held that: (1) statute barring identifying marks on ballots was not violated by presence of extra words on write-in ballots, which accurately stated office and term for which write-in candidate was running by using precise duplicate of words printed on ballot just above space for writing in a candidate's name; (2) placement of stickers on write-in ballots substantially complied with statute requiring write-ins to be inserted "in proper place," and thus such ballots should have been counted for such candidate; (3) ballots on which only write-in candidate's surname or first initial and surname were written in should have been counted for such candidate; (4) under circumstances, ballots on which write-in candidate's name was written in twice with one of names crossed out should have been counted for such candidate; (5) ballots on which write-in candidate's name was put under incumbent's name in his party's column should have been counted for write-in candidate, and (6) ballots on which write-in candidate's name was written in twice, once in his party's column and once in independent column, should have been counted for such candidate.

Reversed and remanded.

West Headnotes

**[1] Elections**  **269**  
[144k269 Most Cited Cases](#)

In view of fact that an election contest involves right of qualified voters to have their ballots counted for candidate of their choice, right of franchise is at stake, which is a fundamental political right essential to representative government, and thus any alleged infringement of right to vote

must be carefully and meticulously scrutinized.

**[2] Elections**  **24**

[144k24 Most Cited Cases](#)

Statutory regulation of voting and election procedure is permissible so long as statutes are calculated to facilitate and secure, rather than subvert or impede, right to vote; among legitimate statutory objects are shielding elector from influence of coercion and corruption, protecting integrity of ballot, and insuring orderly conduct of elections. [I.C.A. § 62.1 et seq.](#)

**[3] Elections**  **161**

[144k161 Most Cited Cases](#)

Statutes regulating voting and election procedure must be construed liberally in favor of giving effect to voter's choice and every vote cast enjoys a presumption of validity.

**[4] Elections**  **186(4)**

[144k186\(4\) Most Cited Cases](#)

As a general rule, if a voter affixes any mark to his ballot which fairly indicates his intention to vote for a particular candidate, vote should be counted for candidate unless a mandatory provision of election law is violated. [I.C.A. § 62.1 et seq.](#)

**[5] Elections**  **161**

[144k161 Most Cited Cases](#)

**[5] Elections**  **300**

[144k300 Most Cited Cases](#)

Statute barring identification marks on ballots originated from desire to guard against possibility of a vote seller indicating to a vote buyer in advance how his ballot could be distinguished so buyer could determine if bribed voter had carried out his agreement; issue as to whether a particular ballot violates prohibition is ordinarily one of fact. [I.C.A. § 49.98.](#)

**[6] Elections**  **194(1)**

[144k194\(1\) Most Cited Cases](#)

Statute barring identifying marks on ballots was not violated by presence of extra words on write-in ballots, which accurately stated office and term for which write-in candidate was running by using precise duplicate of words printed on bal-

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lot just above space for writing in a candidate's name. [I.C.A. § 49.98](#).

**[7] Elections** 192

[144k192 Most Cited Cases](#)

Statute providing that voters are to be instructed not to vote spoiled or defaced ballots was inapplicable in determining whether write-in ballots were invalid, since, assuming such ballots were "spoiled" by attaching one of write-in candidate's stickers to them, statute did not make a "spoiled" ballot invalid as such because it did not establish standard for determining validity of ballots. [I.C.A. § 49.68](#), subd. 6.

**[8] Elections** 161

[144k161 Most Cited Cases](#)

Statute providing that voters are to be instructed not to vote spoiled or defaced ballots is a precautionary device and is procedural rather than substantive; when construed with another statute authorizing voter to return a spoiled ballot for a new one, it means that when a ballot contains an erasure, crossed out words or other extraneous markings, it is "spoiled" or "defaced" and may therefore be replaced; however, when ballot is not replaced it is not invalid so long as voter's intent can be ascertained and markings were not placed on ballot for purpose of identifying it. [I.C.A. §§ 49.68](#), subd. 6, 49.98, 49.100.

**[9] Elections** 182

[144k182 Most Cited Cases](#)

Statute requiring write-in ballots to be inserted "in proper place" has purpose to help prevent fraudulent alteration of ballots to conceal votes properly marked by another for different candidate, to limit opportunity to use placement of stickers to identify ballot and to preserve integrity of ballot by insuring vote is cast as elector tends. [I.C.A. § 49.99](#).

**[10] Elections** 182

[144k182 Most Cited Cases](#)

To be valid, write-in vote must be cast in substantial compliance with statute requiring write-ins to be asserted "in proper place"; such standard is met when sticker is close enough to space designated for write-in to show elector's intention. [I.C.A. § 49.99](#).

**[11] Elections** 182

[144k182 Most Cited Cases](#)

Placement of stickers on write-in ballots substantially complied with statute requiring that write-ins be inserted "in proper place," since, although ballots concealed words "township ticket," printed on ballot directly below space for supervisor write-ins, voters' intent to cast such sticker votes for write-in candidate in board of supervisors race remained clear. [I.C.A. § 49.99](#).

**[12] Elections** 181

[144k181 Most Cited Cases](#)

A write-in vote showing a candidate's surname alone is valid when it appears use of surname is sufficient in circumstances to indicate for whom voter intended to cast his ballot; issue is to be decided in light of all facts of a general public nature surrounding election which voter may be presumed to know and in view of which he may be presumed to have exercised his franchise; among circumstances bearing on determination of voter intent are whether write-in candidacy was well publicized and whether other candidates and other residents of locality involved had same or similar surname.

**[13] Elections** 181

[144k181 Most Cited Cases](#)

Write-in votes showing only candidate's surname or first initial and surname were valid, since use of surname was sufficient to indicate for whom voter intended to cast his ballot in view of write-in candidate's active candidacy, publicity and advertising which accompanied it and unlikelihood of his being confused with few other persons having same surname, none of whom were shown to be politically active.

**[14] Elections** 188

[144k188 Most Cited Cases](#)

Voter's intention, if it can be ascertained, should not be defeated or frustrated by fact name of write-in candidate is misspelled, or wrong initials were employed, or some other slightly different name of similar pronunciation or sound has been written instead of actual name of candidate intended to be voted for.

**[15] Elections** 188

[144k188 Most Cited Cases](#)

In election contest involving write-in board of supervisors candidate Francis P. Devine, no error occurred in counting

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for such candidate votes containing slight name variations such as "France Devine," "France P. Defvine," and "Francis P. Deiven," since all such votes appeared to be attempts by voters to cast their ballot for such candidate.

**[16] Elections**  **188**[144k188 Most Cited Cases](#)

In election contest involving write-in county board of supervisors candidate Francis P. Devine, ballot cast for "Frank Devine" should have been counted for such candidate, since it sufficiently reflected an attempt to vote for such candidate.

**[17] Elections**  **188**[144k188 Most Cited Cases](#)

In election contest involving write-in county board of supervisors candidate Francis P. Devine, no error occurred in rejecting votes cast for "Dan Devine," "Dan P. Devine," "Danny Devine," "D. Devine," "Daniel P. Devine," "James Devine," "James P. Devine," "Jim Devine," "Russell Devine," "P. Devine," "R. P. Devine," "Louis P. Devine," "Francis Levine," "Frances D. Levine," and "V. Devine," in that voters' intent was not adequately shown for variations in given name were not similar to candidate's true name nor did it appear he was known by any of those names.

**[18] Elections**  **186(1)**[144k186\(1\) Most Cited Cases](#)

Primary test of validity of a ballot is whether voter's intent is sufficiently shown.

**[19] Elections**  **194(1)**[144k194\(1\) Most Cited Cases](#)

Extraneous erasures, crossed out words or other markings do not void a ballot unless they have been placed on it as identifying marks. [I.C.A. § 49.98](#).

**[20] Elections**  **194(1)**[144k194\(1\) Most Cited Cases](#)

In election contest involving write-in county board of supervisors candidate, ballots on which such candidate's name was written in twice with one of names crossed out, ballot on which his first name was crossed out and full name correctly written in, ballot on which a "blot" preceded candidate's surname with his first name written under "blot" and

ballot on which name was written three times and crossed out twice should have been counted for such candidate, in that voter's confusion regarding where to write in candidate's name caused voters to cross out and rewrite name and there was no evidence of an attempt to place identifying marks on the ballot. [I.C.A. § 49.98](#).

**[21] Elections**  **194(2)**[144k194\(2\) Most Cited Cases](#)**[21] Elections**  **194(9)**[144k194\(9\) Most Cited Cases](#)

In election contest involving write-in county board of supervisors candidate, ballot on which erasure existed in box next to office of state senator, and ballot on which erasure existed in box next to name of incumbent supervisor should have been counted for write-in candidate; likewise where election officials had given voter ballot marked "sample ballot" in red ink.

**[22] Elections**  **183**[144k183 Most Cited Cases](#)

In election contest between write-in county board of supervisors candidate and incumbent, disputed ballot for incumbent, which contained a vote for an additional person for supervisor position, was properly rejected as ambiguous.

**[23] Elections**  **186(1)**[144k186\(1\) Most Cited Cases](#)

In election contest between write-in candidate and incumbent county board supervisor, ballots on which write-in candidate's name was put under incumbent's name in incumbent's party column should have been counted for write-in candidate, since mistake as to such candidate's party was not a mistake of his identity and since at least three write-in votes were cast for incumbent in another party column and were counted. [I.C.A. § 49.99](#).

**[24] Elections**  **186(1)**[144k186\(1\) Most Cited Cases](#)

Ballots on which write-in candidate's name was written in twice, once in his party's column and once in independent column, were valid as single votes for write-in candidate and should have been counted for him, since statute providing that a voter may not

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vote for more than one candidate for a single office did not speak to problem of voting twice on a single ballot for one candidate and since no doubt existed regarding voters' intent to vote for write-in candidate. [I.C.A. § 49.93](#).

\*622 James P. Rielly, of Spayde & Rielly, Oskaloosa, for appellant.

Ralph R. Brown, of McDonald, Keller & Brown, Dallas Center, for appellee.

\*623 Considered en banc. [\[FN\\*\]](#)

[FN\\*](#) MASON, J. serving after June 14, 1978, by special assignment.

McCORMICK, Justice.

We must here decide who won a Keokuk County board of supervisors seat in the November 1976 election. A canvass after the election showed plaintiff Francis P. Devine, a write-in candidate, defeated defendant Raymond James Wonderlich, the incumbent. Wonderlich initiated a contest and the contest court, after invalidating certain ballots, declared Wonderlich the winner. Devine appealed to the district court which, although disagreeing with the contest court as to the validity of a number of ballots, also concluded Wonderlich won the election. Upon our de novo review, we reverse and remand.

Several general principles guide our review. Contest procedures for county offices are established in Code chapter 62. The contest is tried as a civil action. [ss 62.2, 62.13, The Code](#). Appeal lies from the contest court to district court which hears the appeal in equity and determines anew all questions in the case. [s 62.20, The Code](#). Hence our review is also de novo. [Stamos v. Gray, 221 Iowa 145, 147, 264 N.W. 919, 920 \(1936\); Murphy v. Lentz, 131 Iowa 328, 330, 109 N.W. 530, 531 \(1906\)](#).

[\[1\]](#) Because an election contest involves the right of qualified voters to have their ballots counted for the candidate of their choice, the right of franchise is at stake. The right to vote is a fundamental political right. It is essential to representative government. [Wesberry v. Sanders, 376 U.S. 1, 17-18, 84 S.Ct. 526, 535, 11 L.Ed.2d 481, 492 \(1964\)](#) ("No right is more precious in a free country than that of having a

voice in the election of those who make the laws under which, as good citizens, we must live."). Any alleged infringement of the right to vote must be carefully and meticulously scrutinized. [Reynolds v. Sims, 377 U.S. 533, 561-562, 84 S.Ct. 1362, 1381, 12 L.Ed.2d 506, 527 \(1964\)](#).

[\[2\]\[3\]](#) Statutory regulation of voting and election procedure is permissible so long as the statutes are calculated to facilitate and secure, rather than subvert or impede, the right to vote. Among legitimate statutory objects are shielding the elector from the influence of coercion and corruption, protecting the integrity of the ballot, and insuring the orderly conduct of elections. [Whitcomb v. Affeldt, 319 F.Supp. 69, 76 \(N.D.Ind.1970\)](#), aff'd, [405 U.S. 1034, 92 S.Ct. 1304, 31 L.Ed.2d 576 \(1972\)](#). However, because the right to vote is so highly prized, these statutes must be construed liberally in favor of giving effect to the voter's choice, and every vote cast enjoys a presumption of validity. [Paulson v. Forest City Community School District, 238 N.W.2d 344, 348 \(Iowa 1976\)](#).

[\[4\]](#) As a general rule, if a voter affixes any mark to his ballot which fairly indicates his intention to vote for a particular candidate, the vote should be counted for the candidate unless a mandatory provision of the election law is violated. [26 Am.Jur.2d Elections s 258 at 84](#).

Before addressing the specific issues in this case, it may be helpful to outline the factual background from which they arise.

Francis P. Devine was a Democratic candidate for Keokuk county supervisor in the November 1974 general election. He campaigned extensively, advertised his candidacy, and was listed on the ballot in that election. He was defeated by 50 votes.

In the primary election of June 1976 no Democratic candidate was on the ballot in the supervisor race for the 1977 term. However, Devine received a number of write-in votes in the primary and decided to seek the office. In late June the Democratic county central committee certified his candidacy to the county auditor. In September his candidacy was challenged because he had not been selected by a reconvened county convention pursuant to [s 43.78\(1\)\(d\), The](#)

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The county auditor was uncertain about whether Devine's name should be printed on the paper ballot. On October 4, 1976, he notified Devine his name would be on the \*624 ballot, but two days later he informed him he had changed his mind. Devine commenced an injunctive action to have his name put on the ballot. The auditor had stickers printed, showing Devine's name and the office he sought, which he intended to attach to the ballot if Devine's lawsuit was successful. However, Devine lost his case, and the auditor gave the stickers to the secretary of a county taxpayers' association who distributed more than 3000 of them to other persons in the county.

Devine's problem received considerable publicity, and he campaigned and advertised extensively as a write-in candidate. After the election, the official canvass of votes showed he received 2655 votes and Wonderlich 2653. However, this result was upset by the contest court, and Devine also was declared the loser in district court. This appeal followed.

The district court concluded Wonderlich won by a vote of 2638 to 2503. At issue here is the validity of 282 ballots, 272 of which Devine claims and ten of which Wonderlich claims.

The contested ballots fall into four main categories. First is a group of 108 sticker ballots. Second is a group of 77 ballots on most of which the surname "Devine" only or the name "F. Devine" was written in. Third is a group of 46 ballots in which numerous name variations exist. Fourth is a group of 51 ballots, including the ten claimed by Wonderlich, which involve other irregularities.

The district court counted 79 of the contested ballots for Devine, but Wonderlich contends it erred in doing so. Devine asserts the court should have counted all 272 of the votes he claims.

I. The sticker ballots. Although the use of pasters or stickers for voting on paper ballots is not expressly provided for by statute in Iowa, authority for their use exists under [s 49.99, The Code](#), which provides:

The voter may also insert in writing in the proper place

the name of any person for whom he desires to vote and place a cross or check in the square opposite thereto. The writing of such name shall constitute a valid vote for the person whose name has been written on the ballot without regard to whether the voter has made a cross or check opposite thereto. The making of a cross or check in a square opposite a blank without writing a name therein, shall not affect the validity of the remainder of the ballot.

The words "in writing" include "any mode of representing words or letters in general use." [s 4.1\(17\), The Code](#). See [Barr v. Cardell, 173 Iowa 18, 155 N.W. 312 \(1915\)](#); [Ray v. Hogan, 221 Mass. 223, 108 N.E. 1051 \(1915\)](#), [Murray v. Floyd, 216 Minn. 69, 11 N.W.2d 780 \(1943\)](#).

The stickers used on the contested sticker ballots in this case were in the following form:

FOR MEMBER  
BOARD OF SUPERVISORS  
Term Commencing 1977

[ ] FRANCIS P. DEVINE

The sticker accurately states the office and term for which Devine was running, and the words used to do so are a precise duplicate of words printed on the ballot just above the space for writing in a candidate's name in all but the Republican and petition-candidate columns on the printed ballot.

Wonderlich alleged the 108 [\[FN1\]](#) ballots containing these sticker votes could not be counted for Devine because the stickers have words other than Devine's name printed on them, and he alternatively alleged 52 of them could not be counted because they were not affixed in the proper place on the ballot. The district court rejected his first allegation but sustained his second. We must now determine if the court erred.

[FN1.](#) He attacked an additional sticker ballot because it was voted in the Republican column. This ballot is among those discussed in division IV.

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Two statutory provisions bear on this issue. First is the prescription of [s 49.98](#) against marking a ballot in any manner for the purpose of identifying it. Second is the \*625 requirement of [s 49.99](#) that a write-in vote be inserted "in the proper place" on the ballot.

The extra words on the stickers would invalidate the ballots if they constituted identifying marks within the meaning of [s 49.98](#). This concept is explained in [Fullarton v. McCaffrey, 177 Iowa 64, 70-72, 158 N.W. 506, 508 \(1916\)](#), as follows:

The distinguishing mark prohibited by law is one which will enable a person to single out and separate the ballot from others cast at the election. It is something done to the ballot by the elector designedly and for the purpose of indicating who cast it, thereby evading the law insuring the secrecy of the ballot. In order to reject it the court should be able to say, from the appearance of the ballot itself, that the voter likely changed it from its condition when handed to him by the judges of election, otherwise than as authorized, for the purpose of enabling another to distinguish it from others. \* \* \*

What is an identifying mark is not defined in our statute, and whether any mark on a ballot other than the cross authorized to be placed thereon was intended as a means of identifying such ballot must be determined from the consideration of its adaptability for that purpose, its relation to other marks thereon, whether it may have resulted from accident, inadvertence or carelessness or evidenced design and the similarity of the ballot with others cast and the like. In other words, the court, in deciding the issue \* \* \* may, and should, consider all the evidence and circumstances bearing thereon precisely as in passing on any other issue.

Electors are not presumed to have acted corruptly and identifications only which may fairly be said to be reasonably suited for such purpose, and likely to have been so intended, will justify the rejection of the ballot.

See also [Headington v. North Winneshiek Comm. School Dist., 254 Iowa 430, 117 N.W.2d 831 \(1962\)](#); [Beck v. Cousins, 252 Iowa 194, 106 N.W.2d 584 \(1960\)](#).

[5] The statute barring identifying marks originated from a desire to guard against the possibility of a vote seller indicating to a vote buyer in advance how his ballot could be dis-

tinguished so the buyer could determine if the bribed voter had carried out his agreement. The issue as to whether a particular ballot violates the prohibition is ordinarily one of fact.

[6] We agree with the district court that the presence of the extra words on the stickers did not invalidate the 108 ballots. The words were the same as appeared on the ballot; they appeared on all the stickers which the auditor had caused to be printed and obviously were not calculated to permit individual ballots to be identified. They did not constitute identifying marks within the meaning of the prohibition. See [Ray v. Hogan, 221 Mass. 223, 108 N.E. 1051 \(1951\)](#) (the extra words "three years" stating the term of office did not invalidate ballots); [26 Am.Jur.2d Elections s 269 at 96](#) ("The fact that unnecessary words are printed on stickers used \* \* \* is not a ground for rejecting a ballot.")

[7][8] Wonderlich also asserts the 108 ballots are invalid because the additional language spoiled them. The principal basis for this assertion is [s 49.68, The Code](#), which governs instructions to voters. However, this statute is inapplicable. It provides voters are to be instructed not to vote spoiled or defaced ballots. [s 49.68\(6\)](#). A separate provision authorizes a voter to return a spoiled ballot for a new one. [s 49.100, The Code](#). However, assuming a ballot would be "spoiled" by attaching one of the Devine stickers to it, [s 49.68](#) does not make a "spoiled" ballot invalid as such because it does not establish a standard for determining the validity of ballots.

The statute is a precautionary device. It is procedural rather than substantive. When construed with [s 49.100](#), it means that when a ballot contains an erasure, crossed out words or other extraneous markings, it is spoiled or defaced and may therefore be replaced. However, when the \*626 ballot is not replaced it is not invalid so long as the voter's intent can be ascertained and the markings were not placed on the ballot for the purpose of identifying it.

The instructions "do not supersede the statutes, but are intended to guide the voter, and especially to enable him to avoid any mistake in expressing his choice, and prevent him from loading his ballot with identifying marks." [Fullarton v. McCaffrey, 177 Iowa 64, 68, 158 N.W. 506, 507 \(1916\)](#).

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The question remains one of voter intent and absence of identifying marks. The provisions of [s 49.68](#) do not provide a basis for holding the 108 ballots invalid.

[9] Wonderlich's alternative challenge to 52 of the sticker ballots is based on an alleged violation of [s 49.99](#) which requires write-ins to be inserted "in the proper place". This requirement serves three purposes. First, it helps prevent the fraudulent alteration of ballots to conceal votes properly marked by another for a different candidate. [In re Keogh-Dwyer, 85 N.J.Super. 188, 199, 204 A.2d 351, 356 \(1964\)](#), rev'd on other grounds, [45 N.J. 117, 211 A.2d 778 \(1965\)](#). Second, it limits the opportunity to use placement of stickers to identify the ballot. [Sims v. George, 250 Ind. 595, 236 N.E.2d 820 \(1968\)](#). Third, it serves the obvious purpose of preserving the integrity of the ballot by insuring the vote is cast as the elector intends.

[10] To be valid, the write-in vote must be cast in substantial compliance with the statute. See [Brown v. McCollum, 76 Iowa 479, 486, 41 N.W. 197, 199 \(1889\)](#) (write-in slightly above or below its proper place does not invalidate the ballot). We hold, in accordance with the majority rule, that the standard is met when the sticker is close enough to the space designated for the write-in to show the elector's intention. See [29 C.J.S. Elections s 179 at 510](#) ("(I)t is not sufficient if the sticker is placed under the name of some other office, but a ballot should not be rejected \* \* \* where the sticker is placed so near the name of the office voted for as clearly to indicate the elector's intention.").

Sticker votes were upheld in the following cases where some deviation in placement existed. See [Bartlett v. McIntire, 108 Me. 161, 175, 79 A. 525, 531 \(1911\)](#) ("When a sticker is so placed that enough of the top parts of the letters of the designation remain, so that the eye can see what the office was, the vote should be counted."); [Ray v. Hogan, 221 Mass. 223, 108 N.E. 1051 \(1915\)](#); [Cory v. MacKenzie, 297 Mich. 523, 298 N.W. 120 \(1941\)](#); [Burns v. Rodman, 342 Mich. 410, 70 N.W.2d 793 \(1955\)](#) (stickers placed under rather than opposite name of office); [Sawyer v. Hart, 194 Mich. 399, 160 N.W. 572 \(1916\)](#) (sticker covered words which were not material); [Hanson v. Emanuel, 210 Minn. 271, 297 N.W. 749 \(1941\)](#) (stickers too wide for spot, sticker upside down, and sticker extending over edge of bal-

lot); [Erickson v. Paulson, 111 Minn. 336, 126 N.W. 1097 \(1910\)](#) (covering printed matter); [Roberts v. Bope, 14 N.D. 311, 103 N.W. 935 \(1905\)](#).

Deviation in placement has been held to be too great in other cases. See [Sims v. George, 250 Ind. 595, 236 N.E.2d 820 \(1968\)](#) (stickers at various places on ballots other than space provided); [O'Brien v. Board of Election Comm'rs., 257 Mass. 332, 153 N.E. 553 \(1926\)](#) (same); [Read v. McPherson, 255 Mich. 604, 238 N.W. 477 \(1931\)](#) (sticker in wrong column); [Murray v. Floyd, 216 Minn. 69, 11 N.W.2d 780 \(1943\)](#) (sticker under wrong office); [In re Keogh-Dwyer, 85 N.J.Super. 188, 204 A.2d 351 \(1964\)](#), rev'd on other grounds, [45 N.J. 117, 211 A.2d 778](#) (sticker over opposing candidate's name).

Cases relied on by Wonderlich and the district court were decided under a minority rule requiring strict compliance with statutes relating to placement of stickers, and we decline to follow them. See [In re Election of Supervisor in Springfield Twp., 399 Pa. 37, 159 A.2d 901 \(1960\)](#); [State ex rel. Browne v. Dist. Ct., 167 Mont. 477, 539 P.2d 1182 \(1975\)](#).

[11] We have examined the 52 ballots on which Wonderlich contends stickers were incorrectly placed. We find the placement of these stickers substantially complies with the statute. Although on 30 ballots they \*627 conceal the words "Township Ticket," printed on the ballot directly below the space for supervisor write-ins, the voters' intent to cast these sticker votes for Devine in the board of supervisors race remains clear.

We hold that the district court should have counted all 108 rather than only 56 of the challenged sticker ballots for Devine.

II. The surname votes. The district court refused to count for Devine 77 ballots on which only his surname or first initial and surname were written in. The surname "Devine" was used on 49 of them, the designation "Mr. Devine" on three, and the name "F. Devine" on the remaining 25.

[12][13] We have previously held that a write-in vote showing a candidate's surname alone is valid when it appears the

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use of the surname is sufficient in the circumstances to indicate for whom the voter intended to cast his ballot. [Beck v. Cousins](#), 252 Iowa 194, 106 N.W.2d 584 (1960); [Brown v. McCollum](#), 76 Iowa 479, 41 N.W. 197 (1889). As these cases hold, the issue is to be decided in light of all facts of a general public nature surrounding the election which the voter may be presumed to know and in view of which he may be presumed to have exercised his franchise. Among the circumstances bearing on the determination of voter intent are whether the write-in candidacy was well publicized and whether other candidates and other residents of the locality involved had the same or similar surname.

In this case Devine's candidacy was well publicized and advertised. Because of this and because of his prior candidacy for the same office, his name was familiar to many voters in this rural, lightly-populated county. Ten other residents of the county bore the same surname, but all were relatives of Devine and none was a candidate for this or any other office. One was his 70 year-old aunt and the others were all members of his immediate family. In addition, another person, a non-relative named Daniel Edward Devine, had died in March 1976, about eight months before the election.

The circumstances here are sufficiently close to those in the Brown and Beck cases to warrant the same result. In view of Devine's active candidacy, the publicity and advertising which accompanied it, and the unlikelihood of his being confused with the few other persons having the same surname, none of whom were shown to be politically active, the use of his surname alone was sufficient to indicate a vote for him.

We find that the voters who wrote in the surname Devine, Mr. Devine, or F. Devine intended to vote for candidate Francis P. Devine.

In addition to the Brown and Beck cases, authorities from other jurisdictions support this conclusion. See [Fitzsimmons v. Wilks](#), 25 Cal.App. 56, 142 P. 892 (1914) (three members of immediate family bore same surname); [Kreitz v. Behrensmeyer](#), 125 Ill. 141, 17 N.E. 232 (1888) (other persons in the county had the same surname but none was a candidate); [Gulino v. Cerny](#), 13 Ill.2d 244, 148 N.E.2d 724 (1958); [Dupin v. Sullivan](#), 355 S.W.2d 676

([Ct.App.Ky.1962](#)) (other persons in the city had the same surname but were not candidates); [Petrie v. Curtis](#), 387 Mich. 436, 196 N.W.2d 761 (1972); [Kasten v. Guth](#), 395 S.W.2d 433 (Mo.1965); [Petition of Fifteen Registered Voters on behalf of Flanagan](#), 129 N.J.Super. 296, 323 A.2d 521 (1974) (nine other registered voters had the same surname but none was a candidate); [Chonin v. Millspaugh](#), 13 Misc.2d 841, 180 N.Y.S.2d 674 (1958); [Keenan v. Briden](#), 45 R.I. 119, 119 A. 138 (1922); Annot., 86 A.L.R.2d 1025 et seq. See also [26 Am.Jur.2d Elections s 272 at 99](#) ("Although some courts deem themselves bound by a stricter rule, it has been held that a ballot that contains a candidate's surname only may be counted, even though there are other persons in the county having the same surname."); [29 C.J.S. Elections s 180 at 518](#).

We hold the district court erred in refusing to count these 77 votes for Devine.

[14] III. Other name variations. The trial court counted 19 of 46 ballots for Devine on which numerous variations of his name appeared. The principle which is applicable \*628 in this situation is similar to the one involved when the surname alone is written in. The voter's intention, if it can be ascertained, should not be defeated or frustrated by the fact the name of the candidate is misspelled, or the wrong initials were employed, or some other slightly different name of similar pronunciation or sound has been written instead of the actual name of the candidate intended to be voted for. [Brown v. McCollum](#), 76 Iowa 479, 485, 41 N.W. 197, 198 (1889). In Brown, ballots were counted for Ella S. Brown on which the write-ins were "Mrs. A. Brown", "Ella Brown", "Miss Emma Brown", and "Elice Brown".

[15] In the present case the district court counted 19 votes for Devine where the name variations were slight. Examples include "France Devine", "France P. Devine", and "Francis P. Deiven". These all appear to be attempts by voters to cast their ballot for Devine, and we believe the trial court was correct in counting these votes for him.

[16] However, the court rejected an additional ballot which comes within the same principle. This ballot was cast for "Frank Devine". We find it sufficiently reflects an intent to vote for Francis P. Devine and should have been counted for

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him.

[17] Ballots which were rejected by the district court include five cast for "Dan Devine", one for "Dan P. Devine", one for "Danny Devine", one for "D. Devine", and one for "Daniel P. Devine". The court rejected eight ballots cast for "James", "James P." and "Jim" Devine. Also rejected were two votes for "Russell Devine", two for "P. Devine", one each for "R. P. Devine", "Louis P. Devine", "Francis Levine", "Frances D. Levine" and "V. Devine". Although we suspect these voters intended to vote for Francis P. Devine, we are not persuaded their intent to do so was adequately shown. The variations in given name are not similar to the candidate's true name nor did it appear he was known by any of those names. Write-ins were rejected in similar circumstances in [Bartlett v. McIntire](#), 108 Me. 161, 79 A. 525 (1911), [O'Brien v. Board of Election Comm'rs.](#), 257 Mass. 332, 153 N.E. 553 (1926), [Murray v. Floyd](#), 216 Minn. 69, 11 N.W.2d 780 (1943), [Application of Jeffrey](#), 198 N.Y.S.2d 966 (1960), and [Keenan v. Briden](#), 45 R.I. 119, 119 A. 138 (1922).

We hold the district court was right in its conclusions as to the ballots containing name variations except for the one additional ballot which should have been counted for Devine.

IV. Miscellaneous irregularities. The remaining 51 contested ballots involve various alleged deficiencies. Forty-one of these votes are claimed by Devine and ten by Wonderlich. The district court rejected all but four of the ballots. It counted those four for Devine. However, we believe it was mistaken in rejecting most of the ballots for both parties.

The court relied on [s 49.68, The Code](#), is making a ballot containing erasures or crossed out words invalid. However, as explained in division I, this statute does not establish standards for determining the validity of ballots. Instead it lists precautionary instructions which are to be given to voters. [Fullarton v. McCaffrey](#), 177 Iowa 64, 68, 158 N.W. 506, 507 (1916). It does not provide a basis for declaring ballots invalid.

[18][19] The primary test of validity is whether the voter's intent is sufficiently shown. [Brandenburg v. Hurst](#), 289 Ky.

[155, 158 S.W.2d 420 \(1942\)](#). Extraneous erasures, crossed out words or other markings do not void a ballot unless they have been placed on it as identifying marks. See [Opinion of the Justices](#), 369 A.2d 233 (Me.1977); [In re Keogh-Dwyer](#), 85 N.J.Super. 188, 204 A.2d 351 (1964), rev'd on other grounds, [45 N.J. 117, 211 A.2d 778 \(1965\)](#).

Under these principles we hold the court should have counted 19 additional votes for Devine, was right in counting the four votes which it did for him, and should have counted nine disputed votes for Wonderlich.

[20] On 13 of these ballots Devine's name was written in twice with one of the names crossed out. On one the name \*629 "Francis" was crossed out and the full name correctly written in. On another a "blot" preceded the name "Devine" with "Francis" written under the "blot". On another the name was written three times and crossed out twice. In each of these 16 situations it is obvious the voters were confused regarding where to write in Devine's name. We believe this confusion caused the voters to cross out and rewrite the name, and no evidence exists of an intent to place identifying marks on these ballots.

[21] The same is true of three other Devine ballots which the district court rejected. On one an erasure existed in the box next to the office of state senator. On another an erasure existed in the box next to the name of Wonderlich. On the third the election officials had given the voter a ballot marked "sample ballot" in red ink. We hold these votes should also have been counted for Devine.

The four votes counted for Devine which Wonderlich argues should not have been counted all contain analogous markings and were properly counted.

[22] Nine of the Wonderlich ballots come within the same principle. However, the remaining disputed Wonderlich ballot contains a vote for an additional person for the supervisor position. Because this made the vote ambiguous, the district court was right in rejecting it.

[23] The remaining 18 ballots, all claimed by Devine, contain other irregularities. On eight of them, Devine's name was put under Wonderlich's name in the Republican

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column. The issue is whether this is "the proper place" for a write-in. Although space existed where the name was placed, the form for the write-in was not printed on the ballot like it was under all but one of the other columns, and, of course, Devine was a Democratic and not a Republican candidate. If it was not wrong for the voters to write the name in the Republican column, it was not wrong for them to place it under Wonderlich's name because that was within the space in which the office was designated.

We have not had a case on this issue, but a decision from Washington in which a similar problem was involved is persuasive. In [Knowles v. Holly, 82 Wash.2d 694, 513 P.2d 18 \(1973\)](#), the court held the correct party designation is not essential to the validity of a general election write-in vote. A mistake as to the candidate's party is not a mistake of his identity.

No doubt exists here of the voters' intent to cast these eight ballots for Devine. We hold they should have been counted for him. See also [Sizemore v. Henson, 264 S.W.2d 865 \(Ct.App.Ky.1954\)](#) (write-in of independent under the name of the Republican candidate ballot held valid); [Frothingham v. Woodside, 122 Me. 525, 120 A. 906 \(1923\)](#) (ballot valid where Democratic write-in placed in Republican column). We note that at least three write-in votes were cast for Wonderlich in the Democratic column and were counted.

[24] On seven other ballots Devine's name was written in twice, once in the Democratic column and once in the Independent column. A voter may not vote for more than one candidate for a single office. [s 49.93, The Code](#). However, the statutes do not speak to the problem of voting twice on a single ballot for one candidate. We believe common sense and general principles should govern. No doubt exists regarding the voters' intent to vote for Devine. These ballots are valid as single votes for Devine and should have been counted for him. See [Sizemore v. Henson, 264 S.W.2d 865 \(Ct.App.Ky.1954\)](#) (ballot marked twice for same candidate); [Howard v. Harrington, 114 Me. 443, 96 A. 769 \(1916\)](#) (ballot not invalid when same name placed on it in writing and by sticker); [Frothingham v. Woodside, 122 Me. 525, 120 A. 906 \(1923\)](#) (marking ballot twice for same candidate was a mere emphasis of choice).

We believe the district court was right in holding invalid the remaining three disputed Devine ballots.

However, of the 41 disputed ballots discussed in this division which Devine claims, we hold the district court should have counted \*630 38 for him instead of four. Of the ten disputed votes claimed by Wonderlich, we hold the court should have counted nine.

We have held 164 ballots rejected by the district court should have been counted for Devine, making his total 2667. Nine additional votes should have been counted for Wonderlich, making his total 2647.

We hold Devine won the election. The case is reversed and remanded for judgment ordering issuance of a certificate of election to him in conformity with this holding.

REVERSED AND REMANDED.

All Justices concur.

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Supreme Court of Iowa.  
Francis P. DEVINE, Appellee,  
v.  
Raymond James WONDERLICH, Appellant.  
**No. 62816.**

Feb. 20, 1980.

De facto officeholder appealed from summary judgment entered by the Keokuk District Court, Richard J. Vogel, J., in favor of de jure officeholder, eventual winner of contested election, for salary received by de facto officeholder when serving on board of supervisors after having been adjudged winner of election by contest court and district court. The Supreme Court, Rees, J., held that de jure officeholder who ultimately prevails in an election may not recover from the de facto officeholder the salary he or she received while serving in office during pendency of contest litigation.

Reversed and remanded with directions.

## West Headnotes

**[1] Officers and Public Employees**  **101**[283k101 Most Cited Cases](#)

De jure officeholder who ultimately prevails in an election may not recover from the de facto officeholder the salary he or she received while serving in office during pendency of contest litigation; overruling *Harding v. City of Des Moines*, 193 Iowa 885, 188 N.W. 135.

**[2] Officers and Public Employees**  **101**[283k101 Most Cited Cases](#)

Incumbent officeholders who choose to remain in office while challenging an adverse judgment from contest court are outside scope of ruling that de jure officeholder who ultimately prevails in an election may not recover from the de facto officeholder the salary he or she received while serving in office during pendency of contest litigation. *I.C.A. § 62.20*.

**\*902** Timothy F. Gerard of Baumert & Gerard, Sigourney, for appellant.

James P. Reilly of Spayde & Reilly, Oskaloosa, for appellee.

Considered by REYNOLDSON, C. J., and REES, HARRIS, McGIVERIN and LARSON, JJ.

REES, Justice.

Raymond James Wonderlich appeals from an adverse summary judgment granted plaintiff Francis P. Devine for \$12,749.94, the amount which Wonderlich received as salary while serving on the Keokuk County board of supervisors pursuant to the decisions of an election contest court and the district court. Devine had been adjudicated the winner of the election for the position in question by this court approximately eighteen months after the defendant Wonderlich assumed the office. We reverse the judgment of the district court and remand this case for dismissal of plaintiff's action.

**\*903** After a canvass of the votes cast in the November 1976 election for the position of county supervisor, plaintiff was declared the winner by two votes. Defendant Wonderlich, then incumbent in the office, filed an election contest and, pursuant to [section 62.19, The Code 1975](#), the contest court declared Wonderlich the winner of the election, revoked the plaintiff's certificate of election and caused a certificate of election to be issued to the defendant. Wonderlich thereupon assumed office on January 1, 1977. Upon appeal by Devine, the district court affirmed the decision of the contest court. On further appeal to this court, we reversed the district court ruling and held that plaintiff had actually won the election. [Devine v. Wonderlich](#), 268 N.W.2d 620, 630 (Iowa 1978). On July 21, 1978, the district court directed that a certificate of election be issued to Devine.

On August 29, 1978, Devine instituted the present action, seeking from the defendant the amount

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which Wonderlich had received in compensation for serving on the board of supervisors pursuant to the decisions of the contest court and the district court.

On September 12 Wonderlich filed a cross-petition, naming members of the contest court, the commissioner of elections, members of the county board of supervisors, the county auditor, and Keokuk County as third-party defendants. Wonderlich alleged that said third-party defendants were the parties actually liable to the plaintiff on the salary claim, and sought indemnification from the aforementioned parties. On September 21 the third-party defendants moved to dismiss the cross-petition on the ground that they had been acting in their official capacities and that the cross-petition failed to state a claim upon which relief could be granted. On November 3 the trial court dismissed the cross-petition, a ruling from which the defendant has not appealed. Thus the issue of potential alternative sources for a successful election contestant's salary is not before us at this time.

The plaintiff then moved for summary judgment on his petition. Following hearing and the submission of briefs, the trial court sustained plaintiff's motion for summary judgment on November 3, 1978. While expressing doubt regarding the equity of the result, the trial court found existing case law to be in plaintiff's favor and ruled accordingly. On December 1, 1978 Wonderlich filed a timely notice of appeal to this court.

The sole issue presented by this appeal is whether the eventual loser of an election contest may be found liable to the person to whom the office is ultimately awarded for the amount of salary which he or she received while serving in office pending resolution of the election contest.

We have in the past adhered to the majority position that a de jure officer, the rightful holder of an office, may recover from a de facto officer for the period which the de jure officer was deprived of his or her office. [Harding v. City of Des Moines](#), 193

[Iowa 885](#), 889, 188 N.W. 135, 137 (1922); [McCue v. County of Wapello](#), 56 Iowa 698, 704-05, 10 N.W. 248, 251 (1881). Concomitantly we have held that a governing body cannot be liable to a de jure officer if the salary in question has been paid to a de facto officer. [Glenn v. Chambers](#), 242 Iowa 760, 770-71, 48 N.W.2d 275, 280-81 (1951); [McClinton v. Nelson](#), 232 Iowa 543, 547-48, 4 N.W.2d 247, 248-49 (1942); [Harding v. City of Des Moines](#). The latter position is not without statutory exception. See [Hild v. Polk County](#), 242 Iowa 1354, 1358-59, 49 N.W.2d 206, 207-08 (1951) (general rule abrogated by [section 66.9, The Code](#), as to public officials suspended for misconduct and then restored to office).

Despite Devine's contention, we find no statutory provision applicable to the case at bar. [Section 62.20](#) requires an incumbent who wishes to remain in office And who challenges the decision of the contest court to post a bond which may be forfeited upon an adverse decision upon appeal. As the incumbent Wonderlich was not challenging the decision of the contest court, [section 62.20](#) provides no guidance. Resolution of \*904 this dispute depends on this court's continued adherence to the majority position taken in [Harding](#) in the context of an election contest.

Before reaching the merits of this controversy, we wish to clarify the parameters of our decision. While the possibility of governmental liability to the de jure officeholder involves considerations interrelated with those relevant to resolution of this dispute, no issue of governmental liability is presented by this case. Some of the cases which we will discuss involve the question of governmental liability. This is a result of the underlying considerations which the issues of de facto official and governmental liability hold in common and not a reflection of the scope of this opinion. We are only determining the liability of Wonderlich, the de facto member of the board of supervisors during the election contest period, to Devine, the de jure member of the board of supervisors for the same period,

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for the salary received by Wonderlich. Our holding is therefore limited to the election contest context.

We also note, as earlier mentioned, that the legislature has provided a partial solution to salary disputes which may arise from election contests by enacting [section 62.20](#), and that ultimate resolution of the issue before us, as well as consideration of possible governmental liability, would be an appropriate subject for legislative action.

In [Brown v. Tama County](#), 122 Iowa 745, 754, 98 N.W. 562, 566 (1904), a case involving alleged governmental liability to a de jure officeholder following an election contest, we stated that any hardship which devolves upon the de facto officeholder can be traced to the fault of the de facto officeholder "who, without sufficient grounds, has disputed his right and taken emoluments which rightfully he (the de jure officeholder) should have received." We further noted that an election contest is basically private in nature, involving only the contestants as active parties. *Id.* It is largely this rationale, and the resulting apportionment of liability as applied to election contests, which we are asked to reconsider.

We find the factual situation presented by the election contest in this case to require a reversal of our earlier position as stated in [Harding](#) and the aforementioned cases. It is clear that the public good is best served when the office is occupied and the duties discharged. [Brown](#), 104 Iowa at 754-55, 98 N.W. at 566. In the event of a close election where the outcome hinges upon the validity of a number of disputed votes, the candidate who initially takes office pursuant to the results of an election contest would necessarily be forced to assume the risk that he or she may be forced to surrender any salary received to his or her opponent in the election. He or she could thus in good faith discharge the duties of office in the public service and yet receive no compensation. Such a possibility, we believe, operates more as a deterrent to filling the office pending an election contest since the issue of potential personal liability to the eventual de jure officeholder remains open. See [Stuhr v. Curran](#), 44 N.J.L. 181, 190

(1882). Removing the onus from the de facto officer would ensure maintenance of the public service and, as we will yet discuss, result in a more equitable distribution of risk.

In [Brown](#), as noted above, we stated that any fault which may be found rests on the de facto officer as he or she chose to assume office or contest the election on insufficient grounds. We no longer find this reasoning persuasive. If any error is found in election contest litigation, it is usually attributable to the contest court or the district court whose decisions determine the occupant of the office.[FN1] As was stated in the leading case of [\\*905Stuhr v. Curran](#), 44 N.J.L. at 189 -90, and acknowledged by those courts applying the minority position to election contests, e. g., [LaBelle v. Hazard](#), 91 R.I. 42, 160 A.2d 723, 725 (1960); [State ex rel. Byrd v. Scott County](#), 181 Tenn. 665, 671, 184 S.W.2d 20, 23 (1941); [State ex rel. Godby v. Hager](#), 154 W.Va. 606, 609, 177 S.E.2d 556, 558 (1970), fault does not lie with the de facto officer:

FN1. We in no way mean to imply that the members of the contest court or the district court, discharging their statutory duties in good faith, may be liable to the de jure officeholder. See, e. g., [Blanton v. Barrick](#), 258 N.W.2d 306, 308-09 (Iowa 1977).

It would, however, be far more just and accordant with legal principles that the public treasury should respond to the plaintiff here, than that the loss should fall upon the defendant, for it was through the mistake of the officers of the law, and not by the defendant's fault, that the plaintiff has been subjected to the deprivation of his office. If fraud was imputable to the defendant, the case would present a different aspect, but there is no pretence of bad faith on his part upon which to found a recovery. The unquestioned rule that mistake of the law excuses no one, and that the appropriation of another's property under the honest belief by the wrong-doer that it is his own, furnishes no defence, has not the slightest application here. The distinction is too obvious to escape

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even casual observation. In what respect did Curran (the de facto officer) mistake either law or fact? He took possession of the office upon the assumption that he was declared duly elected by the board legally constituted to decide that question. In this he was not in error, for the fact is conceded to be so. He acted, not upon the fact of his election, but simply upon the fact that he was declared to be elected.

As to the law he made no mistake, for it will not be denied that, as matters then stood, it was his imperative duty to accept the fact to be as found by the board and to occupy the place.

Wonderlich served in office only so long as he remained in possession of a valid certificate of election which the contest court caused to be issued, the action of which was sustained by the district court. He did so pursuant to the decisions of duly empowered governmental bodies whose decisions were later determined to be erroneous.

[1][2] Rather than continuing to adhere to the majority position in the election contest context and deny the de facto official compensation for services rendered under a then valid certificate of election, we conclude that both the public interest in having the office filled and its duties discharged and the aforementioned equitable considerations mandate reversal of our prior position. We hold that the de jure officeholder who ultimately prevails in an election may not recover from the de facto officeholder the salary he or she received while serving in office during the pendency of the contest litigation. [FN2] We are not at this time called upon to decide from whom Devine may have recourse for salary due, and do not intimate any view on this issue.

**FN2.** We note again that our holding is limited by [section 62.20](#). Incumbent officeholders who choose to remain in office while challenging an adverse judgment from the contest court are thus outside the scope of this ruling.

We therefore reverse the trial court's grant of sum-

mary judgment in favor of Devine, and remand this case for dismissal of plaintiff's petition.

REVERSED AND REMANDED WITH DIRECTIONS.

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**H**

Supreme Court of Florida.  
 Andre FLADELL, et al., Appellants,  
 v.  
 PALM BEACH COUNTY CANVASSING  
 BOARD, etc., et al., Appellees.  
 Julius Katz, et al., Appellants,  
 v.  
 Florida Elections Canvassing Commission, etc., et  
 al., Appellees.  
**Nos. SC00-2373, SC00-2376.**

Dec. 1, 2000.

Voters brought action for declaratory judgment on legality of butterfly ballot that allegedly confused voters by listing candidates in right and left columns with arrows pointing to a center column. They sought a re-vote, new presidential election, or a statistical reallocation of the vote. The Circuit Court, Palm Beach County, [Jorge Labarga, J.](#), dismissed the complaints. Voters appealed. The District Court of Appeal certified the order to be of great public importance warranting immediate resolution. The Supreme Court held that the ballot did not constitute substantial noncompliance with the statutory requirements and, therefore, did not mandate the voiding of the election.

Affirmed.

## West Headnotes

**[1] Elections**  **167**  
[144k167 Most Cited Cases](#)

**[1] Elections**  **186(1)**  
[144k186\(1\) Most Cited Cases](#)

Butterfly ballot that allegedly confused voters by listing candidates in right and left columns with arrows pointing to a center column in alleged violation of the statutory requirements on the order of the candidates did not entitle voters to a re-vote, a new presidential election, or a statistical reallocation of the election totals; the ballot did not consti-

tute substantial noncompliance with the statutory requirements and, therefore, did not mandate the voiding of the election. *West's F.S.A. §§ 101.151(4), 101.191.*

**[2] Pleading**  **312**  
[302k312 Most Cited Cases](#)

If an exhibit that is attached to a complaint facially negates the cause of action, the document controls and must be considered in determining a motion to dismiss. *West's F.S.A. RCP Rule 1.130(b).*

**[3] Elections**  **186(1)**  
[144k186\(1\) Most Cited Cases](#)

As a general rule, a court should not void an election for ballot form defects unless such defects cause the ballot to be in substantial noncompliance with the statutory election requirements.

**[4] Elections**  **186(1)**  
[144k186\(1\) Most Cited Cases](#)

The reluctance to reach a decision that will result in the disfranchisement of voters is a vital consideration in determining whether to void an election based on an alleged violation in the form of the ballot.

\***1241** [Henry B. Handler](#), [David K. Friedman](#), [Donald Feldman](#) and [William J. Cornwell](#) of Weiss & Handler, P.A., Boca Raton, Florida; [Gary M. Farmer, Jr.](#) of Gillespie, Goldman, Kronengold & Farmer, P.A., Fort Lauderdale, Florida; and [David H. Krathen](#) of the Law Offices of David Krathen, Fort Lauderdale, Florida, for Appellants in Case No. SC00- 2373.

[Deborah K. Kearney](#), General Counsel, and [Kerey Carpenter](#), Assistant General Counsel, Tallahassee, Florida; [Victoria L. Weber](#) and [Donna E. Blanton](#), Tallahassee, Florida, and [David I. Spector](#), West Palm Beach, Florida, of Steel, Hector & Davis, LLP, on behalf of the Secretary of State Katherine Harris, Clay Roberts, Director of the Division of Elections, and the Elections Canvassing Commission; [Barry Richard](#) of Greenberg, Traurig, P.A.,

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Tallahassee, Florida, on behalf of George W. Bush; and [Leonard Berger](#), West Palm Beach, Florida; [Bruce Rogow](#) and [Beverly A. Pohl](#), Fort Lauderdale, Florida; and [Robert M. Montgomery, Jr.](#), West Palm Beach, Florida, on behalf of Palm Beach County Canvassing Board, and Theresa Lepore, Supervisor of Elections, for Appellees in Case No. SC00-2373.

[Michelle G. Trca](#) of Michelle G. Trca, P.A., Fort Lauderdale, Florida; and [Charles Frederick Chester](#) of the Law Offices of Charles F. Chester, Washington, D.C., for Appellants in Case No. SC00-2376.

[Deborah K. Kearney](#), General Counsel, Florida Department of State, Tallahassee, Florida; [Victoria L. Weber](#) and [Donna E. Blanton](#), Tallahassee, Florida, and [David I. Spector](#), West Palm Beach, Florida, of Steel, Hector & Davis, LLP, on behalf of the Secretary of State and the Elections Canvassing Commission; [Barry Richard](#) of Greenberg, Traurig, P.A., Tallahassee, Florida, on behalf of George W. Bush; \*1242 [Leonard Berger](#), West Palm Beach, Florida, on behalf of Palm Beach County Canvassing Board; and [Bruce Rowgow](#) and [Beverly A. Pohl](#), Fort Lauderdale, Florida, and [Robert M. Montgomery, Jr.](#), West Palm Beach, Florida, on behalf of Theresa Lepore, Supervisor of Elections, for Appellees in Case No. SC00- 2376.

PER CURIAM.

We have for review a trial court order appealed to the Fourth District Court of Appeal, which certified the order to be of great public importance and to require immediate resolution by this Court. We have jurisdiction pursuant to [article V, section 3\(b\)\(5\) of the Florida Constitution](#).

[1] The issue in this case concerns the legality of the form of the ballot used in Palm Beach County, Florida, in the November 7, 2000, general election for the President and Vice President of the United States. The remedy sought by the appellants [FN1] is a re-vote, a new election, or a statistical reallocation of the election totals in Palm Beach County.

**FN1.** The appellants in this case are electors from Palm Beach County.

In the trial court below, the appellants filed complaints containing several claims for declaratory, injunctive, and other relief. After holding a hearing, the trial court denied relief. The appellants appealed to the Fourth District Court of Appeal, which certified the trial court's order to this Court based on the Court's "pass-through" jurisdiction. In their briefs, the appellants have asked this Court to rule on the legality of the Palm Beach County ballot. They claim that the ballot is patently defective on its face in that the form and design of the ballot violated the statutory requirements of Florida election law. The appellants contend that the ballot was confusing and, as a result, they fear that they may have cast their vote for a candidate other than the one they intended.

[2] The ballot form alleged to be patently defective was attached to the complaints as an exhibit. Exhibits attached to a pleading become a part of the pleading for all purposes. See [Fla. R. Civ. P. 1.130\(b\)](#). If an exhibit facially negates the cause of action asserted, the document attached as an exhibit controls and must be considered in determining a motion to dismiss. See [Health Application Sys., Inc. v. Hartford Life & Accident Ins. Co.](#), 381 So.2d 294, 297 (Fla. 1st DCA 1980).

[3][4] As a general rule, a court should not void an election for ballot form defects unless such defects cause the ballot to be in substantial noncompliance with the statutory election requirements. See [Nelson v. Robinson](#), 301 So.2d 508, 510 (Fla. 2d DCA 1974) (rejecting a post-election challenge based upon an alleged defect in the alignment of the candidates' names on the ballot). When considering a petition alleging a violation in the form of the ballot, [FN2] "a vital consideration guiding the courts in determining whether an election should be voided is the reluctance to reach a decision which would result in the disfranchisement of the voters. Indeed, as regards defects in ballots, the courts have generally declined to void an election unless such

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defects clearly operate to prevent that free, fair and open choice." *Id.* at 510.

FN2. We note that in this case we consider and rule upon only the narrow issue regarding the form of the ballot in Palm Beach County.

In the present case, even accepting appellants' allegations, we conclude as a matter of law that the Palm Beach County ballot does not constitute substantial noncompliance with the statutory requirements mandating the voiding of the election. This was the threshold issue in respect to whether the complaints stated a cause of action. Accordingly, we affirm the trial court's dismissal with prejudice of the complaints. Because the dismissal would be proper on that basis, we conclude that all other issues ruled upon by the trial court were not properly reached \*1243 and, therefore, the court's rulings thereon are a nullity.

It is so ordered.

WELLS, C.J., and SHAW, HARDING, AN-STEAD, PARIENTE, LEWIS and QUINCE, JJ., concur.

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## H

Supreme Court, Appellate Division, Second Department,  
New York.  
In the Matter of Robert E. FLOWER et al., Appellants,  
v.  
Antonia D'APICE et al., constituting the Board of Elections  
of the County of  
Westchester, et al., Respondents.  
Sept. 5, 1984.

Proceeding was brought to invalidate petition designating candidate in primary election. The Supreme Court, Westchester County, Martin, J., entered order denying application, and an appeal was taken. The Supreme Court, Appellate Division, held that: (1) candidate's fraudulent acts in knowingly obtaining invalid signatures on designating petition warranted striking his name from ballot, and (2) fraud and irregularity so permeated designating petition as a whole as to call for its invalidation.

Reversed and application granted.

### West Headnotes

#### [1] Elections 158 [144k158 Most Cited Cases](#)

Candidate's fraudulent acts in knowingly obtaining invalid signatures on designating petition warranted striking his name from ballot.

#### [2] Elections 158 [144k158 Most Cited Cases](#)

Fraud and irregularity so permeated designating petition as a whole as to call for its invalidation.

**\*\*281** Before TITONE, J.P., and LAZER, MANGANO and GIBBONS, JJ.

#### MEMORANDUM BY THE COURT.

**\*578** In a proceeding to invalidate a petition designating Daniel Sadofsky as a candidate in the Republican Party primary election to be held on September 11, 1984 for the public office of County Legislator, 1st County Legislative District (unexpired term), the appeal is from a judgment of the Supreme Court, Westchester County, dated August 15,

1984, which, after a hearing, denied the application.

Judgment reversed, on the law and the facts, without costs or disbursements, application granted and the board of elections is directed to remove the name of Daniel Sadofsky from the appropriate ballot.

[1] Candidate Sadofsky signed, as subscribing witness, a page of the designating petition on which appeared the signature of one Robert Gruber. However, during the hearing at Special Term, Sadofsky stipulated "that the name of Robert Gruber was not placed upon the petition by Robert Gruber". In addition, Sadofsky testified that he knowingly obtained some signatures which were invalid, and admitted that, in certain instances, he did not ask the putative signatories to identify themselves before obtaining their signatures. Since Sadofsky is a candidate, his fraudulent acts warrant that his name be stricken from the ballot (see [Matter of Cullen v. Power](#), 14 N.Y.2d 760, 250 N.Y.S.2d 801, 199 N.E.2d 836; [Matter of Layden v. Gargiulo](#), 77 A.D.2d 933, 431 N.Y.S.2d 118; [Matter of Giaccio v. Cappa](#), NYLJ, May 26, 1960, p. 15, col. 6, affd. [10 A.D.2d 998, 204 N.Y.S.2d 104](#)).

**\*\*282** [2] Moreover, we also find that fraud and irregularity so permeated the designating petition as a whole as to call for its invalidation (cf. [Matter of Proskin v. May](#), 40 N.Y.2d 829, 387 N.Y.S.2d 564, 355 N.E.2d 793). Two persons testified that, although their names appear as signatories to the petition, they had never signed it. In addition, there appeared on the petition the purported signature of a person who was deceased at the time the signature was allegedly obtained, and that of a person whose mother testified he had been in California at the time of the alleged signing. In addition, one of the subscribing witnesses to the designating petition testified at the hearing that she had failed to fully complete the subscribing witness statements for the three pages to which she had attested, and, in effect, that the statements were completed **\*579** by someone else at a later date. Finally, another of the subscribing witnesses admittedly failed to ask the signatories to identify themselves as the persons whose names they were signing.

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C

Court of Appeals of Indiana,  
 First District.  
 John D. FULTZ et al., Appellant,  
 v.  
 Frank E. NEWKIRK, Sr. et al., Appellee.  
 No. 1-684A146.

March 18, 1985.

Unsuccessful mayoral candidate appealed from decision of the Circuit Court, Washington County, James Kleopfer, Special Judge, in election contest proceedings, declaring opponent to have been elected mayor. The Court of Appeals, Robertson, J., held that: (1) absentee ballots in three precincts were not to be counted, since they were not initialed by the poll clerks, and (2) trial court properly determined with respect to marks on contested ballots susceptible of more than one inference that irregularity of one mark resulted from voter's infirmity and was not prohibited distinguishing mark, X's made by blue pencil covered by X's made by ballpoint pen did not invalidate ballots, inadvertent marks or retracing were not prohibited distinguishing marks, and ballots marked with check mark rather than X were invalid under then-existing law.

Judgment affirmed.

West Headnotes

**[1] Elections** 🔑227(8)[144k227\(8\) Most Cited Cases](#)

Absentee ballots from three precincts could not be counted in mayoral election, since they were not initialed by the poll clerks. [IC 3-1-22-12](#), [3-1-25-1](#) (1982 Ed.).

**[2] Elections** 🔑180(2)[144k180\(2\) Most Cited Cases](#)**[2] Elections** 🔑186(4)[144k186\(4\) Most Cited Cases](#)

In mayoral election contest proceedings, trial court properly determined with respect to marks on contested ballots susceptible of more than one inference that irregularity of one such mark resulted from voter's infirmity and was not prohibited distinguishing mark, X's made by blue pencil

covered by X's made by ballpoint pen did not invalidate ballots, inadvertent marks or retracing were not prohibited distinguishing marks, and ballots marked with check mark rather than X were invalid under then-existing law. [IC 3-1-22-21](#), [3-1-25-1](#), [3-1-25-18](#) (1982 Ed.).

\*706 William T. Lawrence, Lawrence, Carter, Gresk, Leerkamp & Walsh, Indianapolis, for appellant.

Andrew Wright, Salem, for appellee.

ROBERTSON, Judge.

The appellant John D. Fultz is appealing from a trial court decision declaring appellee Frank D. Newkirk, Sr. to be the elected Mayor of the City of Salem, Indiana.

The counting of the ballots after the November, 1983, mayoral election for the City of Salem showed that Fultz received 1218 votes and Newkirk 1213 votes. Newkirk \*707 sought a recount with Fultz cross-petitioning for a recount. The recount commission issued its certificate of recount with both parties receiving 1205 votes. Both parties sought a final hearing before the Washington Circuit Court. After receiving evidence on the matter, the special judge entered a lengthy judgment detailing why or why not numerous contested ballots should or should not be counted. It was determined that Fultz received 1072 votes and Newkirk received 1091 votes. Newkirk was declared elected with this appeal following.

We find no reversible error raised in the fourteen issues presented by Fultz.

[1] Fultz's first issue claims error in the trial court's finding that all the absentee ballots in three precincts were not to be counted because the ballots were not initialed by the poll clerks. In making his argument he relies upon three theories. The first is a series of older cases holding that the failure of poll clerks to initial a ballot, standing alone, does not invalidate a ballot. See: [Lorch v. Lohmeyer](#), (1969) 252 Ind. 182, 247 N.E.2d 61. Fultz also argues that a 1976 legislative amendment to [IND.CODE 3-1-22-12](#) deleting initialing requirements substantiates his position. It is also argued that the cases of [Wright v. Gettinger](#), (1981) Ind., 428 N.E.2d 1212 and [Schoffstall v. Kaperak](#), (1982) Ind., 457 N.E.2d

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[550](#) are distinguishable because they deal with votes cast under the electronic voting system (EVS), and not paper ballots as used in this election.

Any contention about the applicability of *Lorch, supra* and distinguishing *Schoffstall* and *Wright, supra*, is laid to rest by the following quote from *Schoffstall*:

Schoffstall is correct in his contention that the recount commission improperly counted these ballots. This issue already has been decided by us in *Wright v. Gettinger, (1981) Ind., 428 N.E.2d 1212*. We found there that the poll clerks' initials were important not only to show that only valid ballots go into the ballot box but was also needed so that the valid ballots could be identified when taken from the ballot box. The importance of having the poll clerks' initials on the ballots, insures the integrity of the voting system. [Ind.Code §§ 3-2-4-1 through 3-2-4-10](#) (dealing with the Electronic Voting System) are not in conflict with the early voting statutes and indicate that ballots not initialed by the poll clerks should not be counted. As we stated in *Wright, supra*: "The system of using clerk's initials can, however, provide the knowledge that only initialed official ballots are counted. There is no other way to distinguish an official ballot from a fraudulent one at this point." [428 N.E.2d at 1220](#).

[457 N.E.2d at 554](#).

Moreover, any significance attached to the 1976 amendment to [I.C. 3-1-22-12](#) is lost by the language of [IND.CODE 3-1-25-1](#), which states in pertinent part:

And in the canvass of the votes any member of the election board may protest as to the counting of any ballot, or any part thereof, and any ballot which is not indorsed with the initial of the clerks, as provided for in this article, and any ballot which shall bear any distinguishing mark or mutilation shall be void, and shall not be counted, and any ballot, or part of a ballot, from which it is impossible to determine the elector's choice of candidates, shall not be counted as to the candidate, or candidates, affected thereby. (Emphasis added.)

[\[2\]](#) In reviewing the next twelve issues, we feel it necessary to state perhaps the most primary rule of appellate review and that is the court on review, cannot weigh the evidence.

*Rosner v. Schacht, (1983) Ind.App., 452 N.E.2d 1079*. The significance of this rule in this case is that many of the contested ballots contain marks susceptible of more than one inference. In particular, and using the appellant's own description, they are:

two parallel lines crossed by another line,  
a strung bow mark,  
a pronged "X",  
\*708 a small "x" made by a dull or broken pencil, and  
an "x" with a distinct spur.

In determining whether these marks, all of which are susceptible to more than one inference, are an X as called for by [IND.CODE 3-1-22-21](#), or an imperfect X as described in *Dobbyn v. Rogers, (1948) 225 Ind. 525, 76 N.E.2d 570*, or a distinguishing mark as prohibited by [IND.CODE 3-1-25-1](#) constitutes weighing the evidence. Allegorical authority for such a position is contained in *Uland v. National City Bank of Evansville, (1983) Ind.App., 447 N.E.2d 1124* where it was held that the authenticity of a disputed document lies within the province of the trial court. Any determination on our part of the correctness of the trial court's ruling on these issues [\[FN1\]](#) would require weighing the evidence.

[FN1](#). Fultz's issues 3, 4, 7, 8, 9, 10, 11, and 12.

Fultz's second issue argues that ballot number five should not have been counted because it contained two parallel lines crossed by a third line. The trial court found upon examination of the ballot that the mark was made by an infirm person with an unsteady hand and that it did not constitute a distinguishing mark. Ballots are not rendered invalid where irregularities are due to unskillfulness, physical infirmities, or conditions not conducive to accuracy. *Dobbyn, supra*.

Fultz next contests the trial court's ruling that three ballots should not be counted because the X made by a blue pencil is covered by an X made by a ballpoint pen. In *Conley v. Hile, (1935) 207 Ind. 488, 193 N.E. 95*, it was held that two Xs in one square made a ballot invalid. The trial court did not err in not having these votes counted.

The next ballot in contention "contains a retracing of the X mark and it contains some parallel lines." The trial court ruled that the parallel lines were inadvertently done and did

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}

not constitute a distinguishing mark, and that the X was a retracing. While two Xs in one party circle have been held to invalidate a ballot in *Lorch, supra*, the making of inadvertent marks or a retracting the X seems sanctioned by [I.C. 3-1-25-1](#) in that they do not constitute distinguishing marks.

Neither did the trial court err in excluding the ballots marked with a checkmark instead of an X. *Dobbyn, supra*. [IND.CODE 3-1-25-18](#) now allows the use of checkmarks, however, this statute did not take effect until January 1, 1984, several weeks after the election at issue in this appeal.

As a result of the foregoing, the trial court did not err in declaring Newkirk as the winner.

Judgment affirmed.

RATLIFF, P.J., and NEAL, J., concur.

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(Cite as: 335 S.C. 182, 516 S.E.2d 206)



Supreme Court of South Carolina.  
G. Robert **GEORGE**, Steve M. Kearsse, Mary Ellen Warner,  
Dorothy M. Humphries,  
Barbara H. Miller, and the City of **Charleston** Republican  
Party, Appellants,  
v.  
**MUNICIPAL ELECTION COMMISSION OF THE  
CITY OF CHARLESTON**, Respondent.  
**No. 24941.**

Heard April 20, 1999.  
Decided May 3, 1999.

Political party brought challenge to results of special municipal election. City municipal election committee upheld election results, and the Circuit Court, Charleston County, [A. Victor Rawl](#), J., affirmed. Party appealed. The Supreme Court, [Waller](#), J., held that referendum results were required to be nullified due to total lack of booths and foldable ballots.

Reversed.

West Headnotes

**[1] Elections** **305(7)**  
[144k305\(7\) Most Cited Cases](#)

In municipal election cases, the Supreme Court reviews the judgment of the circuit court upholding or overturning the decision of a municipal election commission only to correct errors of law; the review does not extend to findings of fact unless those findings are wholly unsupported by the evidence.

**[2] Elections** **227(1)**  
[144k227\(1\) Most Cited Cases](#)

**[2] Elections** **291**  
[144k291 Most Cited Cases](#)

The Supreme Court will employ every reasonable presumption to sustain a contested election, and will not set aside an election due to mere irregularities or illegalities unless the result is changed or rendered doubtful.

**[3] Elections** **227(1)**

[144k227\(1\) Most Cited Cases](#)

The Supreme Court is loathe to nullify an election based on minor violations of technical requirements.

**[4] Elections** **227(1)**  
[144k227\(1\) Most Cited Cases](#)

As a general rule, statutory provisions regulating the conduct of elections are mandatory in two instances: when the statute expressly declares that a particular act is essential to the validity of an election, or when enforcement is sought before an election in a direct proceeding.

**[5] Elections** **227(1)**  
[144k227\(1\) Most Cited Cases](#)

The court may deem statutory provisions regulating the conduct of elections to be mandatory after an election--and thus capable of nullifying the results-- when the provisions substantially affect the free and intelligent casting of a vote, the determination of the results, an essential element of the election, or the fundamental integrity of the election.

**[6] Elections** **227(1)**  
[144k227\(1\) Most Cited Cases](#)

Where there is a total disregard of a statute regulating the conduct of elections, it cannot be treated as an irregularity, but it must be held and adjudicated to be cause for declaring the election void and illegal.

**[7] Elections** **227(2)**  
[144k227\(2\) Most Cited Cases](#)

Statute requiring election officials to provide voting booths was mandatory, and municipal election committee's failure to provide any such booths required nullification of results of special municipal election, even though there was no evidence of voter intimidation or fraud. [Const. Art. 2, § 10; Code 1976, § 7-13-740.](#)

**[8] Elections** **28**  
[144k28 Most Cited Cases](#)

**[8] Elections** **166**  
[144k166 Most Cited Cases](#)

The use of ballots that are not designed to be folded violates the constitutional and statutory right to a secret ballot. [Const. Art. 2, § 10; Code 1976, §§ 7-13-611, 7-13-730;](#)

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[S.C.Code Regs. 45-5.](#)

**\*\*207 \*183** [Samuel W. Howell, IV](#), and Edward M. Whelan, of Haynsworth, Marion, McKay & Guerard, LLP, Charleston, for appellants.

[William B. Regan](#) and [Frances I. Cantwell](#) of Regan & Cantwell, Charleston, for respondent.

[WALLER](#), Justice:

G. Robert George, the City of Charleston Republican Party, and others (Appellants) contested the results of a special municipal election in Charleston. The three-member Municipal Election Commission of the City of Charleston (Commission) **\*184** voted unanimously to uphold the results of the election. The circuit court affirmed Commission's decision. We reverse. [\[FN1\]](#)

[\[FN1\]](#) We granted the parties' request in February 1999 to expedite this appeal. See [Rule 234\(b\), SCACR](#) 1999 is a general election year in the City of Charleston, including elections for mayor and six council seats. Prospective candidates must file a petition with Commission no later than May 20, 1999, in order to compete in the primary election August 3, 1999. Thus, it is important to know whether the 1998 referendum, which changed city elections from partisan to nonpartisan, was a valid election.

#### FACTS

Commission learned in September 1998 that it had to organize a special election to be held November 3, 1998, the same day as the general election. Voters would decide whether the city's elections would be changed from partisan to nonpartisan. Commission traditionally had worked with Charleston County officials during elections, using the county's electronic voting machines and getting help from county precinct workers. This time, county election officials were unable to assist Commission due to the length and complexity of the ballots in county, state, and national races, although the county did provide some poll managers in the city election.

On Election Day, city voters signed in at their polling places

and cast their ballots in county, state, and national races on the county's electronic voting machines. The machines were contained in separate booths that ensured voters' privacy. City voters then walked to a nearby table six to eight feet in length. They signed in again and were given a punch-card ballot to vote on the city referendum. After voting, they dropped the ballots in a sealed cardboard box on the table. Commission officials instructed poll managers to allow voters who desired more privacy to step away from the table, turn around, or shield their ballot by holding it behind the ballot box while completing it. [\[FN2\]](#)

[\[FN2\]](#) Voters also elected Paul E. Tinkler to fill the vacant seat in city council District 9. Appellants initially challenged Tinkler's election, but stipulated to the dismissal of that appeal before the circuit court. Consequently, Tinkler's election to the District 9 seat is not affected by our decision.

**\*185** Commission held a hearing November 9, 1998, after appellants contested the results. All parties and Commission stipulated that (1) Commission did not provide voting booths in any city precincts, and the majority of voters in the city election did not vote in a voting booth; and (2) punch-card ballots used in the city election were not designed to be folded because they were counted by a computer, and the majority of voters did not fold the ballots.

Appellants presented no evidence or witnesses at the hearing, but grounded their arguments in the stipulations. Appellants conceded no one testified he or she saw the vote made by another person, no one testified he or she refused to vote due to the method of voting, and no one testified he or she was confused or intimidated during the process.

Candidate Paul E. Tinkler, one of Tinkler's poll watchers, and two voters called by the Committee for Nonpartisan Elections testified they believed the method of voting sufficiently protected their right to cast a secret ballot. They simply cupped their ballots in one hand, punched the desired slot, and dropped them in the box. Other voters usually were standing in nearby lines when voters completed the city ballots.

City residents voted to change municipal elections in the

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city of Charleston from partisan \*\*208 to nonpartisan by a vote of 8,929 to 6,310. Appellants contend the circuit court erred in affirming Commission's decision to uphold the election results.

#### ISSUE

Did the total absence of voting booths and the use of punch-card ballots that were not designed to be folded violate the state constitution or statutes?

#### DISCUSSION

Appellants contend the state constitution and statutes required Commission to provide voting booths and ballots that may be folded in order to ensure each voter's right to cast a secret ballot. They argue the Court should nullify the referendum results due to the total lack of booths and foldable ballots. We agree.

\*186 [1][2] In municipal election cases, this Court reviews the judgment of the circuit court upholding or overturning the decision of a municipal election commission only to correct errors of law. The review does not extend to findings of fact unless those findings are wholly unsupported by the evidence. *Knight v. State Bd. of Canvassers*, 297 S.C. 55, 374 S.E.2d 685 (1988); *May v. Wilson*, 199 S.C. 354, 19 S.E.2d 467 (1942). The Court will employ every reasonable presumption to sustain a contested election, and will not set aside an election due to mere irregularities or illegalities unless the result is changed or rendered doubtful. *Sims v. Ham*, 275 S.C. 369, 271 S.E.2d 316 (1980); *May v. Wilson, supra*.

[3] The statutory provisions regulating the conduct of elections are numerous and detailed. *S.C.Code Ann. §§ 7-13-10 to -2220* (1976 & Supp.1998); S.C. Const. art. II, § 10. This Court, like many others, recognizes that perfect compliance in every instance is unlikely, and the Court is loathe to nullify an election based on minor violations of technical requirements. To that end, courts have developed principles to determine whether such provisions are mandatory or directory.

[4] As a general rule, such provisions are mandatory in two instances: when the statute expressly declares that a particular act is essential to the validity of an election, or when enforcement is sought before an election in a direct proceed-

ing. After an election in which no fraud is alleged or proven, when the Court seeks to uphold the result in order to avoid disenfranchising those who voted, such provisions are merely directory even though the Legislature used seemingly mandatory terms such as "shall" or "must" in establishing the provisions. "Courts justly consider the main purpose of such laws, namely, the obtaining of a fair election and an honest return, as paramount in importance to the minor requirements which prescribe the formal steps to reach that end, and, in order not to defeat the general design, are frequently led to ignore such innocent irregularities of election officers as are free of fraud, and have not interfered with a full and fair expression of the voter's choice." *State ex rel. Parler v. Jennings*, 79 S.C. 414, 419, 60 S.E. 967, 968-69 (1908); accord *Laney v. Baskin*, 201 S.C. 246, 253, 22 S.E.2d 722, 725 (1942); \*187 *Smoak v. Rhodes*, 201 S.C. 237, 241, 22 S.E.2d 685, 686 (1942); *Killingsworth v. State Executive Comm. of Democratic Party*, 125 S.C. 487, 492, 118 S.E. 822, 824 (1921); *State ex rel. Davis v. State Bd. of Canvassers*, 86 S.C. 451, 460, 68 S.E. 676, 680 (1910).

[5][6] The Court still may deem such provisions to be mandatory after an election--and thus capable of nullifying the results--when the provisions substantially affect the free and intelligent casting of a vote, the determination of the results, an essential element of the election, or the fundamental integrity of the election. *Zbinden v. Bond County Community Unit School Dist. No. 2*, 2 Ill.2d 232, 117 N.E.2d 765, 767 (1954); *Lewis v. Griffith*, 664 So.2d 177, 186 (Miss.1995); *O'Neal v. Simpson*, 350 So.2d 998, 1005-09 (Miss.1977); *Mittelstadt v. Bender*, 210 N.W.2d 89, 94 (N.D.1973). Furthermore, "where there is a total disregard of the statute, it cannot be treated as an irregularity, but it must be held and adjudicated to be cause for declaring the election void and illegal." *Moon v. Seymour*, 182 Ga. 702, 186 S.E. 744, 745 (1936); accord \*\*209 *Lewis v. Griffith, supra*. "The Court ... will not sanction practices which circumvent the plain purposes of the law and open the door to fraud." *May v. Wilson*, 199 S.C. at 360, 19 S.E.2d at 470.

With those principles in mind, we turn to the provisions at issue in this case.

"All elections by the people shall be by secret ballot..." S.C. Const. art. II, § 1. [FN3] Secret ballots have been required

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since at least 1907, when the Court interpreted a provision in the original 1895 constitution for voting "by ballot" to mean voting by secret ballot. [State ex rel. Birchmore v. State Bd. of Canvassers](#), 78 S.C. 461, 468-69, 59 S.E. 145, 147 (1907); see also [State v. Shaw](#), 9 S.C. 94, 132-45 (1877) (plainly indicating, while interpreting 1868 state constitution, that voting "by ballot" impliedly means by secret ballot). \*188 [Section 1 of Article II](#) was amended in 1971 to include the term "secret ballot." Act No. 277, 1971 Acts 319.

[FN3. Section 1 of Article II](#) states in full:

All elections by the people shall be by secret ballot, but the ballots shall not be counted in secret. The right of suffrage, as regulated in this Constitution, shall be protected by laws regulating elections and prohibiting, under adequate penalties, all undue influence from power, bribery, tumult, or improper conduct.

The Legislature explicitly has declared "[t]he right to vote of each person so entitled and the secrecy of the ballot shall be preserved at all times." [S.C.Code Ann. § 7-13-130 \(1976\)](#). That legislative goal is evident in several statutory provisions. See [S.C.Code Ann. § 7-13-1830 \(1976\)](#) (after helping a voter understand how to use a voting machine, the poll managers "shall, before the voter has voted, retire and such voter shall cast his ballot in secret"); [S.C.Code Ann. § 7-13-771\(D\) \(Supp.1998\)](#) (after an elderly or handicapped person votes in his or her vehicle outside a polling place, the voter "must fold [the ballot] so that the secrecy of the ballot is preserved and return it to the managers waiting outside the vehicle. The managers shall carry the ballot to the ballot box, taking care not to violate the secrecy of the ballot, and after detaching the stub, deposit the ballot in the ballot box"); [S.C.Code Ann. 7-13-1380 \(1976\)](#) ("The State Election Commission in specifying the form of the ballot shall provide for ballot secrecy in connection with write-in votes").

History demonstrates the importance of the secret ballot. In the early years of our nation, voters expressed their preferences orally or by a showing of hands. With the advent of paper ballots in the late 1700s, individuals prepared their own handwritten ballots at home, marked them, and took them to the polling place. Later, political parties and candid-

ates printed their own specially colored or designed paper ballots for voters to use. None of the methods was secret and all were open to widespread intimidation of voters, fraud, and violence. [Burson v. Freeman](#), 504 U.S. 191, 200-206, 112 S.Ct. 1846, 1852-54, 119 L.Ed.2d 5, 15-19 (1992) (upholding Tennessee statute prohibiting solicitation of votes and display of campaign materials within 100 feet of entrance to polling place); G.H. Utter and R.A. Strickland, *Campaign and Election Reform: A Reference Handbook*, 8-9 (1997); [Wright and Graham, Federal Practice and Procedure: Evidence, § 5632 \(1992\)](#) (discussing history of secret ballot in connection with rejected rule of evidence on voter's privilege).

Polling places on Election Day, unlike today's typical experience of waiting quietly in line, often were "scenes of battle, murder, and sudden death." In addition to real violence, \*189 sham battles were staged to frighten away elderly and timid voters. [Burson v. Freeman](#), 504 U.S. at 202-04, 112 S.Ct. at 1853-54, 119 L.Ed.2d at 16-17. One writer described Election Day in 1856, for example, as a "knock-down, dragged-out fight" in many areas of the country. Thugs forced voters at the polls to reveal their voting ticket, then beat or shot them and forcibly tore up the opposing party's ticket if they refused to vote as ordered. Sheriffs were unable to find men willing to risk their lives to control the violent mobs. In his 1931 autobiography, journalist Lincoln Steffens, commenting on a more peaceable form of vote solicitation, observed that the going rate for a vote in his Connecticut hometown was \$2.50 to \$2.75. J. Mitchell, *How to Get Elected: An Anecdotal History of Mud-Slinging, Red-Baiting, Vote-Stealing and Dirty \*\*210 Tricks in American Politics*, 45-46, 88 (1992).

To combat violence and corruption, most states adopted the secret ballot-- sometimes called the Australian ballot system because it was first used in that country--and other measures in the 1880s and 1890s. [Burson v. Freeman, supra](#); Utter & Strickland, at 42-46. When explaining the importance of the secret ballot to our system of representative democracy, the reasons most often given are to reduce or eliminate the potential intimidation of voters, to reduce or eliminate the chance for voters who are willing to sell their votes to prove they have "delivered the goods" by allowing someone to

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watch them cast their ballot, and to ensure the overall integrity of the electoral process. [State ex rel. Edwards v. Abrams](#), 270 S.C. 87, 92, 240 S.E.2d 643, 645-46 (1978); [Peterson v. City of San Diego](#), 34 Cal.3d 225, 193 Cal.Rptr. 533, 666 P.2d 975, 976 (1983); [Moon v. Seymour](#), 186 S.E. at 745; [Clark v. Quick](#), 377 Ill. 424, 36 N.E.2d 563, 566 (1941); [Evans v. Reiser](#), 78 Utah 253, 2 P.2d 615, 625 (1931), superseded by statute on other grounds as stated in [Mosier v. Gilmore](#), 635 P.2d 55 (Utah 1981); [Sims v. Atwell](#), 556 S.W.2d 929, 933 (Ky.Ct.App.1977); [26 Am.Jur.2d Elections §§ 299, 328](#) (1996).

This Court has held that secrecy of the ballot was violated when a husband and wife were allowed to enter the voting booth together and discuss their vote, [Edwards v. Abrams](#), 270 S.C. at 91-93, 240 S.E.2d at 645-46; when the numbering system for ballots and voter sign-in lists could be used to identify a particular voter's ballot, [Corn v. Blackwell](#), 191 S.C. 183, 4 S.E.2d 254 (1939); and when voters were required to \*190 place their ballots in "for" and "against" boxes that plainly revealed their choice, [Birchmore v. State Bd.](#), 78 S.C. at 471-72, 59 S.E. at 148. Although the records in those cases revealed no actual proof of intimidation or fraud, the procedures substantially affected an essential element of the election (secrecy of the ballot), as well as the fundamental integrity of the election. "While in this particular instance it is possible that no evil results followed from the mode in which the election was conducted, yet we cannot be unmindful of the fact that we must be guided by those general principles of law and policy that will enable us to determine future litigations, under the election laws of the state consistently." [Birchmore v. State Bd.](#), 78 S.C. at 472, 59 S.E. at 148 (nullifying election results).

#### A. THE VOTING BOOTH

[7] Municipal elections must be conducted pursuant to the South Carolina Election Law contained in Title 7, with any necessary changes in points of detail. [S.C.Code Ann. § 5-15-10](#) (1976). The Legislature has established explicit requirements for voting booths.

There must be provided at each polling precinct at least one booth. At least one booth must be provided for each two hundred and fifty registered electors or a major fraction thereof of the precinct. The booths must be made of

wood, sheet metal, or other suitable substance; must not be less than thirty-two inches wide, thirty-two inches deep, and six feet six inches high; must have a curtain hanging from the top in front to within three feet of the floor; and must have a suitable shelf on which the voter can prepare his ballot. In primary, general, and special elections, the booths must be provided by the commissioners of election or other electoral board. Only one voter shall be allowed to enter a booth at a time, and no one except as provided herein is allowed to speak to a voter while in the booth preparing his ballot.

[S.C.Code Ann. § 7-13-740](#) (Supp.1998).

The Court has indicated that minor variations in the design of a voting booth are not likely to prompt it to void an election. [Smoak v. Rhodes](#), 201 S.C. at 241, 22 S.E.2d at 686 ("It will not be contended that a few inches one way or the other in these matters [size of booth or length of curtain screening \*191 booth] would vitiate an election"); [Killingsworth v. State Executive Comm. of Democratic Party](#), 125 S.C. at 492, 118 S.E. at 824 (same). The Court has not, however, decided a case in which voters were not provided with any voting booths at all.

Courts that have considered the issue disagree on it. The Georgia Supreme Court \*\*211 has held that a statute requiring election officials to provide booths is mandatory, and nullified an election in which election officials totally disregarded the statute by providing no booths. [Moon v. Seymour](#), 186 S.E. at 745; see also [Cox v. Williams](#), 216 Ga. 535, 117 S.E.2d 899 (1961) (nullifying referendum results due to numerous irregularities, including the lack of screened voting booths). The North Dakota Supreme Court has taken the opposite view, holding that secrecy was adequately ensured in a school bond election by allowing voters to use three large tables in a large room. The court emphasized it did not intend to minimize the importance of voting booths. [Mittelstadt v. Bender](#), 210 N.W.2d 89, 95-96 (N.D.1973).

In a similar case, the Missouri Supreme Court refused to nullify a school bond election based on the lack of voting booths because the one-question ballot was easily concealed while marking it. [Lake v. Riutcel](#), 249 S.W.2d 450, 451 (Mo.1952); see also [Cashen v. Bd. of Education](#), 2

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[III.App.2d 490](#), [119 N.E.2d 823](#), [824-25 \(1954\)](#) (upholding results in school board election where no booths were provided; no statute required the use of booths in such elections).

In this case, it is undisputed that Commission did not provide any voting booths, and that the record contains no actual proof of voter intimidation or fraud. We acknowledge that Commission's decision to proceed without booths is understandable, given the hasty preparations and the inability of Charleston County officials to provide their traditional assistance. Nothing in the record suggests Commission failed to appreciate the importance of its responsibilities.

Absent the several statutes that address the secret ballot requirement of [Article II, Section 1](#), we would be less constrained in deciding whether Commission met the constitutional requirement in this case. However, we are guided both by the constitution and the Legislature's explicit instructions on how to ensure the right to a secret ballot.

\*192 We conclude this election challenge is not one in which we are faced with minor violations of technical requirements. The history of the secret ballot, our precedent, and the statutes persuade us that the voting booth is an essential element of the electoral process. The lack of any evidence of voter intimidation or fraud is not dispositive because the total absence of booths affects the fundamental integrity of the election. See [Edwards v. Abrams, supra](#); [Corn v. Blackwell, supra](#); [Birchmore v. State Bd., supra](#). We cannot condone the method of voting employed by Commission because it would unwisely sanction a practice that "circumvent[s] the plain purposes of the law and open[s] the door to fraud" and intimidation. [May v. Wilson, 199 S.C. at 360, 19 S.E.2d at 470](#).

Accordingly, we choose to follow the view espoused in [Moon v. Seymour, supra](#), and hold that the statutory provision for voting booths is mandatory in these circumstances. Therefore, the total absence of voting booths violates the constitutional and statutory right to a secret ballot.

## B. THE BALLOT

[8] The Legislature has required that election officials pre-

pare ballots which are designed to be folded. After signing in to vote, the

voter shall immediately go to the booth and mark his ballot preparatory to depositing it in the ballot box. After the voter has marked his ballot, he shall fold it so as to leave the stub remaining attached thereto visible in such position that it can be detached without unfolding. When the ballot is returned, one of the managers shall detach and retain the stub, and the voter shall then deposit his folded ballot in the box.

[S.C.Code Ann. § 7-13-730 \(1976\)](#); see also [S.C.Code Ann. § 7-13-611 \(Supp.1998\)](#) (ballot form containing instructions for voter to fold the ballot). Punch-card ballots used in vote tabulating machines must have serially numbered stubs and strips, which "shall be attached to each ballot card in a manner and form similar to that prescribed by law for paper ballots." [S.C.Code Ann. § 7-13-1370 \(1976\)](#). Regulations promulgated by the State Election Commission require punch-card ballots either to be placed in an envelope by the voter or \*193 be foldable to ensure \*\*212 secrecy of the ballot. [24 S.C.Code Ann.Reg. 45-5 \(1976\)](#).

The purpose of folding the ballot is to ensure secrecy. [Gardner v. Blackwell, 167 S.C. 313, 322, 166 S.E. 338, 341 \(1932\)](#); [Hyde v. Logan, 113 S.C. 64, 81, 101 S.E. 41, 46 \(1919\)](#). In [Smoak v. Rhodes](#), the Court refused to nullify an election in which the record contained no proof that ballots were not folded or that the secrecy of the ballot was violated. [Id., 201 S.C. at 243-44, 22 S.E.2d at 687-88](#). In this case, however, it is undisputed that voters were specifically instructed *not* to fold the ballots.

We hold that the use of ballots that were not designed to be folded violates the constitutional and statutory right to a secret ballot. We do so for the same reasons expressed in connection with the absence of the voting booth. The provision for foldable ballots is mandatory because it affects an essential element of the election and the fundamental integrity of the electoral process.

## CONCLUSION

We reverse the circuit court's order and nullify the referendum results because the total absence of voting booths and foldable ballots violates the statutory and constitutional right to a secret ballot.

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REVERSED.

[FINNEY](#), C.J., [TOAL](#), [MOORE](#), and [BURNETT](#), JJ., con-  
cur.

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Court of Appeals of Texas,  
 Houston (14th Dist.).  
 Raymond Eugene GREEN, Appellant,  
 v.  
 Ben REYES, Appellee.  
 No. B14-92-00680-CV.

June 30, 1992.

Congressional candidate brought election contest challenging final canvass as not reflecting true outcome. The 269th District Court, Harris County, [John M. Delaney](#), J., declared the election canvass void and ordered a new election. Election contestee appealed. The Court of Appeals held that trial court properly ordered new election upon determining that true outcome of contested election could not be ascertained.

Affirmed.

#### West Headnotes

#### [\[1\] Elections](#) [293\(3\)](#)

[144k293\(3\) Most Cited Cases](#)

Voters' constitutional right not to reveal for whom they had voted does not extend to voters who have cast illegal votes. [V.T.C.A., Election Code § 221.009\(a\)](#).

#### [\[2\] Elections](#) [291](#)

[144k291 Most Cited Cases](#)

Burden of proving illegality in an election contest is on contestant who must prove that illegal votes were cast in election being contested and that a different and correct result would have been reached by not counting the illegal votes. [V.T.C.A., Election Code §§ 221.009, 232.001](#) et seq.

#### [\[3\] Elections](#) [305\(6\)](#)

[144k305\(6\) Most Cited Cases](#)

Standard of review to be placed on an appeal from judgment in an election contest is whether from the record it appears that trial court abused its discretion. [V.T.C.A., Election Code § 232.001](#) et seq.

#### [\[4\] Elections](#) [154\(1\)](#)

[144k154\(1\) Most Cited Cases](#)

True outcome of primary election was uncertain, and trial

court properly declared election canvass void and ordered new election, where margin of victory, after deducting the number of the attributable illegal votes from each candidate, was far surpassed by number of unascertained illegal votes. [V.T.C.A., Election Code §§ 221.011\(b\), 221.012\(b\)](#).

#### [\[5\] Elections](#) [298\(3\)](#)

[144k298\(3\) Most Cited Cases](#)

Although election tribunal may void election and order new election to be held without ever attempting to ascertain for whom illegal voters cast their ballots, overriding policy which guides election contest is to determine the true outcome of the election. [V.T.C.A., Election Code §§ 221.003\(a\)\(1\), 221.009\(b\)](#).

#### [\[6\] Elections](#) [298\(3\)](#)

[144k298\(3\) Most Cited Cases](#)

Election Code provision which requires tribunal hearing election contest to declare election void if it cannot ascertain true outcome of the election does not authorize court to void any close election, but rather seeks to ensure that final election canvass is a clear reflection of the legal votes cast in election where illegal votes cast cannot, on reasonable inquiry, be attributed either to contestant or contestee. [V.T.C.A., Election Code § 221.012](#).

#### [\[7\] Elections](#) [298\(1\)](#)

[144k298\(1\) Most Cited Cases](#)

Election Code vests discretion in trial court to determine whether or not true results of election can be ascertained in election contest. [V.T.C.A., Election Code §§ 221.009, 221.012](#).

#### [\[8\] Appeal and Error](#) [1008.1\(2\)](#)

[30k1008.1\(2\) Most Cited Cases](#)

In nonjury cases, in which both findings of fact and statement of facts have been filed, Court of Appeals reviews sufficiency of evidence under same standards utilized for jury tried cases.

#### [\[9\] Appeal and Error](#) [1008.1\(5\)](#)

[30k1008.1\(5\) Most Cited Cases](#)

#### [\[9\] Appeal and Error](#) [1008.1\(7\)](#)

[30k1008.1\(7\) Most Cited Cases](#)

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In reviewing sufficiency of evidence, Court of Appeals must review all of the evidence in support of findings of trier of fact and will reverse only if evidence in support of the finding is so weak as to render outcome manifestly unjust or clearly wrong.

**[10] Evidence** 🔑571(1)

[157k571\(1\) Most Cited Cases](#)

In election contest, finding that 97.5% of illegal voters in multi-race run-off election voted in contested race was supported by expert testimony of professor of political science that approximately 97.5% of those voters that cast legal ballots voted in the contested race and that no reason existed to believe the illegal voters were not typically motivated to vote in each race.

**[11] Elections** 🔑154(10)

[144k154\(10\) Most Cited Cases](#)

Finding, in election contest, that unascertained votes were indeed illegal was supported by evidence that accounting firm determined number of crossover voters by comparison of names, registration numbers, precinct numbers, and signatures of those who voted in both the Republican primary election and the Democratic run-off.

**[12] Elections** 🔑154(10)

[144k154\(10\) Most Cited Cases](#)

Finding, in election contest, that candidates for whom voters cast illegal ballots could not be ascertained was supported by evidence that some voters failed to appear, resisted service, could not be located, refused to disclose for whom they had voted, or disclosed for whom they had voted with qualifications such as "I think" or "I probably."

**[13] Appeal and Error** 🔑1079

[30k1079 Most Cited Cases](#)

Issues raised as points of error but not specifically addressed in the brief are waived. [Rules App.Proc., Rule 74\(f\)](#).

**[14] Evidence** 🔑272

[157k272 Most Cited Cases](#)

Affidavits of persons who thereby admit under oath an action which can subject them to criminal liability may be properly admitted at trial as an exception to the hearsay rule as statements against their interest. Rules of [Civ.Evid., Rule](#)

[803\(24\)](#).

\*204 [Eugene Jones](#), Houston, [Randall B. Wood](#), Austin, [Jack C. Ogg](#), Houston, for appellant.

[William H. White](#), [Gerald M. Birnberg](#), Houston, for appellee.

Before J. CURTISS BROWN, C.J., and [MURPHY](#) and CANNON, JJ.

OPINION

PER CURIAM.

This is an accelerated appeal in an election contest. Appellant, Raymond Eugene Green, appeals from the trial court order of a new election in the Democratic nomination for United States Representative to the 29th Congressional District. In eighteen points of error, appellant asserts that the trial court abused its discretion by declaring the election canvass void and ordering a new election. We affirm.

Appellee, Ben Reyes, brought an election contest pursuant to section 232 of the Election Code challenging the final canvass as not reflecting the true outcome of the election. See [Tex.Elec.Code Ann. § 232.001](#) *et seq.* (Vernon 1986). Both appellee, Ben Reyes, and appellant, Raymond Eugene Green, were candidates in the Democratic primary runoff election for Democratic party nominee to the 29th Congressional District. The April 14, 1992 election primary runoff yielded a 180 vote margin of victory for appellant. Appellee's election contest petition argued that a significant number of voters had cast votes in both the Republican primary contest on March 10, 1992 and subsequently participated in the April 14, 1992 Democratic primary runoff. Under the Texas Election Code, the ballot of voters who cast ballots in both the Republican and Democratic primary elections are void. See [Tex.Elec.Code Ann. § 162.013](#) (Vernon 1986). Therefore, such ballots are illegal votes and not legally countable. See [Tex.Elec.Code Ann. § 221.003](#) (Vernon 1986). Appellee provided a list of 431 names and addresses of the illegal crossover voters which had been compiled by the accounting firm of Arthur Andersen & Company. The company had compiled the list through a detailed comparison of voter names, voter registration numbers and precinct numbers. The list included the names of

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only those voters who had voted in both the March 10, 1992 Republican Primary and the April 14, 1992 Democratic Primary runoff.

[1] During an eleven day trial, the court heard testimony from 313 of the 431 allegedly illegal voters. Many of the voters \*205 appeared at trial to testify; a few were deposed by telephone; and some others submitted affidavits. Many witnesses expressed dismay and anger that the trial court was demanding that they reveal for whom they had voted when generally voters enjoy a constitutional right not to do so; however, the trial court properly advised the voters that this protection does not extend to voters who have cast illegal votes. See, e.g., *Ex Parte Henry*, 132 Tex. 575, 126 S.W.2d 1 (1939). See also [Tex.Elec.Code Ann. § 221.009\(a\)](#) (Vernon 1986). Nevertheless, the trial court issued admonishments to each witness that although voting in both political party's election primary is a crime, "nothing you testify to in this case can ever be used against you." The court determined that the number of illegal votes was truly 429 and that of those votes, 220 illegal votes were cast in favor of Green, 75 illegal votes in favor of Reyes, 8 votes were not illegal at all [FN1], and 126 votes were unable to be attributed to either candidate because the testimony of the voter was unable to be obtained or the voter did not remember how he or she voted. Thereafter, both appellant and appellee brought forth expert testimony to show that statistically the vast majority of the 126 undetermined illegal votes would have been cast for their opponent.

[FN1]. These eight voters included those whose signed in at the March 10, 1992 Republican primary but testified that they had not actually cast ballots and those who voted in the Democratic primary runoff election but did not vote for either Reyes or Green.

After deducting the number of attributable illegal votes from each side, Green maintained a 41 vote margin of victory. Once the trial court has determined which illegal votes it can subtract as attributable to either candidate and which illegal votes are unascertained, [section 221.012](#) provides that:

(a) If the tribunal hearing an election contest can ascertain the true outcome of the election, the tribunal shall declare the outcome.

(b) The tribunal shall declare the election void if it cannot ascertain the true outcome of the election.

[Tex.Elec.Code Ann. § 221.012](#) (Vernon 1986). The trial court exercised its authority under the election code and ordered the election void because the margin of victory was less than the number of unascertained illegal votes. [Tex.Elec.Code Ann. § 221.009\(b\)](#) (Vernon 1986).

In support of this ruling, the trial court issued its Findings of Fact and Conclusions of Law as follows:

#### A. Findings of Fact

1. On April 14, 1992, the Democratic Party of Harris County held a primary run-off election to determine the party's nominee for the newly created 29th Congressional District. The two men running for that election were Ben Reyes, a long-time Houston city councilman, and Raymond Eugene Green, a state senator from the Houston area. The final canvass of the April 14 run-off election showed that Green had won by a 180 vote margin. The April 14 runoff followed a March 10, 1992 general primary, held in both major political parties. Pursuant to a stipulation made by the two parties the final canvass of the election reflected the following totals for each of the candidates: Raymond Eugene Green--15,844 votes; Ben Reyes--15,664 votes.

2. After Reyes had filed this lawsuit, but before the trial had commenced, the Harris County Clerk, Anita Rodeheaver, discovered 22 unopened and uncounted ballots from the Democratic run-off. The ballots were later opened under the supervision of the court and found to reflect the following totals for each of the candidates: Raymond Eugene Green 14 votes, and Ben Reyes 8 votes. When added to the vote count stipulated to by the parties, the court finds that the final canvass should be adjusted to represent the following totals for each of the candidates: Raymond Eugene Green--15,858 votes; Ben Reyes--15,672 votes. This produces a margin of victory for Green of 186 votes.

3. Voting records kept by the Harris County Clerk's office showed that 431 individuals had signed-in to vote at the Republican primary on March 10, 1992 and subsequently \*206 signed-in to vote in the Democratic Primary Run-off election on April 14, 1992. See Plaintiff's Exhibits 1a-1f; Testi-

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mony of Barbara Duganier of Arthur Andersen & Co.

4. Additional evidence indicates that the correct number of individuals that apparently voted in both the Republican primary and the Democratic run-off was 429. Of these, approximately 97.5% (418) probably voted in the Green/Reyes race in the multi-race run-off election, because that percent of all run-off voters cast a vote for one candidate or the other in the Green/Reyes race.

5. During eight days of the trial, Reyes caused subpoenas to be issued for 292 of the 429 identified "crossover" voters. Of those 292 voters, 246 voters actually appeared to give evidence either in person (212) or through telephone depositions (34) supervised by the court. The number who testified by deposition were permitted to do so because of disabilities or circumstances that materially impaired their ability to come to the courthouse. The remaining individuals fell into several different categories: crossover voters that were subpoenaed but failed to appear; crossover voters that resisted service; crossover voters that evidence showed had moved and could not be located; and others that neither party chose to subpoena. Reyes also tendered into evidence affidavits from eight crossover voters. The affidavits were admitted into evidence as statements against interest. [Tex.R.Civ.Evid. 803\(24\)](#).

6. Following presentation of the Contestant's witnesses, the Contestee presented 59 voter witnesses in court over a two day period.

7. At the close of evidence, the court had heard evidence concerning the voting conduct of 313 alleged crossover voters. Of those 313 voters, the court finds that they included 220 illegal votes for Green, 75 illegal votes for Reyes, 10 illegal voters who could not remember how they voted or if they voted in the race in questions, and 8 votes that were not illegal. These findings must be viewed with caution since many of the voters who disclosed their vote did so with qualifications such as "I think" or "I probably."

8. The voting conduct of 126 of the identified crossover voters could not be ascertained for reasons such as failed memory (the 10 described in FOF 7), failure to appear pursuant to subpoena, obstacles to service, or for other reasons

were not called to testify.

9. Subtracting the ascertainable illegal votes (See FOF 7) from the candidates' total votes would produce a 41-vote margin of victory for Green.<sup>1</sup> This margin, however, based only on a subset of the entire apparent illegal voter population, cannot provide the degree of certainty necessary for this court to declare the true outcome of the election. The number of unascertained votes is greater than three times the margin of victory established by the sample of voters whose voting conduct was determinable by the court. These unascertained votes must be considered by the court in making its judgment. [Tex.Elec.Code Ann. § 221.011](#) (Vernon's 1986).

10. The court finds that there was no reliable way of determining how the 126 unascertained votes should be considered to further adjust the votes for each candidate. Contestant's expert witness on the probable tendencies of the crossover voters concluded that the crossover voters as a group were likely to be Green voters. Contestee's expert witness concluded that the voters that did not testify were predominantly Hispanics, and likely to favor Reyes. Applying mathematical projections to the 313 voters whose conduct and memory had been revealed at trial, would produce a victory for Reyes, that is, 70.28% illegal Green votes (220 of 313) x 429 = 302 to be deducted from Green; 23.96% illegal Reyes votes (75 of 313) x 429 = 103 to be deducted from Reyes; yielding a Reyes victory by 13; using the sum of 418 that probably voted in this race (See FOF 4) these projections would give Reyes a victory by 8. Taken as a whole, this evidence is too unreliable to ascertain the *true* outcome.

11. It is highly unlikely that the 116 voters who did not give direct evidence of their conduct could all be produced in court \*207 or located to give testimony by deposition or affidavit, even with a protracted trial.

12. The true outcome of the April 14 run-off election cannot be ascertained, and the number of illegal votes is greater than the number necessary to change the outcome.

### *B. Conclusions of Law*

The Election Code voids any ballot cast in a Democratic

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primary run-off election from someone who had previously participated in the Republican primary in that election year. [Texas Election Code § 162.013](#).

2. [Texas Election Code § 221.012\(b\)](#) mandates that an election tribunal "shall declare the election void if it cannot ascertain the true outcome of the election." (emphasis added.) Moreover, the court may reach this result "without attempting to determine how individual voters voted" so long as "the number of illegal votes is equal to or greater than the number of votes necessary to change the outcome of an election." [Texas Election Code § 221.009\(b\)](#).

3. [Section 221.009\(b\)](#) must be interpreted and applied in a manner that makes sense. It clearly must mean that an election tribunal in its discretion may order a new election when, as here, the number of illegal votes exceeded the official margin of victory by more than two to one without either requiring testimony from each illegal voter, or proof by the Contestant that collecting such testimony represented a physical impossibility. The statute must envision the circumstance in which the magnitude of the illegal voting along with some evidence of the tendencies of the illegal voting warrant the relief of a new election without the laborious, lengthy, and expensive process of a single trial judge trying to call a close election weeks or months afterwards by the testimony of hundreds of voters with uncertain memories.

4. Plainly-worded statutes must be read in their common sense. [Section 221.009\(b\)](#) must mean that in some reasonable circumstances the presumption of correctness of the official outcome no longer prevents relief in the form of a new election.

5. [Section 221.011](#) requires the court to deduct illegal votes from the candidates receiving them, but when it "cannot ascertain how the [illegal] voters voted, the tribunal shall consider those votes in making its judgment." The law assumes that in some cases, as here, some illegal votes will remain in doubt after all the evidence is concluded in an election contest, and further mandates that the court take those illegal but unknown votes into account.

6. When the court, with some degree of certainty, can de-

termine the outcome of the election based upon the evidence presented by the parties, section 212.012(a) requires it to do so. Failing this, the court's only alternative is defined by [§ 221.012\(b\)](#), which requires the voiding of the election. Whatever may be the case when Contestant fails to sustain its burden of proof concerning the number of illegal voters, or proves a number of illegal voters less than the margin in the official returns for the election, once a Contestant has satisfied its burden of proving the number of illegal voters necessary to trigger the powers of the court under [§ 221.009\(b\)](#), [§ 221.012\(b\)](#) cannot be read to require a Contestant to prove the unavailability or lack of memory on the part of each and every voter whose vote might make a difference in order for the court to declare a new election. Such a burden would make some election contests logistically impossible.

7. An application of [sections 221.009](#) and [221.012](#) in this fashion carefully balances two competing public policies which clash when illegal voting exceeds the margin of "victory" by some magnitude: the policy of promptly determining election results versus the policy of maintaining public confidence in the integrity of an election process that is free from taint.

The adjusted final canvas referred to in the second Finding of Fact would be adjusted by the illegal votes as follows: Green's total vote count would become 15,638 votes (15,858 minus 220 illegal votes) and Reyes's total vote count would become 15,597 votes (15,672 minus 75 \*208 illegal votes), yielding the 41-vote margin of victory.

Based upon these Findings of Fact and Conclusions of Law, the trial court reasoned that the election should be declared void and a new election ordered pursuant to [Tex.Elec.Code Ann. § 221.009\(b\)](#) (Vernon 1986).

[2][3] In points of error one, two, three, four, five, six, seven, eight, nine, ten, eleven, twelve, and fifteen, the appellant asserts that the trial court's judgment ordering a new election has impermissibly lessened the burden of proof which is placed upon election contestants. "The burden of proving illegality in an election contest is on the contestant who must prove that illegal votes were cast in the election being contested and that a different and correct result would have been reached by not counting the illegal votes." *See, e.g.,*

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[Chumney v. Craig](#), 805 S.W.2d 864, 870 (Tex.App.--Waco 1991, writ denied). See also [Medrano v. Gleinser](#), 769 S.W.2d 687, 688 (Tex.App.--Corpus Christi 1989, no writ); [Miller v. Hill](#), 698 S.W.2d 372, 375 (Tex.App.--Houston [14th Dist.] 1985, writ dismissed 714 S.W.2d 313 (Tex.1986)); [Wright v. Board of Trustees of Tatum Ind. Sch. Dist.](#), 520 S.W.2d 787, 790 (Tex.Civ.App.--Tyler 1975, writ dismissed w.o.j.); [Grizzaffi v. Lee](#), 517 S.W.2d 885, 892 (Tex.Civ.App.--Fort Worth 1974, writ dismissed w.o.j.). Nevertheless, the standard of review to be placed on an appeal from a judgment in an election contest is whether from the record it appears that the trial court abused its discretion. See, e.g., [Miller](#), 698 S.W.2d at 375; [Goodman v. Wise](#), 620 S.W.2d 857, 859 (Tex.Civ.App.--Corpus Christi 1981, writ refused n.r.e.). See generally, Tex.Jur. III, *Elections* § 185 (1984).

In this instance, appellant brought an election contest under the Texas Election Code on the basis that illegal votes were improperly counted in the final election canvass. [Tex.Elec.Code Ann. § 221.003\(a\)\(1\)](#) (Vernon 1986). In particular, appellant alleged that a large number of voters had registered and voted in both the Republican party primary and the Democratic primary runoff election. [Section 221.003 of the Texas Election Code](#) allows for an election contest to be brought where it appears that the final election canvass is not the true outcome of the election due to the casting of illegal votes. [FN2] See [Tex.Elec.Code Ann. § 221.003\(a\)\(1\)](#) (Vernon 1986). An illegal vote occurs where a registered voter actually casts a ballot in both the Republican and Democratic primaries. [FN3] See [Tex.Elec.Code Ann. § 221.003\(b\)](#) (Vernon 1986).

[FN2. [Tex.Elec.Code Ann. § 221.003\(a\)\(1\)](#) (Vernon 1986). [Section 221.003\(a\)\(1\)](#) provides in relevant part that:

(a) The tribunal hearing an election contest shall attempt to ascertain whether the outcome of the contested election, as shown by the final canvass, is not the true outcome because:

(1) illegal votes were counted....

*Id.*

[FN3. [Tex.Elec.Code Ann. § 221.003\(b\)](#) (Vernon 1986). Subsection states that:

In this title, "illegal vote" means a vote that is not legally countable.

*Id.*

In order to determine the true outcome of the election, the trial court heard testimony from 313 illegal voters during the course of the eleven day trial. [Section 221.009](#) grants the district court the power to compel a voter to reveal his or her vote by providing that:

(a) A voter who cast an illegal vote may be compelled, after the illegality has been established to the satisfaction of the tribunal hearing the contest, to disclose the name of the candidate for whom he voted or how he voted on a measure if the issue is relevant to the election contest.

[Tex.Elec.Code Ann. § 221.009\(a\)](#) (Vernon 1986). Both appellant and appellee were able to secure the testimony of 313 of the 429 illegal voters; of these, 220 illegal voters admitted voting for Green and 75 admitted voting for Reyes.

[4] Pursuant to the Election Code, the trial court subtracted the number of ascertainable illegal votes from the candidates' total votes. [FN4] See [\\*209Tex.Elec.Code Ann. § 221.011\(a\)](#) & [221.012\(b\)](#) (Vernon 1986). See also [Tex.Elec.Code Ann. § 221.012\(a\)](#) (Vernon 1986). In this instance, once the illegal votes were subtracted from the original election results, the canvass yielded a 41 vote margin of victory for Green. Notwithstanding, the trial court also found that 126 illegal votes were not able to be ascertained. Therefore, the 41 vote margin of victory in favor of Green could not accurately reflect the true outcome of the election. In response, the trial court entertained testimony from expert witnesses on behalf of appellant and appellee who testified that statistically the majority of the 126 unascertained illegal votes would have been cast for their opponent. Disregarding this conflicting testimony, the trial court determined that the true outcome was unable to be determined. Therefore, pursuant to [section 221.012\(b\)](#), the trial court held the election void and ordered a new election because the margin of victory, 41, was far surpassed by the number of unascertained illegal votes, 126. See [Tex.Elec.Code Ann. § 221.012\(b\)](#) (Vernon 1986). [Section 221.011\(b\)](#) states that:

[FN4. [Tex.Elec.Code Ann. § 221.011\(a\)](#). [Section 221.011\(a\)](#) mandates that:

If the tribunal hearing an election contest can as-

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certain the candidate or side of a measure for which an illegal vote was cast, the tribunal shall subtract the vote from the official total for the candidate or side of the measure, as applicable.

*Id.* If the true victor of the election can be ascertained, the trial court shall declare the winner. [Tex.Elec.Code Ann. § 221.012\(a\)](#) (Vernon 1986). [Section 221.012\(a\)](#) explains that:

If the tribunal hearing an election contest can ascertain the true outcome of the election, the tribunal shall declare the outcome. [Tex.Elec.Code Ann. § 221.012\(a\)](#) (Vernon 1986). However, where the number of illegal unascertained votes is greater than or equal to the margin of victory, the trial court shall declare the election canvass void and order a new election. [Tex.Elec.Code Ann. § 221.012\(b\)](#) (Vernon 1986). [Section 221.012\(b\)](#) mandates that:

The tribunal shall declare the election void if it cannot ascertain the true outcome of the election.

*Id.*

If the tribunal finds that illegal votes were cast but cannot ascertain how the voters voted, the tribunal *shall* consider those votes in making its judgment.

[Tex.Elec.Code Ann. § 221.011\(b\)](#) (Vernon 1986) (*emphasis added*). Therefore, the trial court properly considered the 126 unascertained illegal votes in making the determination that the true outcome of the election was uncertain. *Id.*

[5] In addition, [section 221.009\(b\)](#) grants the district court the discretion to void the election results and order a new election be held:

If the number of illegal votes is equal to or greater than the number of votes necessary to change the outcome of an election, *the tribunal may declare the election void without attempting to determine how individual voters voted.*

[Tex.Elec.Code Ann. § 221.009\(b\)](#) (Vernon 1986) (*emphasis added*). Pursuant to this section, an election tribunal may void the election and order that a new election be held *without* ever attempting to ascertain for whom illegal voters had cast their ballots. *Id.* Nevertheless, the overriding policy which guides an election contest is to determine "the true

outcome of the election." [Tex.Elec.Code Ann. § 221.003\(a\)\(1\)](#) (Vernon 1986). Out of deference to this policy, the trial court *chose* to entertain the testimony of 313 of the 429 illegal voters in attempt to determine if the true outcome could be ascertained. Finally, the court concluded that "[t]his [41 vote] margin [of victory for Green], however, based only on a subset of the entire apparent illegal voter population, cannot provide the degree of certainty necessary for this court to declare the true outcome of the election." Therefore, the trial court declared the election void pursuant to its discretion under [sections 221.009\(b\)](#) and [221.012\(b\)](#) because the number of unascertained illegal votes was greater than the margin of victory. [Tex.Elec.Code Ann. § 221.009\(b\)](#) & [221.012\(b\)](#) (Vernon 1986).

Appellant contends that the trial court's ruling is in error because the court read 221.009(b) in isolation from the other provisions of the election code. However, our sister court in Corpus Christi has upheld a similar trial court judgment in an election contest. See [Medrano, 769 S.W.2d at 688-89](#). In [Medrano](#), it was held proper for the \*210 trial court to void the election results and order a new election where some but *not all* of the illegal votes were able to be attributed to and deducted from the candidates' final election canvass. *Id.* The court of appeals heard an appeal in which appellant lost the election by a single vote. *Id.* at 688. The evidence presented at trial demonstrated that six illegal votes were cast. *Id.* The trial court heard testimony from each of the six persons who cast illegal votes and each stated for whom he or she had voted; however, the trial court chose not to believe the sixth voter's statements because the voter had a prior felony conviction. *Id.* at 688-89. Therefore, the vote was equally divided and the trial court held the election results void. *Id.* at 689-90.

The court of appeals determined that the proper procedure under the election code was to first compel the illegal voters to reveal how they voted. *Id.* at 688. See also [Tex.Elec.Code Ann. § 221.009](#) (Vernon 1986). Secondly, the court must subtract those votes it can attribute as being cast for a specific candidate from the final election canvass. See [Medrano, 769 S.W.2d at 688](#). See also [Tex.Elec.Code Ann. § 221.011](#) (Vernon 1986). If this tally yields a clear winner, the trial court shall declare the election result.

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[Tex.Elec.Code Ann. § 221.012\(a\)](#) (Vernon 1986). However, the trial court "shall declare the election void" if the margin of victory is less than or equal to the number of undetermined illegal votes after subtracting all of the illegal votes that may be positively attributed to the candidates. [FN5] See [Medrano, 769 S.W.2d at 688](#). See also [Tex.Elec.Code Ann. § 221.009\(b\) & 221.012](#) (Vernon 1986). The court of appeals ruled that the trial court may properly void the election results where it is unable to ascertain for whom all illegal votes were cast and without such the number of undetermined illegal votes is greater than or equal to the margin of victory. [FN6] See [Medrano, 769 S.W.2d at 690](#). Likewise, the trial court in this instance found that the number of illegal unascertained votes was in excess of the margin of victory. [FN7]

[FN5. See also [Kelley v. Scott, 733 S.W.2d 312, 314 \(Tex.App.--El Paso 1987, writ dismissed w.o.j.\)](#). In that instance, the appellee had won the election by only one vote. *Id.* However, the election tribunal found that one absentee ballot had been illegally counted. *Id.* The court held that:

[Tex.Elec.Code Ann. sec. 221.009\(b\)](#) (Vernon 1986) provides that if the number of illegal votes is equal to or greater than the number of votes necessary to change the outcome of an election, the tribunal may declare the election void without attempting to determine how the individual voters involved voted. Since one vote can change the outcome of the election in question, it was not necessary to show how [the illegal voter] cast her vote. *Id.*

[FN6. See also [Kelley, 733 S.W.2d at 314](#); [Wright, 520 S.W.2d at 793](#); [White v. Hearne, 514 S.W.2d 765, 767 \(Tex.Civ.App.--Waco 1974, no writ\)](#); [Ware v. Crystal City Ind. Sch. Dist., 489 S.W.2d 190, 191-92 \(Tex.Civ.App.--San Antonio 1972, writ dismissed w.o.j.\)](#).

[FN7. The trial court's Finding of Fact number twelve states that "The true outcome of the April 14 run-off election cannot be ascertained, and the number of illegal votes is greater than the number necessary to change the outcome."

[6] Appellant argues that under the trial court's ruling "any close election can be voided because the existence of some illegal votes taints the election and public policy requires that a new election is required to correct this taint;" however, the policy behind [section 221.012\(b\) of the Election Code](#) is not about how close the final election results may be but rather, that section merely seeks to insure that the final election canvass is a clear reflection of the *legal votes cast*. See [Medrano, 769 S.W.2d at 688](#). [Section 221.012\(b\)](#) is not a tool to be utilized to void the election results of a close election. Rather, [section 221.012\(b\)](#) only comes into play where there were illegal votes cast which upon reasonable inquiry at an election contest cannot be attributed to either the contestant or contestee. See [Tex.Elec.Code Ann. § 221.012\(a\) & \(b\)](#) (Vernon 1986). See also [Medrano, 769 S.W.2d at 688](#). The trial court may void the election results and order that a new election be held where there is a sufficient number of illegal votes which cannot be attributed to either candidate, \*211 namely, where the number of illegal unascertainable votes is greater than or equal to the margin of victory. [Tex.Elec.Code Ann. § 221.012\(b\)](#) (Vernon 1986). See also [Medrano, 769 S.W.2d at 688](#).

[7] Appellant further argues that under the approach taken by the trial court, "whoever loses, may return to court, prove that the number of illegal voters is equal to or greater than the difference in the margin in the election and the contestant is *entitled* to a new election." (*emphasis added*). Once again, appellant misconstrues the Election Code. [Sections 221.009](#) and [221.012](#) vest discretion in the trial court to determine whether or not the true results of the election can be ascertained. [Tex.Elec.Code Ann. § 221.009 & 221.012](#) (Vernon 1986). "The tribunal shall declare the election void if it cannot ascertain the true outcome of the election." [Tex.Elec.Code Ann. § 221.012\(b\)](#) (Vernon 1986).

In this instance, the trial court found that the true results of the April 14, 1992 primary runoff could not be ascertained. The evidence presented at trial attributed 220 of the illegal votes to Green, 75 to Reyes, 8 were not illegal, and 126 were unable to be attributed to either side. We find that the trial court did not impermissibly alter the burden of proof in an election contest and further find that the trial court prop-

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erly held the election void because the true outcome could not be ascertained. Appellant's points of error one, two, three, four, five, six, seven, eight, nine, ten, eleven, twelve, and fifteen are overruled.

[8][9] Further, in points of error sixteen, seventeen and eighteen, appellant argues that the evidence is insufficient to support the trial court's Findings of Fact. Appellant first alleges insufficient evidence to support the Finding that:

the correct number of individuals that apparently voted in both the Republican primary and the Democratic run-off was 429. Of these, approximately 97.5% (418) probably voted in the Green/Reyes race in the multi-race run-off election, because that percent of all run-off voters cast a vote for one candidate or the other in the Green/Reyes race.

Appellant attributes this finding to the testimony of Mr. Kent Tedin who stated that of the voters who cast ballots in both the Republican primary election and the Democratic runoff election, 97.5% or 418 voters probably voted in the Green/Reyes runoff. In non-jury cases in which both Findings of Fact and a Statement of Facts have been filed, we must review the sufficiency of the evidence under the same standards utilized for jury tried cases. *See, e.g., McGalliard v. Kuhlmann*, 722 S.W.2d 694, 696 (Tex.1987); *Gill Savings Ass'n v. Chair King, Inc.*, 783 S.W.2d 674, 676-77 (Tex.App.--Houston [14th Dist.] 1989), *aff'd in part on other grounds*, 797 S.W.2d 31 (1990). In reviewing the sufficiency of the evidence, we must review all of the evidence in support of the findings of the trier of fact. *See, e.g., Plas-Tex, Inc. v. United States Steel Corp.*, 772 S.W.2d 442, 445 (Tex.1989). This court will reverse only if the evidence in support of the finding is so weak as to render the outcome manifestly unjust or clearly wrong. *See, e.g., In re Kings Estate*, 150 Tex. 662, 664-65, 244 S.W.2d 660, 661 (1951).

[10] Appellee called Mr. Tedin to testify based upon his experience as a professor of political science and Chairman of the Political Science Department at the University of Houston. After stating for the record his academic credentials, Mr. Tedin testified that about 97.5% of the voters who voted in the runoff election voted on the Green/Reyes issue.

We know that approximately two and a half percent of the voters engaged in what we call, in academic political sci-

ence, roll off, meaning they did not vote in a particular election. There is absolutely no reason to think that two and a half percent that characterized the entire Congressional District would have been anything other than characteristic of the 430 Republicans. That is, I would expect that you would probably find roll off of maybe two, two and a half percent, although this is a typically motivated group of people and it might even be less because in a very, very low turnout runoff, these people voted twice.

\*212 In addition, Mr. Tedin stated that there was "no independent factually incontrovertible way of determining who a person really voted for." Although the Findings of Fact in a judge-tried case are not conclusive when a complete statement of facts appears in the record, great deference must be given to the judge's determination of the witnesses' credibility and the weight to be given to their testimony. *See, e.g., Middleton v. Kawasaki Steel Corp.*, 687 S.W.2d 42, 44 (Tex.App.--Houston [14th Dist.] 1985), *writ ref'd n.r.e. per curiam*, 699 S.W.2d 199 (Tex.1985). We find Mr. Tedin's testimony sufficient to support the Finding that "approximately 97.5% (418) [illegal voters] probably voted in the Green/Reyes race...."

[11] In addition, appellant argues that there is insufficient evidence to support the judge's Finding that the remaining 116 unascertained votes were indeed illegal. The final number of unascertained votes included both the 116 illegal voters from whom no statement or testimony was procured as well as the 10 illegal voters who stated that they could not remember for whom they had voted. Nevertheless, Ms. Barbara Duganier of the Arthur Andersen Company testified that she reviewed the lists for both the Republican primary election and the Democratic runoff to compile a list of those voters who had illegally voted. The list was compiled through a comparison of voter names, voter registration numbers and precinct numbers. Further, she confirmed that another employee of the Arthur Andersen Company had compared the signatures of the voters as an added measure to determine whether it was indeed the same voter who voted in both elections. On cross-examination, Ms. Duganier admitted that neither she nor the other employee were experts in handwriting analysis and therefore she could not testify as an expert. On this basis, appellant contends that there was insufficient evidence to show that there were in-

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deed another 116 illegal voters. Once again, we note that great deference must be given to the judge's determination of the witnesses' credibility and the weight of their testimony. See [Middleton](#), 687 S.W.2d at 44. We will reverse only where the record shows that the judge's Findings are so weak as to render the outcome manifestly unjust or clearly wrong. See [In re Kings Estate](#), 150 Tex. at 664-65, 244 S.W.2d at 661. Further, the Rules of Evidence and prior caselaw clearly state that signatures may be properly authenticated where the trier of fact has an opportunity to compare the signatures to determine their genuineness. [FN8] See [Tex.R.Civ.Evid. 901\(b\)\(2\) & \(b\)\(3\)](#). See also [In re Estate of Watson](#), 720 S.W.2d 806, 808 (Tex.1986); [Strong v. State](#), 805 S.W.2d 478, 486 (Tex.App.--Tyler 1990, pet. ref'd). We find the trial court's conclusion of genuineness and Ms. Duganier's comparison based upon voter names, voter registration numbers and precinct numbers are sufficient evidence to support the trial court's Finding that an additional 116 illegal votes existed.

[FN8] In addition, we note that nonexpert comparison of voters' signatures is clearly sanctioned under the Election Code. [Tex.Elec.Code Ann. § 87.027\(e\)](#) (Vernon Supp.1992). Indeed, no expertise is needed in order to serve on a Signature Verification Committee; rather:

To be eligible to serve on a signature verification committee, a person must be a qualified voter:

- (1) of the county, in a countywide election ordered by the governor or a county authority in a primary election;
- (2) of the part of the county in which the election is held, for an election ordered by the governor or a county authority that does not cover the entire county of the person's residence; or
- (3) of the political subdivision, in an election ordered by an authority of a political subdivision other than a county.

*Id.*

[12] Further, appellant complains that Findings of Fact numbers five and eight are erroneous because the trial court simply "generalize[d]" the reasons why the testimony of the remaining 116 illegal voters was not procured. The court

stated that:

The remaining individuals fell into several different categories: crossover voters that were subpoenaed but failed to appear; \*213 crossover voters that resisted service; crossover voters that evidence showed had moved and could not be located; and others that neither party chose to subpoena.

Appellant surmises that "[t]his is an euphemism for the voters that Reyes did not want to produce." Interestingly, appellant's own brief admits that there were some 27 voters who were subpoenaed but failed to appear and that some others resisted service. Moreover, witnesses for both sides testified that difficulties arose in serving some of the people for whom subpoenas were issued.

Furthermore, appellant states that the trial court's Finding number seven unfairly "accepted as true the testimony of every voter witness who testified as to how they voted.... [but] attempts to introduce some uncertainty into this process by stating that '[m]any of the voters who disclosed their vote did so with qualifications such as "I think" or "I probably".' " Although appellant argues that the court's statement about the lack of decisiveness was unsupported by the record, appellant himself admits that "a few were uncertain as to their vote." A thorough review of the record clearly demonstrates that some voters' testimony was not procured because of failure to appear, resistance to service or inability to locate. Additionally, the record reflects that some illegal voters refused to disclose for whom they had voted and even more disclosed who they had voted for with some qualifications such as those noted by the trial court. Therefore, we find sufficient evidence to support the trial court's Findings and overrule appellant's points of error sixteen, seventeen and eighteen.

[13][14] Finally, in his thirteenth and fourteenth points of error, appellant asserts that the trial court erred by allowing affidavits of illegal voters to be admitted into evidence and by allowing thirty-five voters to testify over the telephone. While appellant raises these issues as points of error at the beginning of his brief, he does not specifically address them. The Texas Rules of Appellate Procedure require that argument and authority must be brought forth in support of each point of error for such error to be properly before the

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court on appeal. [Tex.R.App.P. 74\(f\)](#). Regardless of appellant's failure to do so, affidavits of persons who thereby admit under oath an action which can subject them to criminal liability may be properly admitted at trial as an exception to the hearsay rule as statements against their interest. [\[FN9\]](#) See [Tex.R.Civ.Evid. 803\(24\)](#) (Pamph.1992). Further, telephone depositions of witnesses are allowed under the Texas Rules of Civil Procedure. [\[FN10\]](#) See [Tex.R.Civ.P. 202\(2\)\\*214](#) (Pamph.1992). Therefore, appellant's thirteenth and fourteenth points of error are overruled.

[FN9. Tex.R.Civ.Evid. 803\(24\)](#) (Pamph.1992). [Rule 803\(24\)](#) is an exception to the hearsay rule and states as follows:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness: (24) Statement against interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, or to make him an object of hatred, ridicule, or disgrace, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

*Id.*

[FN10. Tex.R.Civ.P. 202\(2\)](#) (Pamph.1992). "The parties may stipulate in writing, or the court may upon motion order, that a deposition be taken by telephone...." *Id.* See also [Clone Component Dist. v. State, 819 S.W.2d 593, 597-600 \(Tex.App.--Dallas 1991, no writ\)](#). In [Clone](#), appellant challenged the validity of telephone depositions where the court reporter was not physically in the same room as the deponent but rather was in the same location as the interrogator. [Id. at 597](#). It was appellant's contention that these circumstances made it impossible for the reporter to know whether the deponent was truly placed under the oath. [Id.](#) The court ruled that "[t]o require the State to hire a

separate court reporter for each witness in order that the reporter can be in the physical presence of the deponent when a single reporter could adequately record all of the depositions over the telephone without harm to the rights of appellants would not be in accordance with our duty to interpret the Rules of Civil Procedure liberally 'to obtain a just, fair, equitable and impartial adjudication of the rights of the litigants under established principles of substantive law ... with as great expedition and dispatch and at the least expense ... to the litigants ... as may be practicable.' [Tex.R.Civ.P. 1.](#)" [Id. at 598](#). "Nowhere do the Rules of Civil Procedure require that the deponent be physically present before the court reporter either for being sworn or for the recording of the testimony." [Id.](#) We agree.

This court will not entertain any motions for rehearing pursuant to [Tex.Elec.Code Ann. § 232.014\(e\)](#) (Vernon 1986). [\[FN11\]](#)

[FN11. Tex.Elec.Code Ann. § 232.014\(e\)](#) (Vernon 1986). [Section 232.014\(e\)](#) vests the discretion to refuse to grant motions for rehearing in appeals from election contests as follows:

The court of appeals may refuse to permit a motion for rehearing to be filed or may reduce the time for filing the motion.

*Id.* Further,

[t]he decision of the court of appeals is not reviewable by the supreme court by certified question or any other method.

[Tex.Elec.Code Ann. § 232.014\(f\)](#) (Vernon 1986).

Having found no merit in any of appellant's eighteen points of error and finding no abuse of discretion by the trial court, the judgment of the trial court is affirmed. The Clerk of the Court is directed to issue the mandate of the Court immediately.

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## H

Supreme Court of South Dakota.  
In the Matter of the ELECTION CONTEST AS TO  
WATERTOWN SPECIAL REFERENDUM  
ELECTION OF OCTOBER 26, 1999 Pertaining To  
Referred Ballot Issues No. 1 and 2.  
**No. 21595.**

Argued April 24, 2001.

Decided May 23, 2001.

City residents brought suit contesting election results on two referendum issues, alleging voting irregularities. The Circuit Court, Third Judicial Circuit, Codington County, [Ronald K. Roehr, J.](#), determined the election was valid. Residents appealed. The Supreme Court, [Amundson, J.](#), held that long lines and inadequate parking associated with holding election in one voting location did not amount to voting irregularities that rose to level of not being a free and fair expression of the people.

Affirmed.

### West Headnotes

#### [1] Elections 305(6)

[144k305\(6\) Most Cited Cases](#)

In an election contest, the Supreme Court must determine whether there is sufficient evidence to support the trial court's findings of fact and conclusions of law and can only reverse the trial court's judgment if it is clearly erroneous; thus, it reviews only the sufficiency of the trial court's findings and whether those findings are in clear error.

#### [2] Elections 269

[144k269 Most Cited Cases](#)

The purpose of an election contest is to challenge the election process itself.

#### [3] Elections 298(1)

[144k298\(1\) Most Cited Cases](#)

The basic question in an election contest is whether the election, despite irregularities, resulted in a free

and fair expression of the will of the voters.

#### [4] Elections 227(1)

[144k227\(1\) Most Cited Cases](#)

To prevail, contestants of an election must show not only voting irregularities, but also show those irregularities to be so egregious that the will of the voters was suppressed.

#### [5] Municipal Corporations 108.10

[268k108.10 Most Cited Cases](#)

Statute expressly permitting a city to use one polling place and one election board, and not statute requiring an adjustment to size of any precinct at which there was unreasonable waiting time imposed upon the voters at the last preceding general election, applied to special referendum election on two zoning changes approved by city council, and thus, long lines and inadequate parking associated with holding election in one voting location did not amount to voting irregularities that rose to level of not being a free and fair expression of the people, absent any evidence that any state or local election law was violated. [SDCL 12-14-4, 9-13-36.](#)

#### [6] Elections 227(1)

[144k227\(1\) Most Cited Cases](#)

Mere inconvenience or delay in voting is not enough to overturn an election on ground of voting irregularities.

#### [7] Elections 291

[144k291 Most Cited Cases](#)

Before the Supreme Court conducts a but-for analysis to determine whether an election outcome may have been different had those allegedly disenfranchised been able to vote, the election contestants must show, as a prerequisite, that voting irregularities existed.

#### [8] Municipal Corporations 108.10

[268k108.10 Most Cited Cases](#)

Even assuming long lines and inadequate parking would amount to voting irregularities at referendum

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election that rose to the level of not being a free and fair expression of the voters, contestants of the election provided no evidence as to how many potential voters left the lines without voting or how they would have voted and no evidence that any voter was turned away, and thus, the results were valid.

**[9] Elections** 🔑227(1)

[144k227\(1\) Most Cited Cases](#)

An election will not be overturned upon the mere mathematical possibility that the results could have been changed, when the possibilities all combine to repel any such conclusion.

**[10] Elections** 🔑227(1)

[144k227\(1\) Most Cited Cases](#)

Although election officials may have misjudged voter turnout, an election that culminates in a free and fair expression of the will of the voters should not be overturned due to the mistakes or neglect of an election official.

**\*337 Robert L. Spears**, Watertown, SD, Attorney for appellants Porisch, Andrea, and Fischer.

**Thomas J. Linngren** of Green, Schulz, Roby, Oviatt, Cummings & Linngren, Watertown, SD, Attorneys for appellee Prairie Lakes Hospital, Sioux Valley Health Care and Bartron Clinic.

**Roy A. Wise** of Richardson, Groseclose, Wyly, Wise & Sauck, Aberdeen, SD, Attorneys for appellees Watertown Mayor, City Finance Officer, and City Council.

**AMUNDSON**, Justice.

**\*\*1** Local residents of Watertown filed an election contest based on allegations of perceived voting irregularities. The trial court held the election valid and declined to order a new election. We affirm.

#### FACTS

**\*\*2** On August 2, 1999, the Watertown City Council approved an ordinance, which would rezone a portion of the city from residential to commercial. The City Council also passed a resolu-

tion, which would vacate a portion of a city street. The ordinance and resolution were passed at the request of Prairie Lakes Health Care System in order for it to expand its main campus. Certain local residents (Contestants) objected to the changes and sought to bring the rezoning issues to a special election. After obtaining the requisite **\*338** number of signatures, Contestants were able to demand a special referendum election on the two zoning changes.

**\*\*3** A special election took place on October 26, 1999, and was held at the Civic Arena. The voters approved both referendums. After a recount, final numbers showed that the resolution was approved 1,739 to 1,679, a difference of 60 votes, and the ordinance was approved 1,711 to 1,677, a difference of 34 votes.

**\*\*4** Contestants brought suit contesting the election results under SDCL ch. 12-22. After hearing Contestants' allegations of voting irregularities, including affidavits from 104 potential voters who did not vote because of long lines, the circuit court found that the election "resulted in a free and fair expression of the will of the voters," and denied Contestants a new election. Contestants appeal, raising the follow issue:

Whether Contestants met their burden of proof showing that the special election was not the free and fair expression of the voters based on the manner in which it was conducted.

#### STANDARD OF REVIEW

**[1] \*\*5** "In an election contest this court must determine whether there is sufficient evidence to support the trial court's findings of fact and conclusions of law and can only reverse the trial court's judgment if it is clearly erroneous." *Larson v. Lock-en*, 262 N.W.2d 752, 755 (S.D.1978). Thus, we review only the sufficiency of the trial court's findings and whether those findings are in clear error.

#### DECISION

**\*\*6** The thrust of Contestants' argument is that the lines leading to the voting registration table were

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too long and there was inadequate parking. The trial court heard evidence that some potential voters had waited to vote between forty-five minutes and an hour and a half. The court also heard testimony that some potential voters had gone to the voting area a few times during the day only to find the voting lines to be same or of greater length. The record reflects that those in line at the 7 p.m. polling closing time were allowed to vote, and after 7 p.m. over four hundred residents voted until the last in line voted at approximately 8:30 p.m. The record also reflects that some potential voters had to park a block and a half from the polling area.

[2][3][4] \*\*7 The purpose of an election contest is to challenge "the election process itself." *Larson*, 262 N.W.2d at 753, n. 1. The basic question in an election contest is whether the election, despite irregularities, resulted in a free and fair expression of the will of the voters. *Id.* (citing *Green v. Ind. Consol. School Dist. No. 1*, 252 Minn. 36, 89 N.W.2d 12 (Minn 1958)). Therefore, Contestants must show not only voting irregularities, but also show those irregularities to be so egregious that the will of the voters was suppressed.

[5][6] \*\*8 Contestants have not pointed to one voting statute or ordinance that City has violated in conducting this special election. The trial court rejected the argument, as do we, that SDCL 12-14-4 applies to the case at hand. SDCL 12-14-4 provides:

In all precincts the board of county commissioners shall adjust the size of any precinct at which there was unreasonable waiting time imposed upon the voters at the last preceding general election. Under ordinary circumstances, more than thirty minutes waiting time is deemed unreasonable waiting time except at the time when the polls close.

\*339 Rather, City is governed by SDCL 9-13-36, which provides:

If a municipality is divided into wards and all of the wards use the same polling places, the governing body of the municipality may appoint a

single election board for all of the wards. The election board appointed pursuant to this section shall consist of a minimum of one judge and two clerks.... If all of the wards are voting on an identical ballot, a single ballot box and one poll-book may be used for all wards.

This statute makes it clear that the legislature expressly permits the City to use one polling place and one election board. This Court fails to see how long lines or inadequate parking equate to voting irregularities to the level of not being a "free and fair expression of the people." Mere inconvenience or delay in voting is not enough to overturn an election. Without proof of a violation of state or local election law, there is no showing that the trial court's findings are clearly erroneous.

[7][8][9][10] \*\*9 It is also true that before we conduct a "but for" analysis to determine whether the election outcome may have been different had those "disfranchised" been able to vote, Contestants must show, as a prerequisite, that voting irregularities exist. [FN1] See *Abbott v. Hunhoff*, 491 N.W.2d 450, 452 (S.D.1992). Although election officials may have misjudged voter turnout, an election that culminates in "a free and fair expression of the will of the voters should not be overturned due to the mistakes or neglect of an election official." *Becker v. Pfeifer*, 1999 SD 17, ¶ 27, 588 N.W.2d 913, 920 (Amundson, J. concurring in result). While Contestants cited numerous alleged voting irregularities in their complaint, they failed to prove such irregularities at trial. [FN2]

**FN1.** Even if we were to assume voting irregularities existed which rose to the level of not being a "free and fair expression of the voters," counsel for Contestants conceded in his argument to the trial court that "who knows how many people showed up on election day." This statement reveals that counsel has no idea how many potential voters left the lines without voting or how they would have voted. "[A]n election will not be overturned upon the mere

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mathematical possibility that the results could have been changed, when the possibilities all combine to repel any such conclusion." *Buonanno v. Distefano*, 430 A.2d 765, 770 (R.I.1981). Likewise, Contestants have provided no evidence that anyone was turned away. To the contrary, the evidence shows that those still in line after 7 p.m. were still permitted to cast their vote. In an election contest, the contestants clearly have the burden of proof, which they have failed to meet. *Larson, supra*.

FN2. Contestants cite *Ury v. Santee*, 303 F.Supp. 119 (N.D.Ill.1969) as being "remarkably similar" to the case at hand. Appellant Brief, p. 23. The *Ury* case is not binding on this Court and is easily distinguishable. The *Ury* case was brought under 28 USC § 1983, and the district court determined that there were equal protection and due process violations due to the town's organization of available voting places. Not only was this action brought solely under SDCL ch 12- 22, no claims of equal protection or due process have been forwarded by Contestants. The facts and circumstances of *Ury* are also dissimilar to the case at hand. In *Ury*, the traffic and lines near the voting booths required police intervention. No such intervention was necessary here. In addition, the village in *Ury* was not relying on state law to combine voting wards. Here, the City employed SDCL 9-13-36 to combine voting wards to one voting location. It logically follows that there was no effective deprivation of the right to vote as claimed by Contestants. Moreover, in its complaint, Contestants alleged that the Mayor was biased in favor of the ballot measures; that poll watchers for Hospital delayed and hindered voter access to the ballot box; that voters were allowed to wear

stickers in support of the measures, but those opposed had to remove their stickers; that poll workers encouraged those in favor of the measures to remain in line, but discouraged those against the measures to do the same. These allegations, if proven, could constitute voting irregularities. However, no evidence was presented to the trial court to prove same, nor were these allegations ever argued to this Court. Therefore, it is obvious they have been dropped from the litigation.

\*\*10 Therefore, we affirm.

\*340 \*\*11 MILLER, Chief Justice, and SABERS, KONENKAMP, and GILBERTSON, Justices, concur.

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## H

Supreme Court of Pennsylvania.

In re PETITION TO CONTEST the **GENERAL ELECTION FOR DISTRICT JUSTICE** IN JUDICIAL DISTRICT 36-3-03 NUNC PRO TUNC (Two Cases).

Appeal of Joseph ZUPSIC.

Appeal of Delores A. LAUGHLIN.

Argued Sept. 19, 1994.

Decided Jan. 22, 1996.

District justice candidate filed petition to contest general election nunc pro tunc. The Court of Common Pleas, Beaver County, Civil Division, No. 10051 of 1994, set aside election. Candidates appealed. The Supreme Court, Nos. 23 and 33 W.D. Appeal Docket 1994, *Nix*, C.J., held that: (1) candidate's petition was not barred by expiration of 20-day period; (2) candidate was not guilty of laches; (3) candidate's petition sufficiently alleged breakdown in operation of county board of elections to allow petition to proceed; (4) substantial evidence supported finding that ballot tampering occurred to at least some degree in district judge election; (5) trial court's failure to make specific findings regarding degree of ballot tampering in district judge election made it impossible for Supreme Court to review whether setting aside election was appropriate remedy or to evaluate claim that trial court should have awarded election to one candidate based on first machine count, as audited, together with write-in votes; (6) voters, who could identify that ballots because they had designated themselves as write-in candidates for various offices, could voluntarily appear and testify regarding how he or she originally voted; and (7) fact that District Attorney openly endorsed candidate did not render disqualification of District Attorney from participating in district justice election contest necessary.

Reversed and remanded.

West Headnotes

### [1] Elections 54

[144k54 Most Cited Cases](#)

Nunc pro tunc relief is appropriate where breakdown in administrative operations of election board occurs.

### [2] Justices of the Peace 3

[231k3 Most Cited Cases](#)

District justice candidate's petition to contest general election nunc pro tunc was not barred by expiration of 20-day period where there was no evidence that candidate had any reason to suspect problem with election until filing period had expired. [25 P.S. § 3456](#).

### [3] Justices of the Peace 3

[231k3 Most Cited Cases](#)

District justice candidate was not guilty of laches and, therefore, his petition to contest general election nunc pro tunc, filed after filing period had expired and more than 20 days after recount was completed could proceed; record failed to indicate that opposing candidate was prejudiced by any delay and opposing candidate also raised problem with election after time to contest had expired. [25 P.S. § 3456](#).

### [4] Equity 72(1)

[150k72\(1\) Most Cited Cases](#)

For laches to apply, there must be lack of due diligence in pursuing a cause of action and resulting prejudice to other party.

### [5] Elections 278

[144k278 Most Cited Cases](#)

Petitioner generally cannot delay contesting election while recounts are being completed.

### [6] Justices of the Peace 3

[231k3 Most Cited Cases](#)

District justice candidate's petition to contest general election nunc pro tunc sufficiently alleged breakdown in operation of county board of elections to allow petition to proceed; while candidate did not specifically state that board was derelict in its duties, he specifically alleged that fraud in election occurred between first machine count and second machine count and ballots were in exclusive control of board and or court during that time.

### [7] Appeal and Error 1010.1(4)

[30k1010.1\(4\) Most Cited Cases](#)

Supreme Court is bound by trial court's findings of fact unless those findings are not based on competent evidence.

### [8] Justices of the Peace 3

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Substantial evidence supported finding that ballot tampering occurred to at least some degree in district justice election; results of two properly operating machine tabulations revealed substantial differences in vote totals for each candidate and in five particular precincts within race, such difference occurred because of altered marks, changes favored one candidate, ballot boxes were left unsecured for period of time, and numerous keys were distributed to ballot boxes.

**[9] Justices of the Peace** [231k3 Most Cited Cases](#)

Trial court's failure to make specific findings regarding degree of ballot tampering in district justice election made it impossible for Supreme Court to review whether setting aside election was appropriate remedy or to evaluate claim that trial court should have awarded election to one candidate based on first machine count, as audited, together with write-in votes; trial court failed to identify ballots it concluded had been altered and explain reasons for its conclusions and to likewise identify ballots that it was unable to classify as either altered or unaltered and explain reasons for its conclusions.

**[10] Elections** 227(8)[144k227\(8\) Most Cited Cases](#)

Even mere casting of fraudulent votes is not sufficient to throw out a return; instead, if it is at all possible, fraudulent votes should be purged and remaining votes retained.

**[11] Elections** 227(8)[144k227\(8\) Most Cited Cases](#)

It is only when election has been characterized by such fraud or intimidation or other unlawful conduct as to make election a mere travesty or when ballots or voting machines are in such condition that it is impossible to ascertain from inspection of them the will of the voters that court will reject entire returns from district and annul election.

**[12] Elections** 253[144k253 Most Cited Cases](#)

Where evidence establishes that ballots were altered between time of initial tabulation and recount, discarding votes is wholly untenable.

**[13] Elections** 253[144k253 Most Cited Cases](#)

Where discrepancy results from fraudulent tampering with ballot boxes and their contents, since official canvass of votes, court is fully justified in directing that fraudulently altered ballots be counted for candidate for whom evidence shows they must necessarily have been counted by election officials, and it would commit grievous error to do otherwise.

**[14] Elections** 293(3)[144k293\(3\) Most Cited Cases](#)

Voters, who could identify their ballots because they had designated themselves as write-in candidates for various offices, could voluntarily appear and testify regarding how he or she originally voted where votes had been properly cast but subsequently altered through no fault of voters.

**[15] Justices of the Peace** [231k3 Most Cited Cases](#)

Fact that District Attorney openly endorsed candidate for district justice did not render disqualification of District Attorney from participating in district justice election contest necessary.

**[16] Justices of the Peace** [231k3 Most Cited Cases](#)

Any supposed conflict of interest resulting from participation of District Attorney, who openly endorsed candidate, in district justice election contest would go to weight of testimony rather than its admissibility.

**\*\*630\*219** [John P. Dohanich](#), Rowley, Smith & Lewis, P.C., Ambridge, for Appellant at No. 23. [J. Philip Colavincenzo](#), Beaver, for Appellant at No. 33.

[J. Philip Colavincenzo](#), Beaver, for Delores A. Laughlin.

[John P. Dohanich](#), Rowley, Smith & Lewis, P.C., Ambridge for Joseph Zupsic.

**\*220** David M. Fouse and [Mary L. David](#), Beaver County Law Department, for Bureau of Elections.

Before NIX, C.J., and FLAHERTY, ZAPPALA, PAPADAKOS, CAPPY, CASTILLE and MONTEMURO, JJ.

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### OPINION

NIX, Chief Justice.

This matter involves consolidated appeals by Joseph Zupsic and Delores A. Laughlin from an Order of the Court of Common Pleas of Beaver County setting aside the election conducted on November 2, 1993, for the office of District Justice for Judicial District \*\*631 36-3-03. [FN1] While the initial vote \*221 tabulation showed Zupsic the winner of the district justice race by thirty-six votes, a hand recount resulted in a swing of eighty-two votes in Laughlin's favor, thus making her the winner by thirty-six votes. The lower court concluded that in all probability, a sufficient number of ballots were altered between the time of the initial tabulation and the recount so as to change the outcome of the election. *In re Petition to Contest the General Election for District Justice in Judicial District 36-3-03 Nunc Pro Tunc*, No. 10051 of 1994, slip order at 4-5, finding of Fact No. 11 (C.P. Beaver County Apr. 8, 1994) [hereinafter *Petition I*]. Further, the court determined that, since it was "impossible to accurately strike all the altered ballots so that the results of the election can be reached," setting aside the election was the appropriate remedy. *Id.*, slip order at 5, Finding of Fact No. 12.

[FN1. In 23 W.D.Appel Docket 1994, Appeal of Joseph Zupsic, probable jurisdiction was noted citing *In re Reading School Board Election*, 535 Pa. 32, 634 A.2d 170 (1993). However, as Laughlin contended in her brief in opposition to the Supreme Court's jurisdiction, this matter should have been appealed to the Commonwealth Court pursuant to 42 Pa.C.S. § 762(a)(4)(i)(C). That section, in pertinent part, reads:

(a) **General Rule.**--Except as provided in subsection (b), the Commonwealth Court shall have exclusive jurisdiction of appeals from final orders of the courts of common pleas in the following cases:

....

(4) Local government civil and criminal matters.--

(i) All actions or proceedings arising under ... or where is drawn into question the application, interpretation or enforcement of any:

....

(C) statute relating to elections, campaign financing or other election procedures.

42 Pa.C.S. § 762(a)(4)(i)(C). Although our Court had previously entertained appeals from the courts of common pleas in election matters, *see, e.g., Jones Election Contest Case*, 376 Pa. 456, 103 A.2d 652 (1954), jurisdiction over such appeals was given to the Commonwealth Court when that court was created in 1970. Appellate Court Jurisdiction Act, Act of July 31, 1970, P.L. 673 No. 223, art. IV, § 402 (codified as amended at 42 Pa.C.S. § 762); *see also* *Olasz v. Wolosik*, No. 46 W.D. Appeal Docket 1995.

However, we will maintain jurisdiction over these two appeals in order to conserve judicial resources and speed the subsequent retrial. In No. 33 W.D.Appel Docket 1994, Appeal of Delores Laughlin, this Court maintains jurisdiction pursuant to 42 Pa.C.S. § 704(a). Section 704(a) provides that "[t]he failure of an appellee to file an objection to the jurisdiction of an appellate court ... shall, unless the appellate court otherwise orders, operate to perfect the appellate jurisdiction of such appellate court...." In this appeal, Appellee Zupsic did not object to the jurisdiction of this Court. However, as we noted above, in No. 23 W.D.Appel Docket 1994, Appeal of Joseph Zupsic, Appellee Laughlin argued that jurisdiction was in the Commonwealth Court, not in this Court. Thus, in No. 23 W.D.Appel Docket 1994, this Court maintains jurisdiction pursuant to 42 Pa.C.S. § 726. *See Commonwealth v. Martorano*, 535 Pa. 178, 188 n. 6, 634 A.2d 1063, 1067 n. 6 (1993), and *Commonwealth v. Lang*, 517 Pa. 390, 395 n. 1, 537 A.2d 1361, 1363-64 n. 1 (1988).

Zupsic contends that the lower court correctly determined that tampering occurred; however, he maintains that the court should have awarded the election to him based on the initial tabulation rather than invalidating it. In the alternative, he claims that the court should have stricken the results from the five districts in which the alterations were concentrated, which would also result in his winning the election.

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Laughlin's primary contentions are that the lower court erred in (1) allowing Zupsic to file this election contest *nunc pro tunc*; and (2) determining, by clear and convincing evidence, that tampering in fact occurred. If, however, this Court rejects these contentions, Laughlin also argues that the lower court erred in invalidating the election rather than making specific dispositions of those ballots subject to tampering. Because we find that the lower court's Findings of Fact are insufficient for us to determine whether invalidation of the election was an appropriate remedy, we reverse the Order of the court of common pleas and remand for proceedings consistent with this opinion.

**\*222** On November 2, 1993, among numerous other state and local races, a general election was conducted for the office of District Justice in Judicial District 36-3-03, which spans the southern and central portions of Beaver County. Zupsic's and Laughlin's names appeared on the ballot as the respective nominees of the Democratic and Republican parties for the office. In Beaver County, the voters record their votes on paper ballots **\*\*632** with graphite marking equipment. These votes are then tabulated by approved automatic tabulation machines. Prior to the election, Beaver County's four machines were tested and found to be counting accurately. *Petition I*, slip order at 3, Finding of Fact No. 2.

At the close of the polls on November 2, Beaver County's ballot boxes were returned to the Beaver County Courthouse and delivered to the room that houses the tabulation machines. Record at 239a. Each box was delivered sealed by a red numbered seal, which number was recorded by the local precinct. Record at 247a. Additionally, each box was locked with a padlock. Record at 242a. The padlocks on all 156 ballot boxes are identical, and approximately 160-170 keys exist for the boxes. Record at 242a, 405a. Any one of these keys can open any of the ballot boxes. *In re Petition to Contest the General Election for District Justice in Judicial District 36-3-03 Nunc Pro Tunc*, No. 10051 of 1994, slip op. at 3 (C.P. Beaver County May 5, 1994) [hereinafter *Petition II*].

After the delivery of the boxes was completed, officials of the Bureau of Elections unlocked the boxes and removed the red seals. Record at 242a. The ballots were then run

through the tabulating machines, after which the ballots were placed back into their respective ballot boxes. Record at 245a-46a. The boxes were then each relocked with a padlock and marked with a new seal; however, the numbers of the new seals were not recorded at that time. Record at 248a; *Petition II*, slip op. at 2-3. Election officials stored the boxes in the tabulation room, and three people had keys to the room. Record at 411a; *Petition II*, slip op. at 3.

On November 5, 1993, three days after the election, the ballot boxes were again opened by the Return and Write-in **\*223** Boards to audit the voter tallies and count the write-in votes. Record at 250a. These boards also made the first record of the seals that had been placed on the ballot boxes after the ballots had been tabulated by machine. Record at 254a. Thus, for a period of two to three days, the numbers of the seals on the ballot boxes went unrecorded.

After the Return and Write-in Boards completed their duties, Zupsic was awarded a total of 3,783 votes and Laughlin a total of 3,747 votes, making Zupsic the apparent winner of the district justice race by thirty-six votes. *Petition I*, slip order at 1. However, on December 1, 1993, twenty-nine days after the election, Laughlin filed Petitions to Open Ballot Boxes and Recount Votes for fourteen of the twenty-two ballot boxes in Judicial District 36-3-03. [FN2] On December 8 and 9, 1993, the Recount Board tabulated the ballots by hand, awarding Laughlin 3,793 votes to Zupsic's 3,747. Thus, the recount resulted in a swing of eighty-two votes, forty-six gained by Laughlin, and thirty-six lost by Zupsic. *Id.* at 2. During this recount, Zupsic challenged sixty-two ballots, while Laughlin challenged an additional thirteen. Record at 285a.

[FN2]. These districts were as follows: Center Township 1, 2 and 4-8; Greene Township; Monaca Borough 1-2; Potter Township; Raccoon Township 1-2; and Shippingport Borough.

Zupsic then filed Petitions to Open Ballot Boxes and Recount Votes on December 17, 1993, for the remaining precincts in Judicial District 36-3-03. [FN3] Although these petitions are not part of the record in this matter, Zupsic's brief filed with this Court states that his petitions alleged substantial fraud or error in computing the votes or in marking the

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ballots not manifest on the general return. Brief for Appellant Zupsic at 11. This recount was conducted on December 20, 1993, and resulted in each candidate gaining only one vote apiece. Thus, after the second recount, the totals were 3,794 votes for Laughlin and 3,748 votes for Zupsic. *Petition I*, slip order at 2. During this recount, Zupsic challenged seven ballots, and Laughlin challenged an additional five. Record at 288a.

[FN3](#). These districts are Center Township 3; Georgetown Borough; Hookstown Borough; and Monaca Borough 3, 4-1, 4-2, and 5.

\*224 The Election Board also conducted a second machine count on January 5, 1994. Record at 290a-91a. While the Board attempted to duplicate the original machine run, this was not possible because one of the four \*\*633 machines used on election night was not operating properly on January 5. Record at 293a. Thus, the ballots originally run through that machine were run through a different machine. Nonetheless, the January 5 machine count was nearly identical to the result obtained by the recounts, with Laughlin receiving 3,792 votes to Zupsic's 3,750. Record at 294a. This machine run tabulated votes for all offices on the ballot. Zupsic Exhibit No. 7.

On January 10, 1994, more than two months after the election, Zupsic filed a Petition to Contest the General Election Nunc Pro Tunc with the Beaver County Court of Common Pleas. Although [25 P.S. § 3456](#) provides that election contests for district justice races must be filed within twenty days of the election, [FN4](#) Zupsic claimed that he was entitled to proceed with his petition because he was unaware of any fraud or irregularities until he learned the results of the January 5 machine tabulation.

[FN4](#). [Section 3456](#) provides that election contests of the second through fifth classes must be filed within twenty days of a primary or election. District justice races are contests of the fifth class pursuant to [25 P.S. § 3291](#).

The court of common pleas then issued a rule upon Laughlin and the Beaver County Board of Elections [FN5](#) to show cause why the relief requested by Zupsic should not

be granted. After Laughlin and the Board filed answers, the court made the rule absolute on February 3, 1994, and granted Zupsic leave to contest the election. Hearings on the petition were held on February 28, 1994, and March 11, 1994. [FN6](#)

[FN5](#). The court of common pleas concluded that the county had standing to participate in the election contest because Zupsic requested that the Board of Elections conduct a new election and "the integrity of the county's election procedures was at issue." *Petition I*, slip order at 2 n. 4.

[FN6](#). A third hearing had been conducted on January 10, 1994, concerning Zupsic's appeal from the final determinations made by the Recount Board in the recount proceedings. Because of the court's disposition of the matter, it did not address Zupsic's appeals.

\*225 By Order dated April 8, 1994, the court ordered that the challenged election be set aside. *Petition I*. In support of its action, the court made the following Findings of Fact, *inter alia*:

9. Sometime between election night and the completion of the work of the Return and Write-in Boards, which commenced on November 5, 1993, a person or persons, presently unknown, gained access to and opened some of the ballot boxes from some of the precincts within Judicial District 36-3-03.

10. After securing access to the ballot boxes, the unknown person or persons altered many of the ballots cast by the voters with respect to the District Justice Office in Judicial District 36-3-03 by placing a mark in the oval designated for Laughlin on the ballots. [FN7](#)

[FN7](#). A footnote inserted at this point in the court's findings states that "of all the many altered ballots, only one contained a similar mark in the oval opposite Zupsic's name."

11. In all probability, a sufficient number of ballots were altered ... so as to change the outcome of the election for that office.

12. It is impossible to accurately strike all the altered bal-

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lots so that the result of the election can be reached by ascertaining the honest intent of the voters without disenfranchising the voters who cast the ballots which were altered.

*Petition I*, slip order at 9-12.

Based on these findings, the court then made the following Conclusions of Law:

3. A substantial number of ballots were altered by a person or persons other than the voter in the election for the office of District Justice in Judicial District 36-3-03.

4. The number of ballots altered by an unknown person or persons cannot be ascertained with reasonable accuracy; the correctness of the result of the election cannot be determined.

\*226 5. Should any of the altered ballots be stricken, the rights of the voters who cast those ballots would be prejudiced through no fault of their own. They would be disenfranchised.

*Petition I*, slip order at 5. Therefore, the court concluded that the election should be \*\*634 set aside and a special election conducted to ascertain the true intent of the voters.

Laughlin then filed her Notice of Appeal from the Order of the lower court to the Commonwealth Court on April 15, 1994, while Zupsic filed his Notice of Appeal with this Court on April 18, 1994. By Order dated May 2, 1994, we noted probable jurisdiction over Zupsic's appeal, and on May 4, 1994, the Commonwealth Court transferred the Laughlin appeal to this Court. On May 5, 1994, the court of common pleas filed an opinion in this matter pursuant to [Rule 1925\(a\) of the Pennsylvania Rules of Appellate Procedure, Pa.R.A.P. 1925\(a\)](#), to "more fully explain" why it set aside the election. *Petition II*. In this opinion, the court noted that, although the voting machines operated properly on both election night and on January 5, there were substantial differences in the vote totals for the two candidates. *Petition II*, slip op. at 1. Further, most of the significant differences occurred in five specific polling places and only within the Zupsic-Laughlin race. *Id.*

More specifically, the court noted that both the undervote and overvote totals recorded by the machines changed in Laughlin's favor. *Id.* at 1-2. An overvote occurs when the elector votes for more candidates for a given office than are

to be elected, while an undervote occurs when the elector votes for fewer candidates than are to be elected. In the present case, the January 5 machine count showed that the number of overvotes increased (such that votes previously counted for Zupsic were now considered void), while the number of undervotes decreased (such that ballots previously counted for neither candidate were now counted for Laughlin). *Id.*

The court explained that the increase in overvotes was attributable to "a number of ... altered marks" that had been placed next to Laughlin's name on ballots where Zupsic's oval \*227 was completely filled. *Id.* Likewise, the number of undervotes increased because "a number of the altered marks" had been placed next to Laughlin's name where the ballot previously bore no marks for either candidate. *Id.* Additionally, the court noted that the testimony of five voters who maintained that they did not place a mark in the oval for Laughlin even though their ballots had such marks. *Id.* at 3.

Further, the court found "overwhelming" evidence that more than five ballots were altered, noting that forty-five of the eighty-seven contested ballots had marks for Laughlin that were "substantially inconsistent" with most other marks on the ballot. *Id.* at 3, 8. However, the court did not identify which forty-five ballots these were. Also, while the court concluded that at least two persons did the tampering based on the types of marks made, the court did not explain what made the marks for Laughlin "inconsistent." *Id.* at 6-7.

Regarding how the ballots were altered, the court concluded that the Board of Elections had not adequately secured the ballot boxes because the seals placed on the ballots after the election night machine count were not recorded until the Recount and Write-in Boards had completed their work. *Id.* at 2-3. Further, the court noted that although each ballot box had been padlocked during this period, "numerous" keys for the padlocks had been distributed on election day, and any one key could open all the ballot boxes. *Id.* at 3. Also, even though the ballot boxes had been stored in a locked room during this period, more than one person had a key to the room. *Id.* Therefore, the court concluded that someone must have gained undetected access to the ballot boxes and made the alterations before the boards commenced their work. *Id.*

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The court then noted that Laughlin was the winner in nine of the fourteen precincts she petitioned to open for a recount. *Id.* The court observed that

[i]t is most unusual for a candidate's supporters to ask for a recount of votes in a precinct won by the candidate. This is especially so when the victory is by a wide margin as it was \*228 in some cases here. One reason for doing so is the certainty of securing even more votes on a recount.

*Id.*

In addressing its decision to set aside the election, the court recognized that, unless it is impossible to separate fraudulent votes \*\*635 from lawful votes, only the fraudulent votes should be stricken. *Id.* at 5. The court noted, however, that it was not able "to determine with certainty all the ballots that had been altered." *Id.* Further, "[a]ssuming [that] it was possible to determine all the ballots that had been altered, the voters who cast those ballots would be disenfranchised from their choice of District Justice through no fault of their own." *Id.* Therefore, "[t]he only way [the court] could assure the integrity of the electoral process and thereby promote confidence in the citizens of Judicial District 36-0-03 [sic] was to order another election." *Id.*

[1] Finally, the court addressed the various remaining matters raised by Laughlin and Zupsic in their appeals. Regarding the allowance of Zupsic's appeal nunc pro tunc, the court acknowledged that [25 P.S. § 3456](#) requires that election contests be filed within twenty days of an election. However, nunc pro tunc relief is appropriate where a breakdown in the administrative operations of the Election Board occurs. *Id.* at 7 (citing [Appeal of Orsatti, 143 Pa. Commw. 12, 598 A.2d 1341, appeal denied, 529 Pa. 637, 600 A.2d 956 \(1991\)](#)). Here, the court found that Zupsic's petition sufficiently alleged an administrative breakdown--namely, ballot tampering while the ballots were in the custody of the Board of Elections.

Turning to the testimony of the five voters, the court noted that dictum in *Orsatti* provides that a voter may not waive his right to secrecy in voting conferred by [Article VII, § 4 of the Pennsylvania Constitution](#). However, the court added that *Orsatti* based this observation on language from *Thomas A. Crowley Election Contest, 57 Dauphin Co. Rep. 120 (1945)*, which also provides:

We are not prepared to state nor called upon to say that there are no circumstances under which a legal voter will be \*229 permitted to take the witness stand on his own volition and testify how he voted. There may be circumstances where it is proper.... But, ... where it is possible to determine from the ballots what the vote of the district was, and there is no proof of fraud, we have no authority to accept the oral testimony of the voter as to his vote....

*Petition II, slip op. at 9 (citing Thomas A. Crowley Election Contest, 57 Dauphin Co. Rep. 120 (1945)).*

While the court recognized that voters should never be compelled to divulge their votes against their will,

where a voter's ballot, properly cast, has been altered so as to either void the vote or change the ballot from a vote for the candidate of the voter's choice to the other candidate, the voter should have the right to voluntarily appear and testify. How else can the voter protect the sanctity of his or her ballot?

*Petition II, slip op. at 9.*

Regarding Laughlin's claim that the court should have disqualified the Beaver County District Attorney from investigating the election because she openly supported Zupsic during the campaign, the court found no authority for such disqualification. Further, the court noted that, even if the claimed conflict of interest affected any testimony, such conflict would go to weight and not admissibility. *Id.* at 9-10.

Concerning Zupsic's only complaint, that the court should have awarded the election to him, the court first noted that Zupsic had not made such a request in his Petition's prayer for relief. Second, the court noted that it was unable to conclude with reasonable certainty that a sufficient number of ballots were changed to have altered the election's outcome. *Id.* at 10.

[2] We must begin with whether the lower court erred in allowing Zupsic to file his petition nunc pro tunc since the timeliness of a petition affects the court's jurisdiction. *See Orsatti, 143 Pa. Commw. at 15, 598 A.2d at 1342.* Laughlin first contends that since petitions for district justice contests must be filed within twenty days of an election, Zupsic's \*230 Petition to Contest should have been filed no later than

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November 22, 1993. However, where a petitioner does not learn of a problem with the election until the filing period has expired and his ignorance is not due to any "fault or dereliction" on his part, this Court has allowed the petitioner to seek \*\*636 relief nunc pro tunc. See e.g., [Field Election Contest Case, 375 Pa. 276, 99 A.2d 867 \(1953\)](#) (petitioner unaware that election officials misspelled his name on return sheet transmitted to county board); [Koch Election Contest Case, 351 Pa. 544, 41 A.2d 657 \(1945\)](#) (petitioner unaware that election officials erred in transferring voting results from tally sheet to return sheets). Here, absolutely no evidence has been presented to show that Zupsic had any reason to suspect a problem with the election until Laughlin filed her Petitions to Open Ballot Boxes and Recount Votes on December 1, 1993, well past the deadline in [section 3456](#). Therefore, Zupsic's Petition to Contest is not barred by the expiration of the twenty-day period.

[3] Laughlin next contends that, even if Zupsic was not required to file his Petition to Contest by November 22, he still should have filed within twenty days of December 9, 1993, the date on which the recount Laughlin requested was completed. According to Laughlin, since Zupsic was present for this recount and it revealed significant changes from the machine tabulation on election night, Zupsic should have been well aware of a problem with the election results no later than the 9th. Thus, it was inexcusable for him to wait another month before filing his petition.

[4] While we find some merit in Laughlin's position, [FN8] we cannot conclude from the record that it was inexcusable for Zupsic to wait until January 10, 1994, to file his Petition to Contest. Rather than imposing a new twenty-day limit on the petitioner, this Court has evaluated the timing of nunc pro tunc petitions by considering whether the petitioner is guilty of laches. See, e.g., [Field, 375 Pa. at 278, 99 A.2d at 867](#) (petitioner should have been allowed to proceed nunc pro tunc because he was not guilty of laches). For laches to apply, there must be a lack of due diligence in pursuing a cause of action and resulting prejudice to the other party. [Brodt v. Brown, 404 Pa. 391, 172 A.2d 152 \(1961\)](#).

[FN8] We note that while Zupsic claimed in his Petition to Contest that he was unaware of any fraud until he learned of the results of the second ma-

chine count on January 5, 1994, he admits in his Brief that his Petitions to Recount filed on December 17, 1993, alleged "substantial fraud or error in computing the votes or in marking the ballots not manifest on the general return."

Here, while at least some evidence indicates that Zupsic had reason to suspect fraud well before January 5, 1994, the record does not indicate that Laughlin was prejudiced by any delay. Between December 9 and January 10, Zupsic filed his own petitions for a recount, and the Board of Elections completed a second machine count. Therefore, Laughlin had no reason to believe that the election was settled in her favor.

[5] A petitioner generally cannot delay contesting an election while recounts are being completed. See [Horsham Township Election Case, 356 Pa. 60, 51 A.2d 692 \(1947\)](#). However, we are hesitant to deny a petitioner the right to contest an election where an initial problem with the election is raised by his opponent after the time to contest has expired. Here, although Zupsic arguably had reason to file his Petition to Contest earlier than January 10, no evidence exists to indicate that Laughlin was prejudiced by any delay. Therefore, the Petition to Contest is not barred by the fact that it was not filed until January 10.

[6] Finally, Laughlin argues that, regardless of when Zupsic's Petition to Contest was filed, he still was not entitled to proceed nunc pro tunc because the evidence did not establish that any supposed tampering was the product of the Election Board or the court. In support of her position, Laughlin cites *Orsatti*, which determined that a petitioner should not be allowed to proceed nunc pro tunc "absent fraud or a breakdown in the court's operation due to a default of its officers." [143 Pa. Commw. at 15, 598 A.2d at 1342](#); see also [In re General Election for Township Supervisor, 152 Pa. Commw. 590, 620 A.2d 565 \(1993\)](#) (indicating that allegation of error by Election Board would also be sufficient).

\*232 We agree with the court of common pleas that Zupsic's Petition to Contest sufficiently alleged a breakdown in the operation of the Beaver County Board of Elections. While Zupsic did not specifically state that the Board of Elections was derelict in its duties, \*\*637 he did specifically allege

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that fraud in the election occurred between the first machine count on November 2 and the second machine count on January 5. Since the ballots were in the exclusive control of the Board of Elections and/or the court during that time, the only logical conclusion to be reached from the Petition is that any alleged ballot tampering occurred while the ballots should have been secured by the Board of Elections.

Laughlin equates the ballot tampering alleged here with the forgery of signatures on absentee ballots alleged in *Orsatti*, which the Commonwealth Court found not to constitute an administrative breakdown. However, in *Orsatti*, there was no indication that the ballots were under the Election Board's control at the time the alleged forgeries occurred. In contrast, the failure to adequately secure ballot boxes alleged here qualifies as a breakdown in the Board of Elections' operation due to some failure on the part of its officers. Therefore, Zupsic's Petition to Contest satisfies the *Orsatti* standard.

[7][8] In addition to the nunc pro tunc arguments, Laughlin contends that the facts do not support the court of common pleas' conclusion that tampering in fact occurred. This Court is bound by the trial court's findings of fact unless those findings are not based on competent evidence. [\*Thatcher's Drug Store v. Consolidated Supermarkets\*, 535 Pa. 469, 477, 636 A.2d 156, 160 \(1994\)](#). Our review of the record in this matter convinces us that there was more than competent evidence to support the trial court's finding of tampering.

The court of common pleas based its finding of tampering on the following evidence:

- (1) the voting tabulation machines were operating accurately on both election night and when the second machine \*233 count was taken on January 5, 1994, *Petition I*, Finding of Fact No. 2; *Petition II*, slip op. at 1;
- (2) the results of the two machine tabulations revealed "substantial" differences in the vote totals for each candidate, *Petition II*, slip op. at 1;
- (3) these differences occurred "for the most part" within the District Justice race and in five particular precincts within that race, *id.*;
- (4) "substantial" differences occurred in the overvote totals between the two machine counts because "a number of altered marks had been placed next to Laughlin's name

and the oval alongside Zupsic's name was completely filled," *id.* at 2;

(5) "substantial" differences also occurred in the under-vote totals between the two machine counts "because a number of altered marks were placed alongside Laughlin's name and the oval alongside Zupsic's name had not been filled," *id.*;

(6) the changes in the undervote and overvote totals were favorable to Laughlin, *id.*;

(7) the ballot boxes were left unsecured for a period of time because the numbered seals on the boxes were not recorded until the Write-in and Return Boards completed their work, *id.* at 2-3;

(8) "numerous" keys had been distributed to the ballot boxes on Election Day, and any one key could open all the boxes, *id.* at 3;

(9) "more than one person" had a key to the room where the ballot boxes were stored after the election, *id.*;

(10) forty-five of the eighty-seven ballots contested by Laughlin and Zupsic had "substantially inconsistent" marks from most other marks on the ballot, including situations where no marks existed for any other individual candidates either anywhere on the ballot or anywhere on the reverse side of the ballot, where the District Justice candidates were listed, *id.*;

\*234 (11) five voters testified that they did not place a mark on their ballots for Laughlin, even though their ballots indicated otherwise, *id.*; and

(12) Laughlin was the winner on election night of nine of the fourteen precincts her petitions sought to be recounted, some by wide margins. *Id.*

There are certainly instances where the court could have been more precise in its factual findings--for example, detailing the initial vote tabulation, identifying the five precincts involved, indicating the number of keys distributed, and detailing the nature of \*\*638 the altered marks. However, our review of the record reveals substantial evidence to support the court's findings that ballot tampering occurred to at least some degree. This is so even if one sets aside the findings detailed in paragraphs (11) and (12) above, which concern matters that Laughlin challenges and which we discuss below.

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[9] However, we agree with Laughlin's third contention that the court of common pleas' failure to make specific findings regarding the degree of tampering makes it impossible for this Court to review whether setting aside the election was the appropriate remedy in this case. For the same reasons, we also find it impossible to evaluate Zupsic's claim that the court should have awarded the election to him based on the first machine count, as audited, together with the write-in votes.

[10][11] To achieve the goal of enfranchisement wherever possible, this Court has consistently recognized that "the power to throw out a ballot for minor irregularities should be sparingly used." *In re Petitions to Open Ballot Boxes*, 410 Pa. 62, 65, 188 A.2d 254, 256 (1963). Even the mere casting of fraudulent votes is not sufficient to throw out a return. See *In re West Mahanoy Township's Contested Election*, 258 Pa. 176, 179, 101 A. 946, 946 (1917). Instead, if it is at all possible, the fraudulent votes should be purged and the remaining votes retained. See *id.*; see also *In re Bright's Contested Election*, 292 Pa. 389, 393, 141 A. 254, 255 (1928).

\*235 It is only when an election has been characterized by such fraud or intimidation or other unlawful conduct as to make the election a mere travesty or when the ballots or voting machines ... are in such condition that it is impossible to ascertain from an inspection of them the will of the voters that a court will reject the entire returns from a district and annul the election.

*Winograd v. Coombs*, 342 Pa. 268, 271-72, 20 A.2d 315, 316 (1941).

In the present case, the court of common pleas set aside the election because it was "impossible to accurately strike all the altered ballots so the result of the election can be reached by ascertaining the honest intent of the voters without disenfranchising the voters who cast ballots which were altered." *Petition I*, Finding of Fact No. 12. Therefore, the court claimed that it could not determine that the alterations definitely changed the election's outcome; instead, at best, it could only conclude that the alteration "probably" affected the outcome. *Petition II*, slip op. at 10.

However, the mere possibility that the alteration of ballots affected the outcome of the election is clearly insufficient to

set aside an election and disenfranchise the vast majority of voters whose ballots remained unaffected by the tampering. Instead, this Court's previous rulings required the lower court to specify which ballots it concluded had been altered and to explain the reasons for its conclusions. Likewise, the lower court should have identified the ballots that it was unable to classify as either altered or unaltered, and again to explain the reasons for its conclusions. Without such findings, it is impossible for this Court to make a review of the ballots to determine whether the election should have been awarded to one of the candidates rather than set it aside in its entirety.

[12][13] We understand the lower court's concern that, if it were to purge all of the altered ballots, the result would be to disenfranchise voters whose ballots were tainted through no fault of their own. The court errs, though, in concluding that the appropriate and only course would be to disregard the \*236 altered ballots. Where evidence establishes that ballots were altered between the time of initial tabulation and a recount, discarding the votes is "wholly untenable." See *In re Opening of Ballot Box*, 344 Pa. 350, 355, 25 A.2d 330, 333 (1942). Instead, where

a discrepancy result[s] from fraudulent tampering with the ballot boxes and their contents, since the official canvass of the votes, ... the court [is] fully justified in directing that the fraudulently altered ballots be counted for ... the candidate for whom the evidence shows they must necessarily have been counted by the election \*\*639 officials, and it would ... [commit] grievous error [to do] otherwise.

*Id.* Therefore, far from striking the altered ballots, the court of common pleas has the duty to enfranchise legitimate voters by awarding those ballots to the intended recipient if that recipient can be determined by clear and convincing evidence. [FN9]

[FN9] For these reasons, we also reject Zupsic's second contention that the court of common pleas should have rejected *all* of the votes in the five tainted districts and awarded him the election based on the results in the remaining districts.

[14] Finally, we turn to Laughlin's remaining claims of error. First, and most significantly, she claims that the lower court erred in admitting the voluntary testimony of five

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voters in the District Justice election. These voters, who could identify their ballots because they had designated themselves as write-in candidates for various offices, all testified that marks for Laughlin on their ballots were not made by them. Laughlin maintains that this testimony should not have been allowed because [Article VII, Section 4 of the Pennsylvania Constitution](#) provides for "secrecy in voting."

Judge Woodside's opinion in *Thomas A. Crowley Election Contest*, 57 Dauphin Co.Rep. 120 (1945), is most often cited in support of the contention that a voter may not waive his right to the secrecy of his ballot. According to Judge Woodside, the secrecy of the ballot

is sound public policy. It is to prevent intimidation and bribery. When a person has a right to reveal how he voted he can be intimidated into revealing it.... If in every close \*237 election in this Commonwealth voters could be subpoenaed into Court ... and asked how they voted, bribery and intimidation would become a simple matter, even though the witness after taking the stand would have the legal right to refuse to answer the question.

The sanctity of the ballot must be preserved, and the courts must throw no technicalities in the way of discovering false and fraudulent election returns, but neither can we abandon the keystone of our democracy--the secrecy of the ballot, on the pretense of discovering an error in the return.

57 Dauphin Co.Rep. at 126-27; see also [Orsatti](#), 143 Pa.Comm. at 17, 598 A.2d at 1344 (voter cannot be permitted to waive right to secrecy) (citation omitted); [In re General Election of Nov. 4, 1975](#), 71 D. & C.2d 83, 91-92 (1975) (voters should not be permitted to testify where no fraud is present).

However, as the court below observed, Judge Woodside also noted in *Crowley* that

[w]e are not prepared to state nor called upon to say that there are no circumstances under which a legal voter will be permitted to take the witness stand on his own circumstances and testify how he voted. There may be circumstances where it is proper.... But, ... where it is possible to determine from the ballots what the vote of the district was, and there is no proof of fraud, we have no authority

to accept the oral testimony of the voter as to his vote....

*Crowley*, 57 Dauphin Co.Rep. at 127.

Here, in contrast to *Crowley* and *General Election of Nov. 4, 1975*, the evidence clearly establishes that at some point after election night and before the first recount, fraud occurred with regard to at least some of the ballots. We agree with the lower court that, under the unusual circumstances of this case, the sanctity of the ballot is not best preserved by secrecy, but instead by allowing those whose legitimate votes were altered through no fault of their own to testify, if they so choose, regarding how they originally voted. Therefore, we hold that, under these limited circumstances, where a vote has been properly cast but subsequently altered through no fault \*238 of the voter, the voter should be allowed to *voluntarily* appear and testify regarding how he or she originally voted.

[15] Laughlin also claims that the court below erred in denying her motion to disqualify the Beaver County District Attorney and her staff from participating in the election contest. Laughlin maintains that such disqualification was necessary because the District Attorney openly endorsed Zupsic for District Justice. The lower court, however, found no authority for Laughlin's position and concluded that it had no authority to \*\*640 order the District Attorney to refrain from any investigation. *Petition II*, slip op. at 10. Further, if the testimony of the District Attorney's investigator was affected by any conflict, the lower court noted that this would go to the weight of that testimony rather than its admissibility.

[16] As the lower court noted, we also find no authority for the proposition that the District Attorney and her staff should have been disqualified from investigating this case. [Rule 1.11 of the Rules of Professional Conduct](#), which Laughlin cites, is clearly inapplicable because it prohibits attorneys in the public sector from participating in matters "in which [they] participated personally and substantially while in private practice." The District Attorney's endorsement of Zupsic has nothing to do with what she may have done in private practice. Further, we agree with the lower court that any supposed conflict of interest would go to the weight of testimony rather than its admissibility. See, e.g., [Weir by Gasper v. Estate of Ciao](#), 521 Pa. 491, 501, 556

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[A.2d 819, 823 \(1989\)](#) (if conflict of interest existed, it would serve to discredit testimony). Therefore, the trial court did not err in denying Laughlin's motion.

Finally, Laughlin complains that the lower court improperly speculated regarding why she asked for recounts in nine of the precincts that she won according to the initial vote tabulation. However, such consideration is not improper, and even if it were, sufficient evidence still existed to support the lower court's conclusion that the ballots were subject to tampering.

Accordingly, the Order of the Beaver County Court of Common Pleas setting aside the election for District Justice in \*239 Judicial District 36-3-03 is hereby reversed and this matter is remanded to the court of common pleas for proceedings consistent with this opinion.

PAPADAKOS and MONTEMURO, JJ., who was sitting by designation, did not participate in the decision of this case.

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164 N.J. 468, 753 A.2d 1101

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Supreme Court of New Jersey.  
In the Matter of the Petition of Kati GRAY-SADLER, John Sturgis and Edward Geiger, Write-In Candidates for the offices of Mayor and Borough Council of Chesilhurst Borough, Contesting the Results of the General Election of November 2, 1999.

Argued May 1, 2000.

Decided June 30, 2000.

Unsuccessful candidates for mayor and city council challenged results of election. The trial court ordered that special election be held. On emergency appeal, the Superior Court, Appellate Division, reversed. Candidates requested certification. The Supreme Court, [Poritz](#), C.J., held that: (1) votes were improperly rejected due to inadequate and confusing instructions regarding write-in votes, and (2) candidates were entitled to new election.

Reversed.

#### West Headnotes

#### [1] Elections 1

[144k1 Most Cited Cases](#)

#### [1] Elections 159

[144k159 Most Cited Cases](#)

A citizen's constitutional right to vote for the candidate of his or her choice necessarily includes the corollary right to have that vote counted at full value without dilution or discount; that principle also encompasses the right of all qualified electors to vote for a write-in candidate by such means.

#### [2] Elections 1

[144k1 Most Cited Cases](#)

Voters need not be physically barred from voting to have their votes "rejected," but may instead show that, through no fault of their own, they were prohibited from voting for a specific candidate by

some irregularity in the voting procedures. [N.J.S.A. 19:29-1](#), subd. e.

#### [3] Elections 216

[144k216 Most Cited Cases](#)

Essential question in determining whether votes were improperly rejected is whether voters were denied the opportunity to vote for a candidate of their choice. [N.J.S.A. 19:29-1](#), subd. e.

#### [4] Elections 181

[144k181 Most Cited Cases](#)

Write-in votes were impermissibly "rejected" due to inadequate and confusing instructions about how to cast write-in votes; no information was provided outside voting booths explaining how to cast write-in votes, and limited and deficient instructions were provided inside booths. [N.J.S.A. 19:29-1](#), subd. e.

#### [5] Elections 227(1)

[144k227\(1\) Most Cited Cases](#)

To determine the nature of any alleged mistakes or problems and their impact on the voters, court considers extrinsic factors such as the notoriety of the candidates' campaign and the character of the electorate.

#### [6] Elections 227(1)

[144k227\(1\) Most Cited Cases](#)

Simple deviance from statutory election procedures, absent fraud or malconduct, will not vitiate an election unless those contesting it can show that as a result of irregularities the free expression of the popular will in all human likelihood has been thwarted.

#### [7] Elections 227(8)

[144k227\(8\) Most Cited Cases](#)

Only when irregularities are such that the court cannot with reasonable certainty determine who received the majority of the legal vote, can a court set aside an election. [N.J.S.A. 19:29-9](#).

#### [8] Elections 227(1)

[144k227\(1\) Most Cited Cases](#)

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If the irregularities are found to have been so serious as to prejudice the election result, election must be set aside, the results declared null and void, and a special election held. [N.J.S.A. 19:29-9](#).

#### [9] Elections 227(8)

[144k227\(8\) Most Cited Cases](#)

Election contestants' burden in seeking new election based on irregularities may be met by a demonstration that had votes been cast for them, result would have been different; standard is one of reasonable certainty as opposed to absolute certainty. [N.J.S.A. 19:29-9](#).

#### [10] Elections 159

[144k159 Most Cited Cases](#)

Write-in candidates for mayor and city council were entitled to new election after write-in votes were impermissibly rejected; total votes cast for write-in mayoral candidate on correct and incorrect lines exceeded total votes cast for winning candidate, and only a small number of "missing" votes would have changed election for write-in council candidates. [N.J.S.A. 19:29-9](#).

#### [11] Elections 181

[144k181 Most Cited Cases](#)

Explicit instructions on how to cast a write-in vote must be provided with sample ballots sent to registered voters; the instructions must offer clear, step-by-step directions that describe the mechanics of the voting machine, explain how to operate the windows and levers, and emphasize the need to cast write-in votes on the appropriate lines.

#### [12] Statutes 223.1

[361k223.1 Most Cited Cases](#)

When interpreting different statutory provisions, court is obligated to make every effort to harmonize them, even if they are in apparent conflict.

**\*\*1103\*470 Shirley Grasso**, Cedar Brook, for appellants and cross-respondents Kati Gray-Sadler, John Sturgis and Edward Geiger (Grasso & Inferera, attorneys).

[Robert G. Millenky](#), Camden County Counsel, ar-

gued the cause for respondent and cross-appellant County of Camden.

[Donna Kelly](#), Senior Deputy Attorney General, argued the cause for respondents and cross-appellants Camden County Superintendent of Elections and Camden County Board of Elections **\*471** John J. Farmer, Jr., Attorney General of New Jersey, attorney; [Mark J. Fleming](#), Assistant Attorney General, of counsel; Ms. Kelly and Karen Griffin, Deputy Attorney General, on the briefs).

[John B. Kearney](#), Cherry Hill, for respondent and cross-respondent Arland Poindexter (Kearney & Castillo, attorneys, [Carol R. Cobb](#), on the brief).

[David E. Mapp](#), Camden, for respondent and cross-respondent Borough of Chesilhurst ([Harvey C. Johnson](#), attorney).

The opinion of the Court was delivered by

[PORITZ](#), C.J.

In this appeal, write-in candidates for the offices of mayor and borough council in the Borough of Chesilhurst challenge the results of the November 2, 1999, general election. After hearing testimony and reviewing the voting rolls, the Law Division ruled that irregularities related to the write-in instructions and non-compliant voting machines required the election results for those offices to be set aside. The court ordered a special election to fill the resulting vacancies. The Appellate Division reversed.

We now reinstate the decision of the trial court, with certain modifications, and order that a special election be held.

### I

Chesilhurst is a small town in Camden County with 880 registered voters. Four-hundred-eleven of those voters participated in the 1999 election for the offices of general assembly, county freeholder, mayor, and borough council. The election took place at a single polling location with two voting machines

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rented from Camden County. Those machines were older models that use paper rolls to record write-in votes.

Among the candidates for local office were three individuals who ran a spirited write-in campaign—Kati Gray-Sadler for mayor, John Sturgis for councilman, and Edward Geiger, also for councilman.

\*472 The other candidates for those offices, Mayor Arland Poindexter, Jr., Councilman Bernard Congleton, and Councilman Ralph Johnson, were incumbents and were the only candidates whose names appeared on the voting machine ballot for mayor and borough council. To vote for a write-in candidate, a voter was required to hold down a lever with one hand, simultaneously slide open a metal window next to the appropriate office with the other hand, and then insert the name of the desired candidate in writing or with a sticker on the paper revealed in the open window.

Prior to the election, voters received sample ballots that depicted the face of the voting machine. In addition, petitioners distributed pre-printed stickers bearing \*\*1104 the write-in candidates' names, together with information about their backgrounds and platforms. No information about how to cast a write-in vote was available at the polling place prior to entering the voting machines.

Inside the voting machines, the face of the ballot contained the following instruction in minute lettering placed in the top left corner: "PERSONAL CHOICE WARNING! Do not touch personal choice unless you intend to write in. Ask Election Judge for instructions before entering machine to vote." [FN1] On the ballot, there were seven lines for each of the available offices (one for mayor and two each for general assembly, county freeholder, and borough council) and forty-three extra blank lines. On the left wall of the voting booths, a poster provided separate instructions that read:

**FN1.** Respondents contend that the personal choice warning was only on the sample ballot and not on the face of the machine.

However, the trial court found testimony that the warning was on the face of the machine to be credible. We have no basis for questioning that finding.

To vote for a candidate of your personal choice, place finger of left hand on small lever indicated. Pull lever to right, this will release window slides.

Pull to right the window slide of the designated office for which you desire to cast your vote.

Paper will then be exposed for your write-in vote. You must place an X after written name. It is also permissible to attach a sticker to the paper with a candidates [sic] name plus the X.

\*473 The written instructions were accompanied by a photograph of two hands, one pointing to the small lever and the other to a metal window.

The initial election return sheet indicated that Poindexter received 164 votes for mayor and Gray-Sadler received 146 votes. With the addition of absentee and provisional ballots, Poindexter's total rose to 172 and Gray-Sadler's to 154. After a recount of the paper rolls, Gray-Sadler's total vote count was decreased from 154 to 152. The return sheet showed that incumbent Councilmen Congleton and Johnson received 166 and 164 votes, respectively, whereas write-in candidates Sturgis and Geiger received 123 and 113 votes. After the recount and the addition of absentee ballots, Sturgis's final total was 135 and Geiger's was 134.

On December 3, 1999, petitioners filed a complaint challenging the election results essentially on the grounds that the write-in instructions were confusing and that the voting machines had scraped off certain write-in stickers, a claim not raised before this Court. The trial court conducted a hearing in which the Borough of Chesilhurst and the Attorney General's Office, on behalf of the Camden County Board of Elections and the Camden County Superintendent of Elections, defended the results. Six witnesses testified for petitioners and all claimed that they had had difficulty in determining how to cast a write-in vote because the instructions were

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sparse and confusing. One witness testified that the confusion was so great it actually prevented her from casting a write-in vote, and another testified that she lost the opportunity to vote when she stepped out of the booth to ask an election official for instructions about write-in votes. The Board of Elections also disclosed for the first time that it had rejected votes, contrary to both the notation on the return sheet that no votes were rejected and the silence of the recount report concerning rejected votes.

The trial court subsequently ordered a review of the paper rolls and discovered that there were sixty-four write-in votes, either hand-written or affixed by sticker, that had not been counted by election officials. Forty-nine were placed on the voting machine in \*474 spaces that did not specify any office. Of those forty-nine, fifteen votes were for Gray-Sadler, nineteen for Sturgis, and fifteen for Geiger. The Board \*\*1105 deemed those forty-nine votes void. Another fifteen votes were placed in spaces designated for offices that were not sought by petitioners (e.g., Gray-Sadler was placed twice in general assembly spaces and six times in borough council spaces). Those votes were counted as votes for those offices, not the offices for which petitioners were running.

The trial court concluded that serious irregularities in the conduct of the election denied qualified write-in voters their "constitutional right to vote for any person they chose." Because the voting machines were not accompanied by proper mechanical models, as specified in *N.J.S.A. 19:48-1(l)*, and because voting instructions were not provided to each voter in the manner required by *N.J.S.A. 19:50-3*, the court voided the results for the offices of mayor and borough council and ordered a special election to be held. On emergency appeal, the Appellate Division reversed. We granted petitioners' request for certification and cross-petitions filed by Camden County and the Attorney General in respect of the appropriate procedures in the event of a new election. *163 N.J. 398, 749 A.2d 371 (2000)*.

## II

[1] A citizen's constitutional right to vote for the candidate of his or her choice necessarily includes the corollary right to have that vote counted " 'at full value without dilution or discount.' " *Reynolds v. Sims*, 377 U.S. 533, 555 n. 29, 84 S.Ct. 1362, 1378 n. 29, 12 L.Ed.2d 506, 524 n. 29 (1964) (quoting *South v. Peters*, 339 U.S. 276, 279, 70 S.Ct. 641, 643, 94 L.Ed. 834, 838 (1950) (Douglas, J., dissenting)). That principle also encompasses "the right of all qualified electors to vote for [a write-in candidate] by such means." *Sadloch v. Al-lan*, 25 N.J. 118, 128, 135 A.2d 173 (1957); see also *Stevenson v. Gilfert*, 13 N.J. 496, 503-04, 100 A.2d 490 (1953) (discussing right to cast write-in vote for any person). To preserve those rights, our state election laws are designed to deter \*475 fraud, safeguard the secrecy of the ballot, and prevent disenfranchisement of qualified voters. Cf. *In re Byron*, 165 N.J.Super. 468, 474, 398 A.2d 599 (Law Div.1978) (concerning purpose of election laws in relation to absentee ballots), *aff'd*, 170 N.J.Super. 410, 406 A.2d 982 (App.Div.), *certif. denied*, 82 N.J. 280, 412 A.2d 786 (1979). In furtherance of those goals, we have held that it is our duty to construe elections laws liberally. See *Wene v. Meyner*, 13 N.J. 185, 197, 98 A.2d 573 (1953) (citing Chief Justice Vanderbilt's opinion in *Kilmurray v. Gilfert*, 10 N.J. 435, 440, 91 A.2d 865 (1952)).

### A.

Among the grounds for contesting an election set forth in *N.J.S.A. 19:29-1*, subsections (e), (f), and (g) are applicable to this appeal. Those subsections provide, in relevant part, that voters may challenge an election,

- e. When ... legal votes [have been] rejected at the polls sufficient to change the result;
- f. For any error by any board of canvassers in counting the votes or declaring the result of the election, if such error would change the result; [or]
- g. For any other cause which shows that another was the person legally elected.

All three petitioners claim that write-in votes

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placed on the wrong line due to insufficient and unintelligible instructions were ignored or counted as votes for offices that the candidates were not seeking. They also claim that the inadequate instructions prevented other voters from casting any write-in votes at all. The gravamen of those claims is that legal votes cast for the petitioners were "rejected." See *N.J.S.A.* 19:29-1(e).

[2][3] Petitioners' reading of the term "rejected" is supported by prior caselaw that defines the term "to include any situation in which qualified voters are denied access to the polls." \*\*1106 *In re 1984 Maple Shade Gen. Election*, 203 *N.J.Super.* 563, 590, 497 *A.2d* 577 (Law 1985) (quoting *Magura v. Smith*, 131 *N.J.Super.* 395, 399, 330 *A.2d* 52 (Law Div.1974), *overruled in part on other grounds*, *In re Mallon*, 232 *N.J.Super.* 249, 271, 556 *A.2d* 1271 (App.Div.), *certif. denied*, 117 *N.J.* 166, 564 *A.2d* 883 (1989)); *accord In re \*476 Moffat*, 142 *N.J.Super.* 217, 223, 361 *A.2d* 74 (App.Div.) (holding that votes "rejected" when partially malfunctioning voting machine prevented recording of votes for one candidate), *certif. denied*, 71 *N.J.* 527, 366 *A.2d* 682 (1976). Voters need not be physically barred from voting to have their votes rejected, but may instead show that, through no fault of their own, they were prohibited from voting for a specific candidate by some irregularity in the voting procedures. *In re Moffat, supra*, 142 *N.J.Super.* at 223, 361 *A.2d* 74. The essential question is whether voters were denied the opportunity to vote for a candidate of their choice. *Ibid.*

[4] Respondents admit that many write-in votes were ignored because they were placed on the wrong line. They argue, however, that *N.J.S.A.* 19:49-5 required election officials to reject those votes, based on a plain reading of the statute, which states that if a write-in vote, or "irregular ballot," is not "in its appropriate place on the [voting] machine, ... it shall be void and not counted."

Although the statute appears straightforward, it must be read in light of the broad purpose of the election laws to prevent disenfranchisement of

qualified voters. In cases involving invalidated write-in votes, our courts have distinguished errors due to extrinsic problems from errors caused by a voter's own neglect. *In re Hartnett*, 163 *N.J.Super.* 257, 268, 394 *A.2d* 871 (App.Div.1978) (holding that vote properly voided where intent was clear but error was within voter's control); *In re Fifteen Registered Voters on Behalf of Flanagan*, 129 *N.J.Super.* 296, 301-02, 323 *A.2d* 521 (App.Div.) (holding that write-in votes bearing only surname should not have been voided where desired candidate was obvious and voter sufficiently complied with instructions), *certif. denied*, 65 *N.J.* 577, 325 *A.2d* 711 (1974); *In re Klayman*, 97 *N.J.Super.* 295, 304, 235 *A.2d* 45 (Law Div.1967) (holding that incorrect spelling or absence of middle initial should not void write-in vote where intent clear and write-in space small); *but see In re Sweetwood*, 91 *N.J.Super.* 496, 499, 221 *A.2d* 543 (App.Div.1966) (holding that \*477 although ballot did not instruct voter to designate office for selected candidate, failure to do so invalidated vote). Those cases generally adhere to the principle that rigid application of technical rules should not prevent otherwise valid write-in votes from being counted. See *Riecker v. Hartmann*, 130 *N.J.Super.* 266, 272, 326 *A.2d* 101 (Law Div.1974) (stating that "the technical restraints of the election laws" should not restrict voters' will).

[5] We do not believe that the Legislature intended *N.J.S.A.* 19:49-5 to be applied in a manner that would frustrate the free expression of the voters' will when the incorrect placement of the write-in vote is the result of mistakes or problems beyond the voters' control. To determine the nature of any alleged mistakes or problems and their impact on the voters, we consider extrinsic factors such as the notoriety of the candidates' campaign and the character of the electorate. See *In re Fifteen Voters, supra*, 129 *N.J.Super.* at 300-01, 323 *A.2d* 521. Reliable extrinsic evidence, "which, in light of human experience might reasonably be expected to demonstrate intent expressed on the ballot but less than perfectly, should be searched to effectuate the

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voter's wish and preserve the franchise." *Id.* at 301, 323 A.2d 521.

We observe, in the case before us, that this was a small election in a small borough with only seven offices to be filled. Like Harry Wright, the candidate for office in *In re Fifteen Voters*, petitioners campaigned vigorously for write-in votes and sent publicity mailings to all of the registered voters in the borough. Petitioners \*\*1107 also campaigned together in opposition to the incumbent candidates and made it quite clear that they were running as a mayor/council team. *Cf. id.* at 298, 323 A.2d 521 (noting joint campaign of write-in candidate and other candidates). On the paper rolls, many of the voided votes were cast in groups of three, but on lines just above or just below the designated spaces. The only reasonable conclusion to be drawn from those groupings is that the intention of the voters who cast those votes was to elect Gray-Sadler for mayor, and Sturgis and Geiger for borough council.

\*478 The voters who used stickers had taken the trouble to bring them to the voting booth and to attempt to affix them in the proper place. It defies common sense to imagine that those voters entered the voting machines with any intent other than to elect the candidates named on the stickers to the offices for which they were running. To disregard those votes would run counter to the purpose of our inquiry--to search for the real intention of the voter "no matter how crudely it is expressed, provided only, of course, that there is a reasonable expression of that intent on the ballot." *Id.* at 300, 323 A.2d 521.

Recognizing the voters' intent, we must ask why write-in votes were placed on the wrong lines or not cast in the first place. The answer to that question should help us to determine whether the "rejected" voters had their votes invalidated as a result of their own errors or as a result of election officials' non-compliance with statutory requirements. *See, e.g., Kirk v. French*, 324 N.J.Super. 548, 554, 736 A.2d 546 (Law Div.1998) (distinguishing extrinsic cause

of rejection from voter's refusal to comply with simple, reasonable, and normal requirement designed to assure honest voting). In fact, the record illustrates a failure to comply with *N.J.S.A. 19:50-3*, which directs election officials to instruct voters on the proper use of voting machines. The instructions should have been "carefully drawn so as to fully advise the voter as to the proper procedure he [or she] is to follow." *In re Sweetwood, supra*, 91 N.J.Super. at 500, 221 A.2d 543. Indeed, the statute requires that a mechanical model be provided, if practicable, to illustrate how to operate the actual machine and to afford voters an opportunity to practice on the model. *N.J.S.A. 19:50-3; see also N.J.S.A. 19:48-1(l)* (requiring mechanical model). It also requires that "[t]he voter's attention ... be called to [a] diagram of the face of the machine so that the voter can become familiar with the location of the questions and the names of the officers and candidates." *N.J.S.A. 19:50-3*.

During the Chesilhurst election, no information was provided outside the voting booths explaining how properly to cast write-in \*479 votes. Voters seeing conflicting and incomplete instructions for the first time on entering the booths were understandably confused, and their confusion is attributable to defects outside of their control. The testimony at the hearing indicated that voters who made a sincere effort to cast a write-in vote were thwarted by the limited and deficient instructions provided inside the booths. For example, one voter, Bernadette Freeman, testified that she wished to cast write-in votes for Gray-Sadler, Sturgis, and Geiger, but followed the personal choice "warning" and stepped out of the booth to ask an election official for instructions. When she spoke with an official, the official entered the voting machine and pulled the lever to enter Ms. Freeman's votes before she was finished voting. [FN2] Even if she had been allowed to re-enter the booth and continue voting, Ms. Freeman would not have found an adequate explanation of the personal choice procedures in the polling place.

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FN2. Under *N.J.S.A. 19:52-3*, a voter may not exit the voting booth and then re-enter; once the voter exits, his or her vote is cast and cannot be amended.

Under the heading "INSTRUCTIONS TO VOTERS" at the top of the ballot, there were clear, legible step-by-step instructions \*\*1108 on how to vote for the candidates printed on the ballot, illustrated by two separate diagrams showing how to push the voting switch. No mention of how to cast a write-in vote was included in those instructions. By contrast, the personal choice warning was printed in difficult-to-read type and located in a corner space one point five centimeters wide and two centimeters high on the far left side of the ballot. It was both easy to miss and difficult to read, and, most important, instructed voters to seek assistance from an official outside the booth. Anyone who followed that direction would be barred from re-entering the voting machine after having been given instructions, as was Ms. Freeman.

The warning also indicated to voters that they had to "touch personal choice" to register a write-in vote. However, no personal choice button or switch was on the machine. Rather, personal choice could be entered only by means of a complicated series of \*480 actions. Finally, the wording on the machine ("Personal Choice Warning! Do not touch personal choice unless you intend to write in") likely led voters to be unduly cautious about pressing any personal choice apparatus without first consulting with an official. Overall, it was considerably easier to vote for candidates whose names were printed on the ballot as opposed to write-in candidates, regardless of the voters' preferences.

As for the poster on the left wall of the voting machine, it provided more detailed instructions but omitted a critical piece of information. The poster indicated that, to cast a write-in vote, a voter must pull a small lever and then pull the window slide; it did *not* state that both the lever and the slide had to be pulled at the same time. Unless there was sim-

ultaneous action by the voter, the window would not slide open. There was a picture on the poster, but it also failed to indicate the need to simultaneously work the levers, and was, as the trial court found, "at once confusing, ambiguous and incomplete." Thus, it is likely that voters pressed the lever, let go, and then tried to slide the window, only to find that the window would not budge. That could explain why eighty-three voters entered the voting machine for a mayoral election but did not cast a vote for mayor. It is also likely that voters tried to open different windows after an unsuccessful first try, and then cast their write-in votes on the first window that would open, even if it was not the proper window.

Those defects may not have been so troubling had there been clear instructions prominently posted outside the voting machines in the polling area or models to demonstrate how the voting machine worked. Unfortunately, no instructions were provided in the polling place other than inside the voting machines. Moreover, the sample ballots sent to voters prior to the election lacked clear information about how to cast a write-in vote. The sample ballot looked substantially the same as the face of the voting machine and thus raised the same issues we have discussed in connection with the personal choice warning on the voting machine ballot. The sample ballot is even more confusing because it does \*481 not indicate that there are windows next to each office on which to cast write-in votes. On the face of the sample, there is no space for a write-in vote to be placed, nor is there any indication that there is a small lever on the machine that must be pulled to release the windows.

This case is readily distinguishable from other cases in which voters' failure to comply with specific procedural instructions invalidated their votes. See *In re Municipal Election Held on May 10, 1994*, 139 N.J. 553, 558, 656 A.2d 5 (1995); *In re Keogh-Dwyer*, 45 N.J. 117, 120, 211 A.2d 778 (1965). In those other cases, voters were clearly and unambiguously instructed to punch or mark the

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ballot in a designated box next to the candidate's name and warned that if the marking was not made, the ballot would not be counted. Similarly clear instructions were not provided to the \*\*1109 Chesilhurst voters; rather, they were given patently inadequate instructions or none at all. More analogous are the cases that discuss the provision of defective voting machines. Cf. *In re Maple Shade, supra*, 203 N.J.Super. at 585, 497 A.2d 577 (finding error when voting machines broke down and officials failed to offer all voters paper ballots); *In re Moffat, supra*, 142 N.J.Super. at 222, 361 A.2d 74 (noting that voting machine counter became disengaged during election); *Magura, supra*, 131 N.J.Super. at 397, 330 A.2d 52 (noting mechanical breakdown of voting machines). There, voters, through no fault of their own, are rendered incapable of recording their preferences for candidates on the voting machines. Whether the barrier is created by a defective machine, or the failure of election officials to provide adequate personal choice instructions, is of little importance. In the end, qualified voters have been disenfranchised.

#### B.

[6][7] Whether petitioners may prevail on their N.J.S.A. 19:29-1(e) claim depends on whether the "rejected" votes were sufficient to change the result. In essence, the Court must decide, under the totality of the circumstances, whether the election \*482 irregularities were so significant as to warrant a new election. Simple deviance from statutory election procedures, absent fraud or malconduct, will not vitiate an election unless those contesting it can show that as a result of irregularities "the free expression of the popular will in all human likelihood has been thwarted." *Wene, supra*, 13 N.J. at 196, 98 A.2d 573; see also *In re Hackensack Recall Election*, 31 N.J. 592, 595, 158 A.2d 505 (1960) (holding that if election results unaffected by alleged error, election should not be overturned). Only when those irregularities "are such that the court cannot with reasonable certainty determine who received the majority of the legal vote," can a court set aside an election. *In re Mallon, supra*,

232 N.J.Super. at 270, 556 A.2d 1271; *In re Bonsanto's Application*, 171 N.J.Super. 356, 360, 409 A.2d 290 (App.Div.1979).

[8] In undertaking this analysis our

"courts [have] consider[ed] the nature of the irregularity, its materiality, the significance of its influence and consequential derivations in order to determine whether the digression or deviation from the prescribed statutory requisitions had in reasonable probability so imposing and so vital an influence on the election proceeding as to have repressed or contravened a full and free expression of the popular will...."

[*In re Mallon, supra*, 232 N.J.Super. at 270, 556 A.2d 1271 (quoting *Sharrock v. Borough of Keansburg*, 15 N.J.Super. 11, 17, 83 A.2d 11 (App.Div.1951)).]

At the heart of the inquiry is the need to safeguard the franchise of not only the voters who cast valid votes at the election, but also those whose votes were rejected. See *Sharrock, supra*, 15 N.J.Super. at 19, 83 A.2d 11. If the irregularities are found to have been so serious as to prejudice the election result, N.J.S.A. 19:29-9 requires the election to be set aside, the results declared null and void, and a special election held.

[9][10] Gray-Sadler satisfies this test because the total votes cast for her, on both the correct and incorrect lines, exceeds the total cast votes for Poindexter. The inquiry is more difficult for Sturgis and Geiger, however, because they cannot prove that votes *not cast* due to the problematic personal choice instructions would have been cast for them. Because we cannot require them to \*483 prove to a certainty how the rejected voters would have voted, they need only show that enough qualified voters were denied the right to cast write-in votes to affect the outcome of the election. See *In re Maple Shade, supra*, 203 N.J.Super. at 589, 497 A.2d 577; *In re Moffat, supra*, 142 N.J.Super. at 225, 361 A.2d 74. Petitioners' burden may be met "by a demonstration that \*\*1110 had the votes been cast for [them], the result would have been differ-

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ent." *In re Moffat, supra*, 142 N.J.Super. at 224, 361 A.2d 74. The standard we apply is one of reasonable certainty as opposed to absolute certitude. *In re Fifteen Voters, supra*, 129 N.J.Super. at 302, 323 A.2d 521.

The Official Board of Canvassers Report dated November 2, 1999, indicates that eighty-three people entered the voting booth and did not cast a vote for mayor, and that 215 votes that could have been cast for borough council were not cast. Although some voters may have simply decided not to vote for those offices, there is a strong possibility that enough of those "missing votes" were not cast because of the confusing personal choice instructions. Cf. *In re Moffat, supra*, 142 N.J.Super. at 225-26, 361 A.2d 74 (finding that discrepancy between number of persons who used malfunctioning voting machines and votes for sole open office suggested certain votes rejected). One witness testified to that effect, and other witnesses corroborated how difficult it was to cast a write-in vote even though those voters ultimately were able to do so.

Although it would have been preferable to have more voters testify at the hearing, we recognize that concerns about privacy, embarrassment, and ridicule may prevent voters from coming forward to offer testimony that they did not vote because they could not understand the instructions. See *id.* at 225, 361 A.2d 74; *In re Klayman, supra*, 97 N.J.Super. at 299, 235 A.2d 45. Because Sturgis and Geiger would have lost by about only ten votes if the voided write-in votes were counted, only a small number of the "missing" votes would have changed the election. Accordingly, we conclude that Sturgis and Geiger also meet the statutory \*484 requirement for successfully contesting the results of the council election. [FN3]

FN3. Since petitioners have demonstrated that "legal votes [have been] rejected at the polls sufficient to change the result," *N.J.S.A. 19:29-1(e)*, we need not decide whether further grounds exist to contest

the election.

### III

In light of all the circumstances, we cannot determine with reasonable certainty those candidates who received a majority of the votes for either the mayor or borough council seats. See *In re Fifteen Voters, supra*, 129 N.J.Super. at 302, 323 A.2d 521. Therefore, we declare the election for the offices of mayor and borough council null and void. A special election must be held to fill the resulting vacancies "not less than 45 days nor more than 50 days" from the effective date of this opinion. *N.J.S.A. 40A:16-16*. The Camden County Clerk must, at least thirty days preceding the election, make the necessary arrangements with the postmaster to have sample ballots mailed, and notify the commissioner of registration in writing to that effect. *N.J.S.A. 19:49-4(c)*. The election must be conducted as it was on the original election day, except that there must be adequate instructions as outlined below and the election will be limited to the offices of mayor and borough council. *N.J.S.A. 19:27-1*. Petitioners' names will not appear on the face of the ballot and they will not have a new opportunity to petition to have their names placed on the ballot as they did not earlier comply with *N.J.S.A. 19:13-3* or *N.J.S.A. 19:14-2.1*.

[11] For the new election, and for all future elections throughout the state, explicit instructions on how to cast a write-in vote must be provided with the sample ballots sent to registered voters. The instructions must offer clear, step-by-step directions that describe the mechanics of the voting machine, explain how to operate the windows and levers, and emphasize the need to cast write-in votes on the appropriate lines. Voters must be warned that an improperly cast vote will be deemed void.

\*485 Similarly clear and informative instructions must be provided at the polling place. Election officials must prominently \*\*1111 display *outside* the voting machines a copy of the reformulated poster explaining personal choice that is located inside the voting booth. As a general rule, any of the instruc-

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tions contained inside the voting machines should be displayed outside the voting machines so that voters have an opportunity to read the instructions in advance and pose any questions they may have to the election officials.

[12] It is preferred that a mechanical model and/or demonstration voting machine be available to instruct voters, but unlike the voting instructions, they are not absolutely required. Although *N.J.S.A. 19:48-1(l)* states that all voting machines "shall be provided with a mechanical model, illustrating the manner of voting on the machine, suitable for the instruction of voters," *N.J.S.A. 19:50-3* adds that the model must be provided only if "practicable." When interpreting different statutory provisions, we are obligated to make every effort to harmonize them, even if they are in apparent conflict. *State v. Federanko*, 26 N.J. 119, 130, 139 A.2d 30 (1958); *Builders League of South Jersey, Inc. v. Pine Hill*, 286 N.J.Super. 348, 352, 669 A.2d 279 (App.Div.1996). Reading those provisions *in pari materia*, we conclude that the latter modifies the former to require the provision of a model only when it will not be a heavy burden on the locality. Consequently, if the Borough of Chesilhurst has difficulty in procuring either an accurate and complete mechanical model or a demonstration voting machine, it need not provide those aids.

For this election, however, there is only one polling place with two voting machines. Thus, providing an extra machine for instructional purposes is not likely to be an undue burden. Respondents concede that the extra machine is feasible here, but express concern about the cost of extra machines in future elections when multiple polling places are used. We do not require that there be an extra voting machine for future elections, but rather that an extra machine be provided when a mechanical \*486 model is unavailable and the extra machine would not be a great burden to obtain.

Chesilhurst argues that Camden County should be responsible for the costs of the special election because the county breached its contract to provide

Chesilhurst with legally compliant voting machines, election workers, and printed ballots. See *N.J.S.A. 19:8-6, 19:48-3.17, 19:48-3.18* (providing that local municipalities rent voting machines, personnel, and ballots from the county). After oral argument we were informed by counsel for Camden County that a new election in Chesilhurst would cost approximately \$9,000. We agree with the trial court that, in these circumstances, Camden County should fund the costs of the special election.

#### IV

The judgment of the Appellate Division is reversed. A special election is to be held in Chesilhurst for the offices of mayor and borough council as set forth herein. We defer the effective date of this opinion to July 31, 2000, to permit the scheduling of the special election in September 2000 pursuant to *N.J.S.A. 40A:16-16*.

*For reversal*--Chief Justice PORITZ and Justices O'HERN, STEIN, COLEMAN, LONG, VERNIERO and LaVECCHIA.

*Opposed*--None.

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**C**

Supreme Court of New Hampshire.  
Appeal of Peter McDONOUGH.  
No. 2002-814.

Argued Jan. 29, 2003.

Opinion Issued Feb. 11, 2003.

Candidate for county office sought review of decision of New Hampshire Ballot Law Commission (BLC) certifying his opponent as winner of election. The Supreme Court, [Nadeau, J.](#), held that: (1) Supreme Court could exercise jurisdiction over election dispute; (2) evidence was not sufficient to rebut statutory presumption that voters intended their straight ticket votes to apply to skipped races; and (3) evidence was not sufficient to support a conclusion that ballot instructions were so confusing as to interfere with a voter's right, if any, to understandable ballot instructions.

Affirmed.

McGuire and Arnold, JJ., specially assigned, concurred specially and filed opinion.

West Headnotes

**[1] Courts** 209(2)

[106k209\(2\) Most Cited Cases](#)

Supreme Court could exercise jurisdiction over candidate's county election dispute, even though statute did not provide an express statutory right of appeal to the Supreme Court; Supreme Court could treat candidate's appeal as a petition for a writ of certiorari. [RSA 665:14](#).

**[2] Certiorari** 4

[73k4 Most Cited Cases](#)

Even assuming the absence of a statutory right of appeal, the Supreme Court cannot be divested of its power to correct errors of law and other abuses, by writ of certiorari.

**[3] Courts** 204

[106k204 Most Cited Cases](#)

The superintending power of the Supreme Court over inferior tribunals does not depend upon, and is not limited by, the technical accuracy of designation of legal forms of action.

**[4] Elections** 300

[144k300 Most Cited Cases](#)

Voter intent presents a question of fact, not a question of law.

**[5] Administrative Law and Procedure** 741

[15Ak741 Most Cited Cases](#)

**[5] Administrative Law and Procedure** 744.1

[15Ak744.1 Most Cited Cases](#)

In the context of a writ of certiorari, the Supreme Court will not conduct a de novo review of the evidence presented before an administrative tribunal; the Supreme Court will, however, review a decision of the administrative tribunal for legal errors with respect to jurisdiction, authority, or observance of the law, causing it to arrive at a conclusion which could not legally or reasonably be made or causing it to act arbitrarily, capriciously, or with an unsustainable exercise of discretion.

**[6] Elections** 227(8)

[144k227\(8\) Most Cited Cases](#)

If the intent of the voter can be determined with reasonable certainty from an inspection of the ballot, in light of the generally known conditions attendant upon the election, effect must be given to that intent; if the voter's intent cannot thus be fairly and satisfactorily ascertained, the ballot cannot rightly be counted.

**[7] Elections** 227(9)

[144k227\(9\) Most Cited Cases](#)

If a voter makes an appropriate mark for any candidate or office in substantial compliance with statute, the vote should be counted. [RSA 659:17](#).

**[8] Elections** 227(9)

[144k227\(9\) Most Cited Cases](#)

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A vote should not be counted for a candidate in a race in which the voter clearly did not intend to vote.

**[9] Elections** 219

[144k219 Most Cited Cases](#)

Voters are not required to vote for all offices in an election.

**[10] Elections** 219

[144k219 Most Cited Cases](#)

A voter's intent is determined by giving weight to all marks placed on the ballot, regardless of the method by which the voter chose to cast a vote.

**[11] Elections** 219

[144k219 Most Cited Cases](#)

Marks on a ballot may not be ignored.

**[12] Elections** 227(1)

[144k227\(1\) Most Cited Cases](#)

The Supreme Court will not void an election because of mere irregularities or technicalities in the form of a ballot, election, or vote.

**[13] Elections** 219

[144k219 Most Cited Cases](#)

In resolving an election dispute, the Supreme Court strives to enfranchise voters by giving effect to all marks on the ballot.

**[14] Elections** 219

[144k219 Most Cited Cases](#)

In resolving an election dispute, the Supreme Court strives to avoid diluting votes by counting as votes marks that were intended to indicate the voter's intent to abstain.

**[15] District and Prosecuting Attorneys** 2(1)

[131k2\(1\) Most Cited Cases](#)

**[15] Elections** 292

[144k292 Most Cited Cases](#)

Evidence was not sufficient to rebut statutory presumption that voters intended their straight ticket votes to apply to skipped races, and thus ballots in which the voter voted a straight ticket and did not

make any mark for candidates in county attorney race were credited toward straight ticket party candidate, where voter left seven or more out of twelve races blank. [RSA 659:17](#).

**[16] District and Prosecuting Attorneys** 2(1)

[131k2\(1\) Most Cited Cases](#)

**[16] Elections** 295(1)

[144k295\(1\) Most Cited Cases](#)

Evidence was not sufficient to support a conclusion that ballot instructions were so confusing as to interfere with a voter's right, if any, to understandable ballot instructions, in county attorney candidate's election dispute, even though candidate's expert testified regarding the confusing nature of the instructions; evidence did not demonstrate that voters did not understand the instructions.

**[17] Prohibition** 1

[314k1 Most Cited Cases](#)

**[17] Prohibition** 10(1)

[314k10\(1\) Most Cited Cases](#)

A writ of prohibition is an extraordinary writ used to prevent an inferior tribunal or agency from improperly exercising jurisdiction not granted.

**[18] Prohibition** 1

[314k1 Most Cited Cases](#)

A writ of prohibition is granted with extreme caution, and then, only when the right to relief is clear.

**[19] Elections** 227(1)

[144k227\(1\) Most Cited Cases](#)

To set aside an election, a party must prove either fraud which leaves the intent of the voters in doubt or irregularities in the conduct of the election of such a nature as to affect the result.

**\*\*1024 \*106** Nixon Peabody, LLP, of Manchester ([W. Scott O'Connell](#) and Patricia L. Peard on the brief, and Mr. O'Connell orally), and Shaheen and Gordon, of Concord (Steven M. Gordon on the brief), for the petitioner.

[Stephen J. Judge](#), acting attorney general ([Anne M. Edwards](#), associate attorney general, and Orville B.

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Fitch, II, assistant attorney general, on the brief), for the State.

Douglas, Monziona, Leonard & Garvey, P.C., of Concord (Charles G. Douglas, III and C. Kevin Leonard on the brief, and Mr. Douglas orally), for John Coughlin.

Richard J. Lehmann, senate legal counsel, and Betsy B. Miller, house legal counsel, by brief for the President of the New Hampshire Senate and the Speaker of the New Hampshire House of Representatives, as amici curiae.

Law Office of Joshua L. Gordon, of Concord (Joshua L. Gordon by brief), for the New Hampshire Citizens Alliance for Action, as amicus curiae.

NADEAU, J.

The petitioner, Peter McDonough, appeals a decision of the New Hampshire Ballot Law Commission (BLC) affirming the New Hampshire Secretary of State's certification of his opponent, John Coughlin, as the winner of the November 5, 2002 election for Hillsborough County Attorney. McDonough also asks us to exercise our original jurisdiction to address his constitutional concerns about New Hampshire straight ticket voting laws. While this appeal was pending, we temporarily \*107 enjoined Coughlin from taking the oath of office. See RSA 653:10 (1996). We vacate the injunction and affirm.

### I. Background

The following facts were presented to the BLC and are relevant to this appeal. McDonough and Coughlin were the two candidates for Hillsborough County Attorney in November 2002. McDonough was the incumbent and the Democratic candidate, while Coughlin was the Republican candidate. Because the initial vote count showed Coughlin received 226 more votes than McDonough, the secretary of state declared Coughlin the winner of the election. See RSA 659:81 (1996). McDonough

requested a recount, which the secretary of state conducted. See RSA 660:1-:6 (1996). The recount reduced Coughlin's margin of victory to 126 votes. See RSA 660:5 (1996). The secretary of state certified Coughlin as the winner, see RSA 660:6, and McDonough appealed to the BLC. See RSA 665:6, II. The BLC held a two-day evidentiary hearing and reviewed 269 ballots that were contested from the secretary of state's recount. See RSA 665:9 (1996).

All of the ballots require a voter to make appropriate marks, by filling in ovals or arrows on the ballot, to be read by an optical scanning machine. (A sample ballot follows this opinion.) All of the ballots have the same layout, which begins with instructions to the voter for marking the ballot, followed by three columns for voting by party, voting on candidates and voting on constitutional questions. See RSA 656:4-:14 (1996).

The instructions on the ballots provide:

#### **INSTRUCTIONS TO VOTERS:**

1. To vote, complete the oval ... opposite your choice like this...

#### **\*\*1025 2. To Vote a Straight Ticket**

Complete the oval ... opposite the political party of your choice, like this ... if you wish to vote for all candidates running in that party. If you vote a straight ticket, but wish to vote for one or more individual candidates, you may do so, and your vote for an individual candidate will override the straight party vote for that office. However, if you vote for one candidate for an office where more than one candidate is to be elected, be sure to vote individually for all candidates of your choice for that office, because your straight ticket vote will not be counted.

#### **3. To Vote a Split Ticket**

If you do not wish to vote for all candidates running in the same party, complete the oval ... opposite the names of the candidates for whom you wish to vote like this...

#### **\*108 4. To Vote by Write-in**

If you wish to vote for candidates whose names

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are not printed on the ballot, write in the names on the blank lines for write-in votes and fill in the oval.

See [RSA 659:17 \(1996\)](#). Each party is identified on the ballot by a symbol, which may be marked to allow straight ticket voting. Each candidate is then identified on the ballot by a square for the designated office, with lines for party designation.

See [RSA 656:5-:12](#). Finally, each constitutional question is identified by text, with an opportunity for the voter to vote "yes" or "no" by filling in the appropriate oval or arrow. See [RSA 656:13](#).

At the hearing, the secretary of state testified about election voting procedures, ballot types and ballot language used in New Hampshire, and explained how he determines voter intent when conducting recounts of contested elections. He testified that it often is difficult to determine the intent of the voter. If the voter has marked the "straight ticket" oval on the ballot, the secretary of state counts any "skipped race" as a vote for the straight ticket party candidate. See [RSA 659:66 \(1996\)](#) (Counting Straight Party Vote); [RSA 659:17, III \(1996\)](#) (Instructions to Voters for Straight Ticket Voting). The secretary of state explained that he applies this rule to all ballots with both "skipped races" and straight ticket votes.

Melissa Lee Farrall, Ph.D., a linguistic psychologist, testified about the confusing nature of the voter instructions on New Hampshire ballots. In her opinion, the voter instructions require at least three years of college to understand. Finally, Paul McDonough testified about the summaries and charts he made to show the significance of the marks cast on each challenged ballot.

McDonough challenged all ballots where the voter: (1) filled in the appropriate mark to vote a straight ticket Republican ballot; and (2) made appropriate marks to vote for individual candidates, either Republican or Democrat; but (3) did not make any mark for candidates in the county attorney race.

McDonough argued that the secretary of state erro-

neously credited these ballots to Coughlin. He asserted that the challenged ballots with individual votes for some offices, but a "skipped vote" for the county attorney's office, rebutted the presumption that the voter intended to vote a straight ticket in that race. He argued, therefore, that the ballots should not be counted. After the hearing, the BLC, in a two-to-one decision, acknowledged the evidence showed the voter instructions on the ballot are difficult to understand, but upheld the secretary of state's certification of Coughlin as the winner of the race.

\*109 The BLC found that "there was not enough evidence presented to overcome \*\*1026 the presumption that the voter, by marking the straight ticket party box, intended to vote straight party throughout the ballot despite having also voted for individual races." The BLC explained that, in its view, whenever a straight ticket vote is cast, it may "only be overridden by an actual additional vote for an individual candidate. If a race is left blank, but a straight ticket box has been marked, the straight ticket will trump." The dissenting member of the BLC opined that the majority applied an improper presumption to determine voter intent on the "skipped race" ballots, which was contrary to its legal duty on an appeal from a recount, and required a new election to be held in the race for Hillsborough County Attorney.

McDonough appeals the BLC's decision and seeks a writ of prohibition to enjoin the BLC from counting such "skipped race" ballots in violation of the New Hampshire Constitution. Alternatively, he requests the court to order a new election.

## II. Preliminary Matters

We first address Coughlin's challenge to our jurisdiction over this case and the parties' disagreement about the appropriate standard of review.

[1][2][3] Coughlin argues that we lack jurisdiction over this appeal because [RSA 665:14 \(1996\)](#) does not provide an "express statutory right of appeal to

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the Supreme Court for the office of County Attorney." "Even assuming the absence of a statutory right of appeal, this court cannot be divested of its power to correct errors of law and other abuses, by writ of certiorari." *Taylor v. Ballot Law Comm'n*, 118 N.H. 671, 673, 392 A.2d 1203 (1978); see *Dinsmore v. Mayor and Aldermen*, 76 N.H. 187, 189-90, 81 A. 533 (1911). We have adjudicated county election disputes in the past. See *Murchie v. Clifford*, 76 N.H. 99, 100, 79 A. 901 (1911) (challenge to election results for county solicitor of-fice); *Stearns v. O'Dowd*, 78 N.H. 358, 359, 101 A. 31 (1917) (challenge to election results for county sheriff office). Furthermore, the form of the petition to this court is irrelevant to our review of McDonough's legal claims, because "[t]he superintending power of the court over inferior tribunals does not depend upon, and is not limited by, the technical accuracy of designation of legal forms of action." *Dinsmore*, 76 N.H. at 190, 81 A. 533; see also *Sheehan v. Mayor and Aldermen*, 74 N.H. 445, 446-47, 68 A. 872 (1908). Parties are entitled to "the most convenient procedure for settlement of their controversy." *Dinsmore*, 76 N.H. at 190, 81 A. 533. Therefore, we exercise our original jurisdiction in this case because "the parties desire and the public need requires, a speedy determination of the important issues in controversy." \*110 *Monier v. Gallen*, 122 N.H. 474, 476, 446 A.2d 454 (1982); see RSA 490:4 (1997). Accordingly, we treat McDonough's appeal as a petition for a writ of certiorari.

[4][5] By granting certiorari review, we also settle the parties' disagreement about the appropriate standard of review we should apply in this case. Contrary to McDonough's request that we conduct a *de novo* review of the challenged ballots, voter intent presents a question of fact, not a question of law. See *Broderick v. Hunt*, 77 N.H. 139, 141, 89 A. 302 (1913). In the context of a writ of certiorari, we will not conduct a *de novo* review of the evidence presented before the administrative tribunal. We will, however, review the BLC decision for legal errors with respect to jurisdiction,

authority or observance of the law, causing it to arrive at a conclusion which could not legally or reasonably be made or causing it to act arbitrarily, capriciously or with an unsustainable exercise of discretion. See *Petition of Hoyt*, 143 N.H. 533, 534, 727 A.2d 1001 (1999); cf. \*\*1027 *State v. Lambert*, 147 N.H. 295, 296, 787 A.2d 175 (2001) (explaining unsustainable exercise of discretion standard).

### III. Discussion

McDonough first argues that the BLC erroneously credited the challenged ballots to Coughlin based upon the straight ticket Republican marks. He contends that by so doing, the BLC violated the fundamental duty of any election official, which is to ascertain the intent of the voter on each contested ballot. With respect to 172 of the challenged ballots, we disagree. We do not reach a determination with respect to the remaining 97 challenged ballots.

#### A. General Legal Principles

[6] Long ago we advised:

In resolving election difficulties of this nature, care must be taken that the matter is not decided on the basis of unwarranted technicalities. The goal must be the ascertainment of the legally expressed choice of the voters. The object of election laws is to secure the rights of duly qualified voters, and not to defeat them. As a means to the end of ascertaining the popular will, a statutory recount is simply a resort to the ballots themselves as the primary and best evidence of the election.

*Opinion of the Justices*, 116 N.H. 756, 759, 367 A.2d 209 (1976) (citations and quotations omitted). "The cardinal rule for guidance ... in cases of this nature is that if the intent of the voter can be determined with reasonable certainty from an inspection of the ballot, in light of the generally known conditions \*111 attendant upon the election, effect must be given to that intent." *Delahunt v. Johnston*, 423 Mass. 731, 671 N.E.2d 1241, 1243 (1996) (quotation omitted). If the voter's intent "cannot

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thus be fairly and satisfactorily ascertained, the ballot cannot rightly be counted." *Id.* (quotation omitted); see *In re Election of U.S. Representative*, 231 Conn. 602, 653 A.2d 79, 92 (1994) ("ballots should, where reasonably possible, be read to effectuate the expressed intent of the voter, so as not to unreasonably disenfranchise him or her."). At oral argument, counsel for both parties agreed this standard is consistent with New Hampshire election laws and jurisprudence, and can be applied in this case.

Our election laws provide voters with several ways to express their intent. See RSA 659:17 (1996).

The legislature directs voters to: "Vote for the candidate of your choice for each office by making the appropriate mark. Follow directions as to the number of candidates to be elected to each office."

RSA 659:17, I. The statutory scheme further provides:

II. A voter may vote for a candidate in a state general election ... by making the appropriate mark for the name of each candidate for whom he wishes to vote. If he desires to vote for a candidate whose name is not printed on the ballot, he shall write in the name of the person for whom he desires to vote in the space provided for that purpose.

III. In a state general election, the following instructions to voters for straight ticket voting shall be printed on the ballot: Make the appropriate mark for the political party of your choice if you wish to vote for all candidates running in that party. If you vote a straight ticket, but wish to vote for one or more individual candidates, you may do so, and your vote for an individual candidate will override the straight party vote for that office. However, if you vote for one candidate for an office where more than one candidate is to be elected, be sure to vote individually for all candidates of your choice for that office, because your straight ticket vote will not be counted for that office.

IV. In a state general election, the following instructions to voters for split **\*\*1028** ticket voting shall be printed on the ballot: If you do not wish

to vote for all candidates running in the same party, make the appropriate mark opposite the names of the candidates for whom you wish to vote.

RSA 659:17, II-IV.

[7][8][9] Pursuant to this statutory scheme, voters may vote for individual candidates, write in names of candidates, vote along straight party lines, **\*112** and vote along split party lines. None of these voting methods is required. Nor, as we read the permissive statutory language, are these methods exclusive of one another. Cf. *Murchie*, 76 N.H. at 104, 79 A. 901 (county election dispute decided under prior law when straight ticket vote was exclusive of any other mark on ballot). Thus, if a voter makes an appropriate mark for any candidate or office in substantial compliance with the above statute, the vote should be counted. See *id.* A vote should not be counted, however, for a candidate in a race in which the voter clearly did not intend to vote. See *State v. Kress*, 142 W.Va. 475, 96 S.E.2d 166, 170 (1957). There is no provision in our laws requiring voters to vote for all offices in an election. See *id.*

[10][11] We determine a voter's intent by giving weight to *all* marks placed on the ballot, regardless of the method by which the voter chose to cast a vote. See *Murchie*, 76 N.H. at 107, 79 A. 901. Marks on a ballot may not be ignored. See *id.*

[12][13][14] In summary, the principles guiding our inquiry in this case are as follows: (1) we will not void an election because of mere irregularities or technicalities in the form of a ballot, election or vote; (2) we strive to enfranchise voters by giving effect to all marks on the ballot; and (3) we strive to avoid diluting votes by counting as votes marks that were intended to indicate the voter's intent to abstain. See *Bennett v. Yoshina*, 140 F.3d 1218, 1226-27 (9th Cir.1998), cert. denied, 525 U.S. 1103, 119 S.Ct. 868, 142 L.Ed.2d 770 (1999). Our decision is not guided by party politics or a preference for a particular political candidate, but is guided by these neutral legal principles.

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*B. Analysis*

[15] Keeping these principles in mind, which are consistent with our statutes and common law, we turn to the BLC's decision. The BLC determined that the evidence in this case was insufficient to rebut the presumption that the voter intended his or her straight ticket vote to apply to skipped races. We hold that the BLC's ruling was reasonable and sustainable on the record with respect to 172 of the ballots, in which the voter skipped seven or more races. When a voter left seven or more out of twelve races blank, the voter's intent to have his or her straight ticket vote count in the blank races can be determined with "reasonable certainty." We uphold the BLC's decision to count these 172 ballots for Coughlin.

Even if any of the remaining 97 challenged ballots should not have been counted for Coughlin, he would still win the election for Hillsborough County Attorney by a margin of 25 votes. Thus, we need not determine whether the BLC's ruling with respect to any of the remaining 97 ballots is sustainable.

\*113 We caution that, in a future case, evidence that a voter skipped races on the ballot could be considered strong evidence that the voter intended to abstain from the skipped races and did not intend his or her straight ticket vote to count in those races. For instance, if a voter were to mark the straight ticket box and then also mark the boxes next to each candidate of the straight ticket party in eleven out of twelve races, it might very well strain logic to hold, as the concurrence requires, that \*\*1029 the voter intended to vote for a candidate in the twelfth race. It may well be that the more reasonable interpretation of that ballot was that the voter intended to abstain from the twelfth race.

In the future, the BLC must examine *all* of the evidence of the voter's intent, including the number of races left blank and whether the voter voted for individuals who were of the straight ticket party or of a different party. If the legislature responds to the

concerns expressed by the secretary of state, the BLC and this opinion, the confusion feared by the concurrence should be eliminated.

We now address McDonough's constitutional challenges. McDonough argues that the BLC abrogated its judicial function to determine voter intent in favor of the statutory scheme. He argues that the BLC interpreted the statutory scheme to require it to apply a voter's straight ticket vote "despite inconsistent ballot markings." The record does not support his assertion. It shows that the BLC determined voter intent based upon the ballots themselves, and not by blind reference to the statutory scheme. Moreover, contrary to McDonough's assertions, the BLC did not find that the ballot markings were inconsistent with a straight ticket vote. Because the record does not support the factual predicate for this argument, we do not address it substantively.

[16] McDonough next argues that the ballot instructions were so confusing as to interfere impermissibly with a voter's fundamental right to vote. Assuming, without deciding, that voters have a constitutional right to understandable ballot instructions, the factual record in this case is insufficiently developed for us to decide this issue as a matter of law.

The BLC heard, and rejected, testimony from McDonough's expert regarding the confusing nature of the instructions. The BLC determined that although "evidence was presented that the instructions on the ballot are confusing and difficult to understand," this evidence was insufficient to demonstrate that voters did not understand the instructions. "This is particularly true of the language nearest the oval to vote a straight ticket which states: ... 'For all candidates of this party fill in the oval.' "

As the trier of fact, the BLC was free to reject the expert's testimony in whole or in part. *Appeal of Chickering*, 141 N.H. 794, 796, 693 A.2d 1169 (1997). We cannot say that its rejection of

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the expert's testimony was legal error.

\*114 We also find no merit to McDonough's claim that missing statutory language in the instructions regarding voting in multiple candidate races confused the voters with respect to their straight ticket vote. The missing language is a technical irregularity that should not invalidate a vote. See *Keene v. Gerry's Cash Mkt., Inc.*, 113 N.H. 165, 167-68, 304 A.2d 873 (1973). Moreover, McDonough challenged no errors in the results of the multiple candidate races and there is no evidence that the missing language had any effect on the outcome of this election. See *id.* at 167, 304 A.2d 873.

We share the concerns, however, expressed by both the BLC and the secretary of state that the instructions for straight ticket voting required by RSA 659:17, III are "a source of great confusion to the voters of New Hampshire." We additionally note the straight ticket voting instructions and procedures have been a source of confusion under prior election laws. See *Murchie*, 76 N.H. at 107, 79 A. 901.

We are troubled also that the ballots do not instruct voters clearly and unambiguously about the circumstances under which their votes will not count. There are no instructions that explain when a skipped \*\*1030 race will not be counted for any candidate. Having these kinds of instructions may avoid future disputes such as this one.

[17][18] Having held that the BLC did not err with respect to 172 of the 269 challenged ballots, we deny McDonough's requests for a writ of prohibition and a new election. A writ of prohibition is an extraordinary writ used to prevent an inferior tribunal or agency from improperly exercising jurisdiction not granted. See *Wyman v. Durkin*, 114 N.H. 781, 783, 330 A.2d 772 (1974). This writ is granted with extreme caution, and then, "only when the right to relief is clear." *Durkin v. Hillsborough County Super. Ct.*, 114 N.H. 788, 789, 330 A.2d 777 (1974). In this case, McDonough's right to relief is not clear.

[19] To set aside an election, a party "must prove either fraud which leaves the intent of the voters in doubt or irregularities in the conduct of the election of such a nature as to affect the result." *Appeal of Soucy*, 139 N.H. 110, 117, 649 A.2d 60 (1994) (quotation and brackets omitted). In this case, McDonough has not alleged or proved fraud, and although he asserts "irregularities," as discussed, these "irregularities" did not affect the result of the election.

Accordingly, we vacate our injunction preventing Coughlin from assuming the office of Hillsborough County Attorney and affirm his certification as the winner in this election for Hillsborough County Attorney.

*Affirmed.*

DUGGAN, J., concurred; FAUVER, J., superior court justice, specially assigned under RSA 490:3, concurred; MCGUIRE and ARNOLD, JJ., \*115 superior court justices, specially assigned under RSA 490:3, concurred specially.

MCGUIRE and ARNOLD, JJ., concurring specially.

Although we concur in the result, we would uphold the decision of the New Hampshire Ballot Law Commission (BLC) with respect to all 269 contested ballots. We agree with the majority, the BLC and the secretary of state that straight ticket balloting has led to voter confusion. We believe, however, that the majority erroneously questions the BLC's uniform rule of straight ticket ballot interpretation and exacerbates the confusion surrounding straight ticket balloting.

The issue before us is whether the decision of the BLC was illegal with respect to jurisdiction, authority or observance of the law, by arriving at a conclusion that could not legally or reasonably be made, or whether its exercise of discretion was unsustainable, arbitrary or capricious. *Petition of Heron*, 141 N.H. 245, 246-47, 679 A.2d 603 (1996);

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cf. *State v. Lambert*, 147 N.H. 295, 296, 787 A.2d 175 (2001) (explaining "unsustainable exercise of discretion" standard). This standard of review is "narrow and highly deferential." *In re Ryan G.*, 142 N.H. 643, 645, 707 A.2d 134 (1998). Unlike the majority, we believe that, in light of the instructions given to voters on the ballots and applicable election laws, the BLC's decision was both reasonable and sustainable on the record with respect to all of the challenged ballots.

The touchstone of the BLC's inquiry is voter intent. Voter intent is determined by examining the ballots, in light of relevant statutory provisions and the instructions to the voters. See *Murchie v. Clifford*, 76 N.H. 99, 104-05, 79 A. 901 (1911).

The relevant statutes and ballot instructions permit a voter both to vote straight ticket and to vote for individual candidates. The relevant portion of the straight ticket voting instruction reads as follows:

**\*\*1031** Complete the oval ... opposite the political party of your choice ... if you wish to vote for all candidates running in that party. If you vote a straight ticket, but wish to vote for one or more individual candidates, you may do so, and your vote for an individual candidate will override the straight party vote for that office.

This instruction is based upon *RSA 659:17* (1996). Under *RSA 659:17*, a voter may: (1) cast votes for individual candidates only, see *RSA 659:17*, II and IV; (2) cast a straight ticket vote only, see *RSA 659:17*, III; or (3) cast a straight-ticket vote and also vote for individual candidates of the same or of a different party, see *id.*

**\*116** The only marks on the challenged ballots were the mark in the straight ticket box, a mark for one or more individual candidates, and on some but not all ballots, a mark on one or more constitutional questions. None of these marks was faint, crossed-out, or erased, indicating that the voter no longer intended it. See *Broderick v. Hunt*, 77 N.H. 139, 141, 89 A. 302 (1913) (faint, nearly wholly erased cross opposite plaintiff's name and heavy cross opposite challenger's name indicates vote for chal-

lenger); *McIntyre v. Wick*, 558 N.W.2d 347, 361 (S.D.1996) (erasure indicates voter's intent to remove original mark).

In light of these marks and the relevant ballot instructions and statutes, the BLC determined that the voters intended their straight ticket vote on the challenged ballots to count in the skipped race for Hillsborough County Attorney. We would find no legal error in the BLC's exercise of its discretion and hold that its ruling was both reasonable and sustainable on the record with respect to all of the challenged ballots.

We believe that the majority errs by casting doubt upon the BLC's uniform rule of ballot interpretation. Under the BLC's uniform rule, merely voting for individual candidates is insufficient to overcome the presumption that a voter intended his or her straight ticket vote to count in skipped races. While suggesting that "in a future case," this rule might be unlawful, the majority fails to give the BLC guidance as to when or why this might be the case. This omission can only worsen the confusion surrounding straight ticket balloting.

The BLC's uniform rule of ballot interpretation is consistent with our case law. It seeks to give effect to *all* of the markings on a ballot, see *Murchie*, 76 N.H. at 107, 79 A. 901, and adheres to our general policy of interpreting ballots liberally to enfranchise voters, see *Opinion of the Justices*, 114 N.H. 711, 713, 327 A.2d 713 (1974). The BLC's rule also comports with the ballot instructions given to voters.

Moreover, having a uniform rule of ballot interpretation to determine voter intent "is practicable and ... necessary." *Bush v. Gore*, 531 U.S. 98, 106, 121 S.Ct. 525, 148 L.Ed.2d 388 (2000). As the United States Supreme Court has explained, the use of uniform rules to determine voter intent is particularly necessary because "the question is not whether to believe a witness but how to interpret the marks or holes or scratches on an inanimate object, a piece of cardboard or paper.... The factfinder confronts a

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thing, not a person. The search for intent can be confined by specific rules designed to ensure uniform treatment." *Id.*

For all of the above reasons, we concur in the result but would uphold the BLC's determination with re-

spect to all 269 contested ballots.

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**INSTRUCTIONS TO VOTERS**

1. To vote, candidates' names are listed in the order in which they appear on the ballot.
2. To Vote a Straight Ticket  
 Mark the oval next to the appropriate political party of your choice. The oval next to the party name will vote for all candidates running for that party. If you vote a straight ticket for one party, you will not vote for any candidates of any other party. You may also vote for one or more candidates of one party and one or more candidates of another party. If you do this, you will not vote a straight ticket for either party.
3. To Vote a Split Ticket  
 If you do not wish to vote for all candidates running in the same party, complete the oval next to the name of the candidate for whom you wish to vote for the office.
4. To Vote by Absence  
 If you wish to vote for candidates whose names are not printed on the ballot, you may do so on the blank lines for which space is left in the oval.



**OFFICIAL BALLOT FOR  
 MANCHESTER – WARD 6**

**GENERAL ELECTION  
 November 5, 2002**

*John D. White*  
 SECRETARY OF STATE

**STRAIGHT TICKET**

**REPUBLICAN**  
Party of the Lion

**DEMOCRATIC**  
Party of the Star

**For Governor**  
Vote for one name only

CHRIS JOHNSON  
REP. R

MARK FERRELLI  
DEM. D

JOHN J. BARRAZA  
IND. I

---

**For United States Senator**  
Vote for one name only

JOHN F. SUNSHINE  
REP. R

JULIANE SHAFER  
DEM. D

KEN BELFRAGE  
IND. I

---

**For Representative in Congress**  
Vote for one name only

JUD BRADLEY  
REP. R

MARTHA ELLER BLAIR  
DEM. D

JOHN BELFRAGE  
IND. I

---

**For Executive Council**  
Vote for two names only

RAYMOND J. WILCOX  
REP. R

SHARON O'BRIEN  
DEM. D

---

**For State Senator**  
Vote for one name only

ANDREW "ANDY" WARTHEL  
REP. R

DAVE DELIMAS  
DEM. D

**For State Representatives**  
Vote for three names only

WILLIAM INFANTINE  
REP. R

BERNARD "BOB" LUEBKERT  
DEM. D

"DICK" SIEMEN  
IND. I

STEPHAN D. WARDODY  
REP. R

"STEVE" JOHNSON  
DEM. D

ROBERT E. MURPHY  
IND. I

---

**For Sheriff**  
Vote for one name only

JAMES A. FARBY  
REP. R

ERIK W. DORNE  
DEM. D

---

**For County Attorney**  
Vote for one name only

JOHN F. HIRSHIN  
REP. R

PETER MACDONOUGH  
DEM. D

---

**For County Treasurer**  
Vote for one name only

DAVID B. FLEBETTE  
REP. R

JEROME R. RINAL  
DEM. D

---

**For Register of Deeds**  
Vote for one name only

JUDITH A. MACDONALD  
DEM. D

**For Register of Probate**  
Vote for one name only

ROBERT D. D'AMARO  
REP. R

"LEO" LOMBARD  
DEM. D

---

**For County Commissioner**  
Vote for one name only

"TONY" PAPPAS  
REP. R

LESLIE STEWART  
DEM. D

**Question Relating to a Constitutional Amendment Proposed by the 2002 General Court**

Are you in favor of amending Article 72 of the second part of the constitution to read as follows: Part, 72 a. (Successor Court Administration.) The chief justice of the supreme court shall be the administrator of the courts. He or she shall have the concurrence of a majority of the supreme court. He or she shall be responsible for the administration of the courts, including the preparation of the budget, the appointment and removal of judges, the appointment and removal of court officers and employees, and the appointment and removal of court clerks. This office shall not have the same powers of law. The general court may also regulate these matters by statute provided that the general court shall have no authority to abrogate the necessary administrative functions for which the courts were created. In the event of a conflict between a statute and a rule of the state shall supersede the rule. It is advisory to the provisions of the constitution. (Passed by the last session 200 Yes 40 No 7 May 2002)

YES

NO

**Question Proposed pursuant to Part II, Article 100 of the New Hampshire Constitution**

Shall there be a commission to study the constitution?

YES

NO

**TURN OVER TO CONTINUE VOTING**

END OF DOCUMENT

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C

Superior Court of New Jersey,  
Appellate Division.

In the Matter of the Application of the OCEAN  
COUNTY COMMISSIONER OF  
REGISTRATION FOR A RECHECK OF THE VOT-  
ING MACHINES FOR THE MAY 11, 2004,  
MUNICIPAL ELECTIONS in the Township of Long  
Beach and Manchester and the  
Borough of Island Heights.  
Peter L. Murphy, Plaintiff-Appellant,  
v.

Ocean County Board of Elections, Ocean County Clerk,  
Township of Long Beach and  
Ralph Bayard, Defendants-Respondents.

Argued Feb. 15, 2005.

Decided Aug. 5, 2005.

**Background:** Unsuccessful candidate for township board of commissioners challenged results. The Superior Court, Law Division, Ocean County, entered summary judgment dismissing complaint. Candidate appealed.

**Holdings:** The Superior Court, Appellate Division, Wecker, J.A.D., held that:

- (1) candidate was not prejudiced by rechecking voting machines;
  - (2) absentee ballots received after polls closed were invalid;
  - (3) writ-in vote for candidate already listed on ballot was invalid; and
  - (4) candidate was not entitled to additional discovery.
- Affirmed.

West Headnotes

**[1] Elections** 222

144k222 Most Cited Cases

Unsuccessful candidate for township board of commissioners was not prejudiced by court order authorizing state attorney general to clear the voting machines and recheck the machines; candidate had notice of attorney

general's motion to recheck machines and candidate failed to oppose it, and board of elections was required to keep paper tape of votes, and candidate failed to seek permission to inspect the paper tapes. [N.J.S.A. 19:52-6](#).

**[2] Elections** 291

144k291 Most Cited Cases

A candidate challenging election results has the burden of proving that one or more legal votes were rejected, and that the number of improperly rejected votes was sufficient to change the result of the election; however, the challenger is not required to prove that the rejected votes were cast for him or her.

**[3] Elections** 216.1

144k216.1 Most Cited Cases

Absentee ballots for township board of commissioners that were received after the polls had closed were invalid, even though they were postmarked before election day; plain meaning of statute is that ballots must be "received" by the board of elections before the polls closed, using date of receipt rather than date of postmark prevents fraud and provides a reasonably prompt determination of election results. [N.J.S.A. 19:57-23](#).

**[4] Elections** 216.1

144k216.1 Most Cited Cases

A clear purpose of strict adherence to the statutory cut-off date for counting absentee ballots, as with other rules for accepting absentee ballots, is to deter fraud and maintain the integrity of the elective process. [N.J.S.A. 19:57-23](#).

**[5] Elections** 227(8)

144k227(8) Most Cited Cases

Write-in vote for candidate for township board of commissioners whose name already appeared on the ballot was invalid under statute governing irregular ballots; there was no guarantee that an electronic vote had not also been cast for the candidate by the elector, and candidate's name was clearly listed on the ballot. [N.J.S.A. 19:49-5](#).

**[6] Judgment** 186

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### 228k186 Most Cited Cases

Objection to a summary judgment motion on the basis that it is premature requires the resisting party to demonstrate with some specificity the discovery sought, and its materiality.

### [7] Pretrial Procedure 36.1

#### 307Ak36.1 Most Cited Cases

Unsuccessful candidate for township board of commissioners was not entitled to additional discovery regarding whether elector who wrote in a vote for candidate, which invalidated ballot, had also voted electronically for candidate, where the machines had been cleared, there was no method to determine if the elector double voted for candidate, and candidate challenged election under fast track statute that implicitly instituted a summary proceeding that did not normally warrant full-scale discovery. *N.J.S.A. 19:29-2*.

**\*\*1175 \*463** *Joseph D. Coronato*, Toms River, argued the cause for appellant (*Mulvaney, Coronato & Brady*, attorneys; *Mr. Coronato*, on the brief).

*Judith Andrejko*, Deputy Attorney General, argued the cause for respondent Ocean County Board of Elections (*Peter C. Harvey*, Attorney General, attorney, *Patrick Dealmeida*, Assistant Attorney General, of counsel; *Ms. Andrejko*, on the brief).

*Laura M. Benson* argued the cause for respondent Ocean County Clerk (*Berry, Sahradnik, Kotzas, Riordan & Benson*, attorneys; *Mr. Benson*, on the brief).

*Edmund F. Fitterer, Jr.*, Ship Bottom, argued the cause for respondent Township of Long Beach (*Shackleton & Hazeltine*, attorneys; *Richard J. Shackleton*, on the brief).

*Richard A. Grossman*, Brick, argued the cause for respondent Ralph Bayard (*Grossman, Kruttschnitt, Heavey & Jacob*, attorneys; *Mr. Grossman*, on the brief).

Before Judges STERN, WECKER and S.L. REISNER.

The opinion of the court was delivered by

**\*464** WECKER, J.A.D.

These consolidated appeals arise out of a May 11, 2004 municipal election in the Township of Long Beach, in Ocean County. Plaintiff, Peter L. Murphy, was an unsuccessful candidate in that election, having lost the position he sought by one vote. In A-5899, we affirm the order permitting a recheck of the voting machines at the request of the State, and in A-5900, we affirm the summary judgment dismissing plaintiff's complaint.

#### I.

These are the relevant facts apparent from the record. The ballot contained the names of six candidates for three positions on the Township Board of Commissioners. The sample ballot shows that six printed names appeared, as well as three spaces for potential write-in votes. The three incumbents, Peter L. Murphy, Dianne C. Gove, and Joseph H. Mancini, ran as a slate. Each was listed on a separate line under Column D, with the caption "The Leadership Team You Can Trust" under each name. The three challengers were separately listed. Ralph H. Bayard was listed under Column A with the caption "People's Choice for a New Voice"; Robert A. Palmer was listed under Column B; and William W. Buckley was listed under Column C with the caption "Fair and Equal Treatment for Residents." The fifth column on the ballot was labeled "Personal Choice," and provided three lines for write-in votes. [FN1]

**FN1.** We use the term "write-in" throughout this opinion, as used in the election statutes, e.g., *N.J.S.A. 19:53A-5e, -7f*, although the computer screen apparently provides for a "write-in" candidate's name to be entered by touching the letters of the name on a virtual keyboard on the screen.

**\*\*1176** Immediately upon the close of the polls at 8 p.m., the 1,134 machine ballots and the thirty-three absentee ballots that had been received by that time were tallied. At that point, the tally for each of the six candidates in the ballot stood as follows: [FN2]

**FN2.** Printouts from each of the six computer voting machines used in the election, serial numbers 13363 through 13368, display the number of votes cast for each of the six candid-

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ates. Each printout also shows the number of write-in votes cast on the machine, as well as the write-in (literally, typed in) candidate's name.

**\*465**

Robert A. Palmer	672
DiAnne C. Gove	550
Ralph H. Bayard	518
Peter L. Murphy	518
William W. Buckley	484
Joseph H. Mancini	376

A total of five write-in votes also had been cast: three for Tice Ryan, one for Jeff Seddon, and one for Peter L. Murphy. The write-in vote for Murphy was rejected on the basis of *N.J.S.A. 19:49-5* because his name appeared as a candidate on the printed machine ballot. [FN3] Thus prior to counting any of the provisional ballots, plaintiff was tied with defendant Ralph Bayard for the third Commissioner position.

ditional votes for any candidate were tallied, Bayard received two additional votes and Murphy received one. The totals for the six candidates whose names appeared on the ballot were recertified as follows:

[FN3]. We shall address the rejection of the write-in vote for Murphy in Part VI of this opinion.

[FN4]. The election laws were amended by *L. 1999, c. 232* to provide for provisional ballots to be cast in the case of an unresolved challenge at the polls; the challenged voter may cast a paper ballot, which is to be sealed until the right to vote has been determined. See *N.J.S.A. 19:53C-1* through 20; see also *N.J.S.A. 19:12-7(f)*; *N.J.S.A. 19:31-11*; *N.J.S.A. 19:48-3.2*, -3.13.

Seven provisional ballots also were cast. [FN4] Six were subsequently counted; one was rejected on the ground that the provisional voter had recently moved to Stafford Township and was no longer a resident entitled to vote in Long Beach Township. When the six valid provisional ballots were counted on May 17, and all ad-

Robert A. Palmer	677
DiAnne C. Gove	552
Ralph H. Bayard	520
Peter Murphy	519
William W. Buckley	485
Joseph H. Mancini	377 5

[FN5]. Printouts from each of the six computer voting machines, serial numbers 13363 through 13368, display the number of votes cast for each of the six candidates. Each printout also shows the number of write-in votes cast on the machine, as well as the name written in (actually typed in on the computer).

**\*466** Bayard, having then received one vote more than Murphy, was promptly sworn in as a Commissioner,

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along with the first two successful candidates, Palmer and Gove.

Three additional absentee ballots, each of which was postmarked prior to May 11, were not received until May 12. They were rejected and never opened because they were not received by the close of the polling place on May 11, as required by *N.J.S.A. 19:57-23*; 19:57-26. [FN6]

FN6. *N.J.S.A. 19:57-23* provides, in pertinent part: "Such ballot must be received by [the county] board [of elections] or its designee before the time designated by *R.S. 19:15-2* or *R.S. 19:23-40* for the closing of the polls, as may be appropriate on the day of an election."

*N.J.S.A. 19:57-26* provides: "All valid ... absentee ballots received by the county boards prior to the time designated for the closing of the polls for each election shall be counted."

**\*\*1177 II.**

On this appeal from both Law Division orders, plaintiff presents these arguments:

POINT ONE:

THE PLAINTIFF WAS STATUTORILY ENTITLED TO A RECOUNT OF THE VOTES.

POINT TWO:

THE FACT THAT THE ELECTION RESULTS WERE SUBJECTED TO A "RECHECK" BY THE STATE ATTORNEY GENERAL'S OFFICE DOES NOT AFFECT THE PLAINTIFF'S RIGHT TO A RECOUNT.

POINT THREE:

THE WRITE-IN VOTE FOR THE PLAINTIFF SHOULD HAVE BEEN COUNTED.

POINT FOUR:

**\*467** THE PLAINTIFF IS ENTITLED TO HAVE ALL ABSENTEE BALLOTS COUNTED WHICH WERE RECEIVED BY MAIL BY THE DATE OF THE ELECTION.

POINT FIVE:

THE PLAINTIFF IS ENTITLED TO DISCOVERY AND A DETERMINATION AS TO THE PROPRIETY OF THE ACCEPTANCE OF SIX OF THE SEVEN PROVISIONAL BALLOTS CAST, AND

THE EJECTION [sic] OF THE ONE PROVISIONAL BALLOT.

POINT SIX:

THE PLAINTIFF IS ENTITLED TO DISCOVERY PRIOR TO THE COURT'S CONSIDERATION OF ANY MOTION FOR SUMMARY JUDGMENT.

POINT SEVEN:

SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED TO THE DEFENDANTS IN THIS CASE BECAUSE THE PROCEDURES OF THE SUMMARY JUDGMENT RULE WERE NOT PROPERLY FOLLOWED.

We have thoroughly considered the briefs and arguments of counsel in light of applicable law, and we affirm.

III.

In A-5898, plaintiff challenges the order granting the Attorney General's request for a "recheck" of the voting machines used in the Long Beach Township municipal election. Specifically, plaintiff contends that rechecking cleared the results of the municipal election and deprived him of his statutory right to a recount under *N.J.S.A. 19:28-1*. [FN7] While the recheck ordered by the court at the Attorney General's request did clear the machines, literally preventing further confirmation of the municipal clerk's certified tally, that action did not deprive Murphy of his right to a recount. He had notice of the Attorney General's application and failed to **\*468** object. He cannot, then, on that ground complain of the consequences.

FN7. *N.J.S.A. 19:28-1*, as of May 2004, provided, in pertinent part:

When any candidate at any election shall have reason to believe that an error has been made by any district board or any board of canvassers in counting the vote or declaring the vote of any election, he may, on or before the second Saturday following such election, or declaration of any board of canvassers, apply to a judge of the Superior Court ... for a recount of the votes cast at the election....

This statute was recently amended to expand to fifteen days the time within which a candidate

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can challenge the election in the Superior Court. *L. 2005, c. 150*. The timeliness of Murphy's complaint is not in issue here.

The State sought judicial authority to clear and recheck the operation of the voting machines before the expiration of the fifteen-day period when voting machines are to remain locked, unless otherwise ordered by the court. See *N.J.S.A. 19:52-6*. The State sought relief from that \*\*1178 fifteen-day waiting period in order to have the machines ready for the statewide June 8, 2004 primary.

[1] The record establishes that Murphy received written notice of the Attorney General's application by certified mail on May 12, two days before the May 14 return date of the Attorney General's Order to Show Cause. [FN8] Murphy submitted no written objection to the State's application, nor did he appear in court on May 14 to object. [FN9] On May 14, Judge Donald F. Campbell signed an order permitting the recheck to take place on May 17; Murphy, however, did not receive a copy of the May 14 order until May 18.

**FN8.** A signed, certified mail return receipt was submitted to the court.

**FN9.** All of the candidates had notice of the Attorney General's request, and none filed any objection or appeared in court to object.

On May 21, Murphy filed a verified complaint, apparently pursuant to *N.J.S.A. 19:29-2*, along with a proposed Order to Show Cause, seeking a recount and an order setting aside the election. Judge Marlene Lynch Ford signed the Order to Show Cause, returnable June 11. Defendants filed summary judgment motions on June 7 and June 9, just days before the scheduled return date. Those motions were heard on June 18. [FN10]

**FN10.** While that date was well short of the twenty-eight days normally required before hearing a summary judgment motion, *N.J.S.A. 19:29-4* provides that trial on a petition contesting an election is to be scheduled between fifteen and thirty days after the filing of the petition. *N.J.S.A. 19:29-5* allows the court to ad-

journal the trial up to thirty days. Thus the time periods provided by court rules for other civil litigation are clearly foreshortened. Although Murphy raises that alleged procedural irregularity in his brief, he submitted written opposition and argued against defendants' motion. Additional discussion below in this opinion will demonstrate that the accelerated motion argument did not affect plaintiff's substantive rights.

\*469 Plaintiff disputes the Attorney General's statutory authority for the recheck, citing *N.J.S.A. 19:28-1*, which explicitly provides for a "recount" either at the request of a candidate or, with respect to a public question, on petition by ten voters. We do not read that statute to relate to the State's right to confirm that voting machines are operating properly, much less to prohibit the "recheck" at the State's request, as occurred here.

Although the State's recheck did clear the municipal election results from the machines, paper tapes of each voting machine's results were preserved and available for inspection. Significantly, Murphy does not dispute defendants' contention that he never sought to inspect those tapes. In any event, we are satisfied that plaintiff has not been prejudiced thereby.

#### IV.

[2] A challenger has the burden of proving that one or more legal votes were rejected, and that the number of improperly rejected votes was sufficient to change the result of the election. The challenger is not required to prove that the rejected votes were cast for him or her. *In re Application of Moffat*, 142 N.J.Super. 217, 224, 361 A.2d 74 (App.Div.), certif. denied sub nom. *Princeton Tp. v. Bleiman*, 71 N.J. 527, 366 A.2d 682 (1976); *Kirk v. French*, 324 N.J.Super. 548, 736 A.2d 546 (Law Div.1998).

Plaintiff argues that three absentee ballots that were not delivered until May 12, but were postmarked before the May 11 election, should have been counted. *N.J.S.A. 19:57-23* provides, in pertinent part, that an absentee ballot "must be received by [the county] board [of elections] or its designee before the time designated by *R.S.*

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19:15-2 or R.S. 19:23-40 \*\*1179 for the closing of the polls, as may be appropriate on the day of an election." The polls in \*470 Long Beach Township remained open until 8 p.m., as required by *N.J.S.A. 19:15-2* for a general election.

[3][4] Plaintiff's argument is two-fold. First, plaintiff suggests that as long as an absentee ballot is postmarked before election day, it should be counted. The statute, however, explicitly provides otherwise, and we rejected that argument in *DeFlesco v. Mercer County Bd. of Elections*, 43 *N.J.Super.* 492, 129 *A.2d* 38 (App.Div.1957). There we held that such a ballot could not be counted. "The preservation of the enfranchisement of qualified voters and of the secrecy of the ballot, the prevention of fraud, and the achievement of a reasonably prompt determination of the result of the election have been the vital considerations in the development of the absentee voting legislation." See also *Mulcahy v. Bergen County Bd. of Elections*, 156 *N.J.Super.* 429, 433- 34, 383 *A.2d* 1214 (Law Div.1978) (applying and quoting *DeFlesco*, *supra*, 43 *N.J.Super.* at 495-96, 129 *A.2d* 38). In *Mulcahy*, Judge Petrella upheld the board's rejection of absentee ballots received after the date of the election, despite some evidence that unusual weather may have delayed mail delivery on election day. "The postmark date is not and cannot be controlling; the received date is and must be conclusive to avoid fraud and provide some finality to the closing of the polls." *Id.* at 434, 383 *A.2d* 1214. The judge further emphasized the anti-fraud rationale underlying the statute:

The court has no authority or discretion to adjust the time requirement. To do so would undermine the legislative intent and pave the path for future abuses. There have been many changes in the postal system in recent years which the court could well take judicial notice of, including *the private use of postage meters, a mechanism which could easily subject the absentee voting procedure to abuse if the postmark date was determinative.*

[*Id.* at 435, 383 *A.2d* 1214 (emphasis added).]

A clear purpose of strict adherence to the statutory cut-off for counting absentee ballots, as with other rules for accepting absentee ballots, is to deter fraud and main-

tain "the integrity of the elective process." See *Application of Langbaum*, 201 *N.J.Super.* 484, 490, 493 *A.2d* 580 (App.Div.1985). Without a cut-off date, the counting process might go on indefinitely.

\*471 We have found only one exception to the literal application of the "received by" requirement of *N.J.S.A. 19:57-23*. See *In re Holmes*, 346 *N.J.Super.* 372, 788 *A.2d* 291 (App.Div.2002). There the issue arose in a truly exceptional circumstance: the shutdown of the Hamilton Post Office in Mercer County as a result of anthrax contamination discovered shortly after the 9/11 terrorist attack on the World Trade Center. Nineteen absentee ballots that were postmarked before the November 6, 2001 election were not received by the Board of Elections until November 7. [FN11] We allowed those ballots received on November 7 to be counted, noting the "extraordinary circumstance of national dimension and unforeseen consequence":

FN11. There was undisputed evidence that the closing and quarantine of the Hamilton Postal facility delayed mail delivery to the Mercer County Board of Elections by one day.

We do not believe that the Legislature intended *N.J.S.A. 19:57-23* to be applied in a manner that would prevent otherwise valid absentee ballots from being counted when, in the absence of voter fraud or malconduct, *it has been conclusively demonstrated* that such absentee ballots would have been timely delivered but for the extraordinary and unpredictable circumstances experienced in this case.

\*\*1180 [*Id.* at 377-78, 788 *A.2d* 291 (emphasis added).]

Nonetheless, in balancing the competing policies underlying the election laws--protecting a citizen's right to vote while deterring fraud and promoting certainty in the electoral process--we disallowed three ballots received on November 8 and eleven ballots received between November 9 and November 21, despite all having been postmarked before the November 6 election.

The statute--*N.J.S.A. 19:57-23*--is clear on its face; its rationale is plain, and the means adopted to secure its purpose as reasonable. The fact that other methods,

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deadlines, or rules arguably could have been enacted to address the same concerns or to accomplish the same purpose is not a proper consideration for this court.

Plaintiff's secondary argument with respect to the absentee ballots is that one or more actually may have been delivered to the \*472 Ocean County Board of Elections before the polls closed at 8 p.m., but "sat on someone's desk." That argument is nothing more than unsupported speculation on plaintiff's part, and does not merit further discussion.

#### V.

Plaintiff contends that the rejection of one provisional ballot calls into question the validity of the election results. We fail to see any basis for that contention. Included in the Township's Statement of Undisputed Facts, submitted in support of its summary judgment motion, is the fact that the rejected provisional vote was cast by a person who had moved to Stafford Township and was no longer a resident of Long Beach Township on election day. Murphy did not respond to or challenge that Statement of Fact, which is therefore deemed established. *See R. 4:46-2(b)*. Plaintiff's request for discovery respecting the procedure by which the provisional ballots were considered, including the six that were counted, likewise appears to be without basis.

#### VI.

Murphy's contentions, raised in Point III of his brief, warrant further discussion. Murphy contends that the one write-in vote cast for him was improperly declared void and not counted.

Where voting machines are used in an election, write-in ballots are subject to *N.J.S.A. 19:49-5*, which provides:

Ballots voted for any person whose name does not appear on the machine as a nominated candidate for office are herein referred to as *irregular ballots*. [[[FN12]]] Such irregular ballot shall be written or affixed in or upon the receptacle or device provided on the machine for that purpose. *No irregular ballot shall be voted for any person for any office whose name appears on the machine as a nominated candidate for that office ... any irregular ballot so voted shall not be counted.*

FN12. *N.J.S.A. 19:47-1* provides the following definition: "Irregular ballot means a vote cast, by or on a special device, for a person whose name does *not* appear on the ballots." (Emphasis added).

[Emphasis added].

\*473 That unambiguous statutory direction is consistent with the rule applicable to write-in votes where paper ballots are used, *N.J.S.A. 19:15-28*; it is, however, more explicit in directing that such improperly cast write-in votes not be counted. [FN13]

FN13. *N.J.S.A. 19:15-28* provides, in pertinent part:

Nothing in this Title shall prevent any voter from writing or pasting under the proper title of office in the column designated personal choice the name or names of any person or persons for whom he desires to vote *whose name or names are not printed upon the ballot for the same office or offices* ....

[Emphasis added.]

\*\*1181 [5] Murphy argues that neither the instructions on the sample ballots mailed to registered voters, nor the instructions on the voting machines themselves, sufficiently warn voters not to write-in the name of a candidate whose name appears on the printed ballot. The Long Beach Township ballot for the May 11, 2004 election included this general notice with respect to write-in votes:

"*WARNING!* An improperly cast write-in vote will be deemed void. Be sure that your write-in vote is cast in the PERSONAL CHOICE column on the same line as the office for which you are casting the write in vote." The ballot itself (and the sample ballot mailed to voters in advance) clearly explained how to enter a write-in vote. But it did not warn that a write-in vote for a candidate whose name appears on the printed ballot would be an "improperly cast" vote that would be "deemed void" and not counted.

We first note that the obvious purpose of *N.J.S.A. 19:49-5* is to prevent a voter from casting two votes for the same candidate--once by marking the printed name

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and a second time by writing in the same name. We also note that the voter who improperly wrote in Murphy's name on the ballot--just like every person--is charged with knowledge of the law; *N.J.S.A. 19:49-5* clearly and unambiguously invalidates the write-in vote for Murphy in these circumstances. Even in the context of the Criminal Code, where violations incur far more severe consequences, we hold persons to knowledge of behaviors prohibited by the Code, without requiring a copy of the Code to be provided to each person.

\*474 Neither of those considerations, however, negates the strong public policy in favor of protecting every citizen's right to vote, and to have his or her vote counted. Little is more basic to the concept of a democracy.

A citizen's constitutional right to vote for the candidate of his or her choice necessarily includes the corollary right to have that vote counted at full value without dilution or discount. That principle also encompasses "the right of all qualified electors to vote for [a write-in candidate] by such means." *To preserve those rights, our state election laws are designed to deter fraud, safeguard the secrecy of the ballot, and prevent disenfranchisement of qualified voters.* In furtherance of those goals, we have held that it is our duty to construe elections laws liberally. [*In re Petition of Gray-Sadler*, 164 N.J. 468, 474-75, 753 A.2d 1101 (2000) (internal citations and quotation marks omitted) (emphasis added)].

Legislative findings and declarations recently set forth describe "a consensus that the nation's electoral system needs improvements to ensure that every eligible voter has the opportunity to vote, that every vote will be counted that should be counted, and that no legal vote will be canceled by a fraudulent vote." *N.J.S.A. 19:61-1b* (enacted by *L. 2004, c. 88, § 1* as part of the Voting Opportunity and Technology Enforcement Act, *N.J.S.A. 19:61-1* to - 8, adopted in accordance with the federal "Help America Vote Act of 2002," *Pub.L. 107-252*, 42 *U.S.C.A.* § 15481.1).

In *Gray-Sadler*, the problem arose from a combination of confusing instructions and an awkward mechanism for casting a write-in vote. See *Gray-Sadler, supra*, 164 N.J. at 472, 753 A.2d 1101. Numerous write-in votes for

three challengers, enough to change the result, were placed \*\*1182 on the wrong lines on the ballot and were rejected on that ground pursuant to the last sentence of *N.J.S.A. 19:49-5* ("An irregular ballot must be cast in its appropriate place on the machine, or it shall be void and not counted."). The Court ordered a new municipal election, largely because the polling place did not provide the instructions with respect to write-in voting, or a model voting machine as required by *N.J.S.A. 19:50-3*. *Gray-Sadler, supra*, 164 N.J. at 478-79, 753 A.2d 1101.

The facts in *Gray-Sadler*, however, are significantly different from those before us. The first significant difference is that the \*475 three challengers in that case were write-in candidates whose names did *not* appear on the printed ballot, and who had campaigned vigorously against the incumbents for mayor and for two council positions. The only names that appeared on the printed voting machine ballot were the incumbents in each office. Thus the second sentence of *N.J.S.A. 19:49-5*, the sentence that controls here, was not implicated in *Gray-Sadler*.

Because the write-in candidates' names were not on the ballot in that case, there was no risk that counting a write-in vote would result in double-counting any one voter's vote. And that is the precise risk implicitly addressed by *N.J.S.A. 19:49-5* and explicitly addressed by *N.J.S.A. 19:53A-3(f)*, which provides that the statutory requirements for "[e]very electronic voting system, consisting of a voting device in combination with automatic tabulating equipment, ... shall [be designed to] ... [p]revent the voter from voting for the same person more than once for the same office."

The Court in *Gray-Sadler* distinguished between voter carelessness and circumstances beyond the voter's control.

"We do not believe that the Legislature intended *N.J.S.A. 19:49-5* to be applied in a manner that would frustrate the free expression of the voters' will when the incorrect placement of the write-in vote is the result of mistakes or problems beyond the voters' control."

[*Gray-Sadler, supra*, 164 N.J. at 477, 753 A.2d 1101.]

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Here there was no problem "beyond the voter[']s control." Referring to "cases involving invalidated write-in votes," the Court cited a judicial history of "distinguish[ing] errors due to extrinsic problems from errors caused by a voter's own neglect." *Id.* at 476, 753 A.2d 1101. The principle the Court derived from the cases cited was "that rigid application of technical rules should not prevent otherwise valid write-in votes from being counted." *Id.* at 477, 753 A.2d 1101 (emphasis added) (citing *Riecker v. Hartmann*, 130 N.J.Super. 266, 272, 326 A.2d 101 (Law Div.1974) (write-in votes on Democratic primary ballot for individuals whose names appeared only on the Republican primary ballot were properly counted and were effective to secure the Democratic party nomination.))

\*476 It is not too much to expect that a voter would notice that his candidate's name appears as a choice on the ballot and that there is a clearly prescribed place on the ballot for expressing that choice. This is particularly so in light of the sample ballot that demonstrates, in advance, the names of the candidates as they will appear on the voting machine. Given those facts, and recognizing that we cannot know for certain whether the same voter also cast a proper vote for Murphy and if so, whether it was counted, [FN14] we see no basis \*\*1183 for undoing the certification of the election results and ordering a run-off election.

FN14. Murphy's argument about the write-in vote is based on two alternative possibilities: (1) that the voter's entire ballot was improperly rejected, instead of just the write-in vote (with the possibility that the voter also cast a valid vote for Murphy) which was not counted, or (2) that the voter failed to mark Murphy's name on the printed portion of the ballot which was counted. Neither possibility persuades us that the write-in voter was deprived of his right to vote, or that Murphy or the township was deprived of a fair election.

The Court in *Gray-Sadler* cited two relevant grounds for contesting an election: "when legal votes have been rejected at the polls sufficient to change the result" or "for any error ... in counting the votes or declaring the

result of the election, if such error would change the result," 164 N.J. at 474, 753 A.2d 1101 (citing *N.J.S.A. 19:29-1(e) and (f)*), and identified "[t]he essential question whether voters were denied the opportunity to vote for a candidate of their choice." *Id.* at 476, 753 A.2d 1101 (citing *In re Moffat*, 142 N.J.Super. 217, 223, 361 A.2d 74 (App.Div.), certif. denied sub nom. *Princeton Tp. v. Bleiman*, 71 N.J. 527, 366 A.2d 682 (1976)). The same statutory grounds implicitly are invoked by Murphy in this case, and the essential question here is the same: whether the voter who improperly wrote in Murphy's name, when Murphy's name was printed on the ballot, was unfairly deprived of the right to cast a vote for Murphy. We conclude that no such deprivation occurred here.

Unlike the voters in *Gray-Sadler*, the unknown write-in voter here was not deprived of the right to cast a vote for Murphy. The \*477 printed ballot gave the voter that opportunity. Every voter in the township election had a clear opportunity to vote for Murphy without writing in his name on the ballot. Moreover, a reasonable voter would understand, without explicit instruction, that it is unnecessary to write in the name of a candidate whose name already appears on the ballot, and that a vote for that candidate must be cast by marking the place on the ballot where that candidate's name appears. Significantly, only one of the 1,134 persons who voted by machine in this election made the mistake of writing in any of the six named candidates on the ballot.

Despite the Court's charge to protect each "citizen's constitutional right to vote for the candidate of his or her choice" and "the corollary right to have that vote counted," *Gray-Sadler, supra*, 164 N.J. at 474, 753 A.2d 1101, plaintiff's reliance upon *Gray-Sadler* to compel a new election here is misplaced.

In another case involving the validity of write-in votes for a candidate whose name was printed on the ballot, *In re General Election Held in the Tp. of Monroe*, 245 N.J.Super. 70, 583 A.2d 1154 (App.Div.1990), certif. denied, 127 N.J. 325, 604 A.2d 600 (1991), several voters who wrote in the name of the candidate also marked the candidate's name where it appeared on the printed portion of the ballot. The Law Division judge

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held that the *entire* ballot of each such voter was invalid. We reversed, and held that those voters were entitled to have their votes counted--that is, their votes on the printed portion of the ballots. *Id.* at 73, 583 A.2d 1154. See also *Petition of Keogh-Dwyer*, 85 N.J.Super. 188, 203, 204 A.2d 351 (App.Div.1964), *rev'd on other grounds*, 45 N.J. 117, 211 A.2d 778 (1965), in which we held that N.J.S.A. 19:16-3f barred election officials from counting a write-in vote for a candidate whose name appeared on the ballot.

The election laws unambiguously instruct the election authorities on the proper counting of votes in this situation. N.J.S.A. 19:53A-7f provides, in pertinent part: "Before write-in votes are counted they shall be compared with votes cast on the ballot card for the same office.... Votes cast for duly nominated candidates \*478 on the ballot card will not be voided because of an invalid write-in vote, but if otherwise valid shall be counted." Further, \*\*1184 N.J.S.A. 19:53A-10 provides: "Any overvote or misvote for one or more offices shall not invalidate the entire ballot." Murphy has provided nothing that evidences a reasonable possibility that the statutory instructions for counting the votes were not followed here.

We are satisfied that the election of Ralph Bayard as the third Commissioner in Long Beach Township was properly certified, and that the Board was correct in refusing to count the single write-in vote for candidate Peter L. Murphy. Nonetheless, this case suggests that a more complete instruction on the ballot with respect to the execution of write-in votes would be salutary. While not constitutionally required, nor required by current law, an explicit instruction would impose no significant burden upon the election authorities. The ballot might include, for example, language such as the following:

The write-in portion of the ballot is provided *only* for the purpose of voting for a person whose name does *not* appear on the printed ballot. A write-in vote for a candidate whose name *does* appear on the printed ballot will not be counted.

We recommend that the Legislature consider requiring such a modification to all New Jersey election ballots.

## VII.

[6] Plaintiff argues that he was entitled to discovery before his complaint was dismissed. There is no question that summary judgment pursuant to *Rule* 4:46 normally is not appropriate before the party resisting such a motion has had an opportunity to complete the discovery relevant and material to defense of the motion. *Velantzas v. Colgate-Palmolive Co., Inc.*, 109 N.J. 189, 193, 536 A.2d 237 (1988). Here, as defendants argue, plaintiff brought his complaint under the authority of N.J.S.A. 19:29-2, which provides for a fast track proceeding, [FN15] and by Order to \*479 Show Cause, implicitly initiating a summary proceeding pursuant to *Rule* 4:67. The nature of such an action does not normally warrant the full-scale discovery permitted in other civil lawsuits. Moreover, objection to a summary judgment motion on the basis that it is premature requires the resisting party to demonstrate with some specificity the discovery sought, and its materiality. *Auster v. Kinonian*, 153 N.J.Super. 52, 56, 378 A.2d 1171 (App.Div.1977).

FN15. N.J.S.A. 19:29-6 does grant the court power, however, to compel production of witnesses, voting records and equipment where warranted on a recount application.

[7] Murphy's discovery argument respecting the rejected write-in vote appears aimed at learning whether the voter also marked Murphy's name on the ballot, and if so, whether that vote was counted. If such information was potentially available before the machines were cleared, it was not available thereafter, and Murphy's argument in that respect is therefore moot. [FN16]

FN16. Recent legislation has amended N.J.S.A. 19:48-1 and N.J.S.A. 19:53A-3 to add the following requirement for all voting machines, mechanical or electronic, beginning in 2008 (or later). L. 2005, c. 137:

By January 1, 2008, each voting machine shall produce an individual permanent paper record for each vote cast, which shall be made available for inspection and verification by the voter at the time the vote is cast, and preserved for later use in any manual audit. In the event of a recount of the results of an election, the voter-

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verified paper record shall be the official tally in that election. A waiver of the provisions of this paragraph shall be granted by the Attorney General if the technology to produce a permanent voter-verified paper record for each vote cast is not commercially available.

**\*\*1185 VIII.**

We affirm the orders appealed from denying relief to plaintiff in this case.

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(Cite as: 447 Pa. 304, 290 A.2d 69)

C

Supreme Court of Pennsylvania.

In re Opening of Ballot Box in the SECOND WARD,  
SECOND PRECINCT OF the BOROUGH  
OF CANONSBURG, WASHINGTON COUNTY,  
Pennsylvania.

Appeal of Councilmanic Candidate Jack PASSANTE.  
In re Opening of Ballot Box in the SECOND WARD,  
THIRD PRECINCT OF the BOROUGH  
OF CANONSBURG, WASHINGTON COUNTY,  
Pennsylvania.

Appeal of Francis J. BUCKLEY, Jr.

April 20, 1972.

Election contest. The Court of Common Pleas, Civil Division, Washington County, Nos. 134 and 223, November Term, 1971, Alexander R. Curran, P. Vincent Marino, and Thomas D. Gladden, JJ., denied candidates' requests for second recount of ballots and they appealed. The Supreme Court, Nos. 50 and 63 March Term, 1972, Eagen, J., held that where trial court was satisfied that computation of ballots by court-appointed recount board in one precinct was correct and conclusion was supported by record, summary denial of one candidate's request for second recount of ballots cast in that precinct was proper, and that other candidate's appeal was untimely and would be quashed where it was filed more than 30 days after trial court's order in the recount proceeding.

Remanded with directions.

West Headnotes

**[1] Elections**  **305(6)**

[144k305\(6\) Most Cited Cases](#)

Supreme Court's scope of review of orders entered by trial court in recount proceedings initiated by petitions is broad in nature. [25 P.S. § 3261](#).

**[2] Elections**  **299(4)**

[144k299\(4\) Most Cited Cases](#)

Second recount of ballots cast in contested election is not mandatory merely because some interested party alleges mistake in first recount; rather, trial court may order second

recount if it is convinced that mistake in first recount occurred. [25 P.S. § 3261\(f\)](#).

**[3] Elections**  **299(4)**

[144k299\(4\) Most Cited Cases](#)

Where trial court was satisfied that first computation of ballots by court-appointed recount board was correct and such conclusion was supported by record, summary denial of candidate's request for second recount of ballots was proper. [25 P.S. § 3261\(f\)](#).

**[4] Elections**  **180(1)**

[144k180\(1\) Most Cited Cases](#)

Ballot which was properly marked in pencil with an X in small box opposite one candidate's name but which contained barely visible smudge within outer lines of large square or box on ballot containing names of all candidates was not invalid on theory that smudge was result of an eraser. [25 P.S. § 3063](#).

**[5] Elections**  **186(4)**

[144k186\(4\) Most Cited Cases](#)

Ballot which was properly marked in pencil next to name of one candidate in councilmanic election but which also contained very light semicircular line made with ink in box opposite opposing candidate's name and small scratch marks made with ink on ballot above names of all candidates was not invalid on theory that voter had attempted to vote for three candidates for two council seats or that voter marked his ballot with two separate writing instruments where voter who cast ballot voted for total of eleven candidates for various offices and, in each instance, an X marked in pencil was properly placed in box opposite candidate's name.

**[6] Elections**  **305(4)**

[144k305\(4\) Most Cited Cases](#)

Candidate's appeal from order entered by trial court in recount proceedings was untimely and would be quashed where it was filed more than 30 days after entry of order; candidate's petition for reargument did not toll time for filing appeal absent order staying proceedings. 17 P.S. § 211.502; [25 P.S. § 3063](#).

**\*306 \*\*70** Frank C. Roney, Rodgers & Roney, Washington, for appellant.

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Arthur M. Wilson, Patrick C. Derrico, Greenlee, Richman, Derrico & Posa, Washington, for appellee.

\*305 Before JONES, C.J., and EAGEN, O'BRIEN, ROBERTS, POMEROY, NIX, and MANDERINO, JJ.

**\*306 OPINION**

EAGEN, Justice.

At the general election of November 2, 1971, Edward J. Norwood, Jr., and Francis J. Buckley, Jr., were the nominees of the Democratic Party, and Rose Churray and Jack Passante were the nominees of the Republican Party for the office of councilman of the Second Ward in the Borough of Canonsburg, Washington County, with two to be elected. Candidate Norwood was elected decisively, but an extremely close contest developed between Buckley and Passante for the second seat. This litigation resulted.

There are three voting precincts in the Second Ward of Canonsburg Borough and paper ballots were used in all in the 1971 election.

Alleging error was committed in the computation of the votes cast in the Second Precinct, three electors acting in Buckley's interest filed a timely petition in the Court of Common Pleas requesting a recount of the ballots cast in this precinct. Three electors acting in Passante's interest filed a similar petition seeking a recount of the ballots cast in the Third Precinct. The court granted both petitions and appointed two separate boards, each consisting of three individuals, to recount the ballots in each of the precincts in which the correctness of the computation of the vote was challenged, and directed that notice of the time and place to given to all parties concerned.

\*307 The recounts directed by the court duly followed with Buckley, Passante and their respective counsel present. Subsequently, the reports of the two court-appointed recount boards were filed with the court, which then directed that the election returns for the two precincts involved be recorded in accordance with the computations made by the recount boards.

[1] Buckley filed exceptions to the recount board's computation of the vote in the Third Precinct. Passante filed excep-

tions to the recount board's computation of the vote in the Second Precinct. All of these exceptions dealt with the validity of certain ballots to which challenges had been entered. Passante also requested the court to order a second recount of the ballots cast in the Second Precinct alleging the recount board for this precinct had inadvertently failed to count certain ballots cast in his favor due to confusion created during the recount proceedings by delaying and distracting actions on the part of one of its clerks. The recount board filed an \*\*71 answer to this request by Passante categorically denying that all of the votes were not counted and detailing the work and effort performed by the board to assure a correct computation of the vote. After argument before a court en banc, the court denied the request for a second recount of the vote in the Second Precinct and ruled on the exceptions filed by both candidates. Petitions for reargument were denied and both Buckley and Passante then filed appeals in this Court. Since the appeals are from orders entered by the court below in recount proceedings initiated by petitions filed, as authorized by Article XVII, s 1701 of The Election Code of 1937, Act of 1937, June 3, P.L.1333, [25 P.S. s 3261](#), our scope of review is broad in nature. See [McKelvey Appeal, 444 Pa. 392, 281 A.2d 642 \(1971\)](#), and [Cullen v. Appeal, 392 Pa. 602, 141 A.2d 389 \(1958\)](#).

**\*308 PASSANTE APPEAL**

Passante initially maintains that the court below erred in summarily denying his request for a second recount of the ballots in the Second Precinct.

[2][3] Section 1701, subsection (f) of the Act of 1937, supra, 25 P.S. s 3261(f) provides: 'Ballot boxes may be opened under the provisions of this section at any time within four months after the date of the general, municipal, special or primary election at which the ballots therein shall have been cast.' In [Greenwood Township Election Case, 344 Pa. 350, 25 A.2d 330 \(1942\)](#), we ruled that under this statutory provision a court of common pleas has the power to order a second recount of the votes cast in any election district (subject to the time limitation specified in subsection (f) of Section 1701) If it is convinced a mistake has been made in the first recount of the votes. This does not mean that a second recount is mandatory if some interested party

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alleges such a mistake, but rather that the court may order a second recount if it is convinced such a mistake occurred. Here the lower court was apparently satisfied that the computation made by the board in the first recount was correct and the record does not evidence any meritorious reason why this conclusion should not be affirmed.

Passante next and finally questions the correctness of the lower court's ruling on the validity of two ballots cast in the Second Precinct. In one instance, Passante's challenge to a ballot marked in favor of Buckley was overruled, and in the second instance Buckley's challenge to a ballot marked in favor of Passante was sustained.

[4] The first ballot involved was properly marked the pencil with an X in the small box opposite Buckley's name, but adjacent to this box and partly within the \*309 outerlines of the large square or box on the ballot containing the names of all of the councilmanic candidates appears a smudge which is barely visible to the naked eye. Passante argues this smudge is the result of an erasure which voids the vote for Buckley under Section (a) of the Election Code of 1937, supra, 25 P.S. s 3063 (Supp.1971) which provides in part that '(a)ny erasure or mutilation in the vote in any office block shall render void the vote for any candidates in said block, but shall not invalidate the votes cast on the remainder of the ballot, if otherwise properly marked.' The lower court correctly overruled the challenge to this ballot if for no other reason that it is not reasonably certain the smudge was caused by an erasure.

As to the second ballot, involved in this particular appeal, we agree the lower court erred in voiding this vote for Passante.

[5] The ballot is properly marked in pencil as a vote for Passante and his running mate, Churray, but there also appears a single very light semicircular line made with ink in the box opposite Buckley's name. There are also some small scratch marks made with ink on the ballot above the candidates' names running for the councilmanic seats. Why the lower court \*\*72 voided this particular vote cast for Passante does not appear in the record, but Buckley argues the vote was properly voided for either of two reasons, i.e., the voter by placing the ink mark behind Buckley's name

was attempting to vote for three candidates for council, or for more persons than there were to be voted for, and/or the voter marked his ballot with two separate writing instruments contrary to the provisions of Section 1223, as amended, of the 1937 Election Code supra, 25 P.S. s 3063 (Supp.1971). This position is founded on a faulty premise, namely, that the voter placed the ink marks on the ballot. Everything indicates the contrary. The voter \*310 who cast this ballot voted for a total of eleven candidates. In each instance, an X Marked in pencil was properly placed in the box opposite the candidates' names. To conclude the voter then used an ink pen to make the extraneous marks is too speculative, especially since the marks themselves indicate they were made with an old fashioned ink writing pen, rather than with some modern writing instrument. This particular vote should be counted for Passante and the court below erred in ruling otherwise.[FN1]

[FN1]. Whether the counting of this vote for Passante will change the result of the election in question cannot be ascertained either from the briefs or record filed in this Court.

#### BUCKLEY'S APPEAL

[6] This appeal is untimely and will be quashed.

The appeal was filed on January 21, 1972, from an order entered in the court below on December 15, 1971.[FN2] The petition for reargument absent an order staying the proceedings did not have the effect of tolling the time for filing an appeal. Cf. Merrick Estate, 432 Pa. 450, 247 A.2d 786 (1968).

[FN2]. A time limit of thirty days has been established for appeals of this nature. See, Act of July 31, 1970, P.L. ---, No. 223, Art. V, s 502, 17 P.S. s 211.502.

The record is remanded to the court below with directions to correct the election returns consonant with this opinion.

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END OF DOCUMENT

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(Cite as: 773 So.2d 519)

**H****Briefs and Other Related Documents**

Supreme Court of Florida.  
 Harry N. **JACOBS**, etc., et al., Appellants,  
 v.  
**SEMINOLE COUNTY CANVASSING BOARD**, etc., et  
 al., Appellees.  
**No. SC00-2447.**  
 Dec. 12, 2000.

Action contesting certification of state results in presidential election was brought against county canvassing board and others, alleging thousands of absentee ballots should be invalidated for failing to comply with laws governing absentee ballots. The Circuit Court, Leon County, [Nikki Ann Clark, J.](#), entered judgment denying all relief. Appeal was taken. The First District Court of Appeal certified judgment as being of great public importance and requiring immediate resolution by the Supreme Court. On review, the Supreme Court held that: (1) conduct of county supervisor of elections in allowing representatives of one political party access to her office for purpose of adding voter identification numbers to requests for absentee ballots, but failing to notify other political parties or any other group or to invite them to take same action, did not amount to illegal disparate treatment, and (2) information on application forms for absentee ballots was sufficient to establish the qualifications of each applicant, and thus, supervisor's conduct did not amount to fraud, gross negligence, or intentional wrongdoing in connection with any absentee ballots.

Affirmed.

West Headnotes

**[1] Elections**  **227(8)**  
[144k227\(8\) Most Cited Cases](#)

Unless a statutory provision governing absentee voting specifically states that the lack of information voids the ballot, the lack of the information does not automatically void the ballot.

**[2] Elections**  **216.1**

[144k216.1 Most Cited Cases](#)

**[2] Elections**  **227(8)**  
[144k227\(8\) Most Cited Cases](#)

The statutory requirement that the requester "must" disclose the nine items listed as necessary for a request for an absentee ballot is simply not a definitive statement by the Legislature that requests which are missing the voter's registration number are illegal or void. [West's F.S.A. § 101.62](#).

**[3] Elections**  **216.1**  
[144k216.1 Most Cited Cases](#)

**[3] Elections**  **227(8)**  
[144k227\(8\) Most Cited Cases](#)

Conduct of county supervisor of elections in allowing representatives of one political party access to her office for purpose of adding voter identification numbers to requests for absentee ballots in presidential election, but failing to notify other political parties or any other group or to invite them to take same action, did not amount to illegal disparate treatment such that integrity of the ballots or election was compromised in connection with any absentee ballots, where only political party that was allowed access mailed out preprinted request forms without either a space for identification numbers or a preprinted number, and there was no evidence that any other political party or subdivision requested similar access and was denied it.

**[4] Elections**  **216.1**  
[144k216.1 Most Cited Cases](#)

**[4] Elections**  **227(8)**  
[144k227\(8\) Most Cited Cases](#)

Information on application forms for absentee ballots in presidential election, which included each applicant's name, address, signature, and the last four digits of the applicant's social security number, was sufficient to establish each applicant's qualifications, and thus, conduct of county supervisor of elections in allowing third parties to correct omissions on the forms by adding voter identification numbers to forms that were already signed and returned did not amount to fraud, gross negligence, or intentional wrongdoing such that election results were compromised in connection with any absentee ballots.

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**[5] Elections** 🔑197

[144k197 Most Cited Cases](#)

Nothing can be more essential than for a supervisor of elections to maintain strict compliance with the statutes in order to ensure credibility in the outcome of the election.

**[6] Elections** 🔑227(1)

[144k227\(1\) Most Cited Cases](#)

Violations of the election code by election officials will not necessarily invalidate the votes of innocent electors. [West's F.S.A. § 104.011](#) et seq.

\*520 [Gerald F. Richman](#), [Alan G. Greer](#) and [John R. Whittles](#) of Richman, Greer, Weil, Brumbaugh, Mirabito & Christensen, P.A., West Palm Beach, Florida; [Scott E. Perwin](#) and [Pamela I. Perry](#), Miami, Florida; [Kent Spriggs](#) of Spriggs & Davis, Tallahassee, Florida; [Robert D. Lenhard](#), Washington, D.C.; [John R. Cuti](#), [Jonathan S. Abady](#) and Llan M. Maazel of Emery, Cuti, Brinckerhoff & Abady PC, New York, New York; and [Eric Seiler](#) and [Katherine L. Pringle](#) of Friedman, Kaplan, Seiler & Adelman LLP, New York, New York, for Appellants.

[Terry C. Young](#) and [Janet M. Courtney](#) of Lowndes, Drosdick, Doster, Kantor & Reed, P.A., Orlando, Florida, for Seminole County Canvassing Board, Sandra Goad, Kenneth McIntosh and John Sloop; [Barry Richard](#) of Greenberg, Traurig, P.A., Tallahassee, Florida, [Benjamin L. Ginsberg](#) of Patton Boggs LLP, Washington, D.C., [B. Daryl Bristow](#) and [Amy Douthitt Maddux](#) of Baker Botts LLP, Houston, Texas, and [Stuart Levey](#) of Miller, Cassidy, Larroca & Lewin LLP, Washington, D.C., for George W. Bush and Dick Cheney; [Kenneth W. Wright](#) of Shutts & Bowen, LLP, Orlando, Florida, for Republican Party of Florida; and [Deborah K. Kearney](#), General Counsel, and [Kerey M. Carpenter](#), Assistant General Counsel, Tallahassee, Florida, and Jonathan Sjoström, [Victoria L. Weber](#), [Donna E. Blanton](#) and [Elizabeth C. Daley](#) of Steel, Hector & Davis LLP, Tallahassee, Florida, for Katherine Harris, as Florida Secretary of State, and Katherine Harris, [L. Clayton Roberts](#), and [Bob Crawford](#), as members of the Florida Elections Canvassing Commission, Appellees.

[Mathew D. Staver](#), Erik W. Stanley, Joel L. Oster, [Dean F. DiBartolomeo](#), [Katherine Christy](#), [Marvin Rooks](#), [John Stemberger](#), Mike Gotschall, and Sharon Blakeney, Liberty

Counsel, Longwood, Florida, for Tim Brock, et al., Intervenors.

PER CURIAM.

We have for review a trial court order appealed to the First District Court of Appeal, which certified the order to be of \*521 great public importance and to require immediate resolution by this Court. We have jurisdiction pursuant to [article V, section 3\(b\)\(5\) of the Florida Constitution](#). For the reasons expressed below, we affirm.

Appellants filed suit against the Seminole County Canvassing Board and others pursuant to [section 102.168, Florida Statutes \(2000\)](#), to contest the 2000 election. A bench trial was held in this case on December 6 and 7, 2000. The appellants alleged there were thousands of requests for absentee ballots in Seminole County that should be invalidated because the requests were not made in strict compliance with the absentee ballot laws. Specifically appellants claimed the Seminole County Supervisor of Elections illegally treated Republican Party representatives differently from other political party representatives by allowing them access to her office for the purpose of adding voter identification numbers to requests that did not contain that information. Based on the complaint, answers, admissions, stipulations, and the evidence adduced at trial the following facts were determined.

Prior to the November 7, 2000, general election both the Republican and Democratic Parties prepared and mailed to registered voters for their respective parties preprinted requests for absentee ballots. The parties agreed that this practice is not prohibited by law. The request form prepared by the Democratic Party had a space provided for the voter identification number or the voter identification number was preprinted on the request form. In contrast, the request form prepared by the Republican Party did not include either a space for the voter identification number or the preprinted number. In addition there was no instruction on the Republican form informing the voter to include the voter identification number.

Generally, when absentee ballot request forms are returned, the Supervisor's office mails out the absentee ballots with

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instructions. In this instance, thousands of request forms without voter identification numbers were returned to the Supervisor's office. Thereafter, Republican Party representatives, who were not employed in the Supervisor's office, used the Supervisor's office and equipment to add voter identification numbers to request forms. Once the voter identification numbers were added, the Supervisor accepted the requests and sent absentee ballots to the persons named on the request forms.

[1][2][3] In its comprehensive order, the trial court denied relief, stating in relevant part:

The first issue for this court to decide is whether the absentee voting laws require strict compliance with all its provisions, or whether substantial compliance is sufficient to give validity to the ballots. Did the addition of voter registration identification numbers on the request forms after they were submitted to the Supervisor constitute such an irregularity that the ballots cast thereafter should be invalidated, or did the addition of that information constitute a violation of the absentee voter election laws that did not impugn or compromise the integrity of the ballots cast or ultimately the election itself?

Section 101.62, Florida Statutes, provides that the supervisor of elections may accept a request for absentee ballots from an elector and that the person making the request must disclose:

1. The name of the elector for whom the ballot is requested;
2. The elector's address;
3. The last four digits of the elector's social security number;
4. *The registration number on the elector's registration identification card;*
5. The requester's name;
6. The requester's address;
7. The requester's social security number and, if available, driver's license number;
- \*522 8. The requester's relationship to the elector; and
9. The requester's signature (written requests only). (emphasis supplied).

Although the statute clearly sets forth what must be disclosed by the person requesting the absentee ballot, there is no statutory directive regarding the treatment of absent-

ee ballot requests which do not contain all of the information required by Section 101.62(1)(b), Florida Statutes. In contrast, there is a clear statutory directive regarding the treatment of absentee ballots which do not contain all of the information required on the ballot. Section 101.68(2), Florida Statutes specifically provides that a ballot that fails to include the statutory elements is illegal....

[In McLean v. Bellamy, 437 So.2d 737, 742-743 (Fla. 1st DCA 1983), the court stated:

Our examination of Section 101.62 leads us to conclude that its provisions are directory. We are unable to glean from the provision of that section a legislative intent that the failure to follow the letter of its provisions should result in the invalidation of absentee ballots cast by qualified electors who are also qualified to vote absentee.] [FN1]

FN1. The language in the brackets was included in another portion of the trial court's order.

[A]fter rampant absentee voter fraud occurred in the Miami mayoral election, the Miami Beach City Commission election and the Hialeah mayoral election, the Florida Legislature amended and detailed absentee voter laws to include the requirements now found in Section 101.62, Florida Statutes.... Unless a statutory provision also specifically states that the lack of information voids the ballot, the lack of the information does not automatically void the ballot. *See*, Final Bill Research & Economic Impact Statement, House of Representatives Committee on election Reform, CS/HB Sections 3743, 3941 at page 8 (passed as CS/HB 1402) on May 12, 1998.

Because the irregularities in the casting of the actual ballot are directory unless specified in a statute as mandatory, it follows that the information listed as necessary for a request for an absentee ballot is directory, and not mandatory. It cannot be said that the lack of a voter registration identification number on an absentee ballot request is calculated to effect the integrity of the request itself or the subsequent ballot or the election, when substantial other identifying information has been included on the request. In comparison, Section 102.68(2)(c), Florida Statutes requires that a voters name, address and signature must be included on an absentee ballot. That section goes on to provide specifically that the failure to include the absentee

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voter's name address and signature voids the ballot.

There is no invalidating directive for failure to include the voter registration identification number on a request for an absentee ballot....

The statutory requirement that the requester "must" disclose the nine items in [Section 101.62\(b\)](#) is simply not a definitive statement by the Legislature that requests which are missing the voter's registration number are illegal or void. In contrast, [Section 101.68\(2\)\(c\)1.](#), Florida Statutes provides that an absentee ballot shall be considered illegal if it does not include the signature and the last four digits of the social security number of the elector, as shown by the registration records, and either the subscription of a notary [or] the signature, printed name, address, voter identification number, and county of registration of one attesting witness, who is a registered voter in the state.

....

The second issue for the court's determination is whether the Supervisor of Elections treated the representatives of \*523 the Florida Republican Party differently than she treated representatives of other political parties to the extent that the integrity of the ballots or election was compromised. The plaintiffs allege that the Supervisor of Elections "treated the interests of non-Republican voters differently from those of Republican voters" because she informed the public that she would strictly enforce the requirements of [Section 101.62, Florida Statutes](#), including the disclosure of the voter identification number, yet she honored the request of a Republican representative to obtain access to the incomplete request forms and add the voter identification numbers and did not notify the Democratic Party or any other group of this development. The plaintiffs argued at trial that this failure to notify others and invite others to take the same actions constituted illegal disparate treatment. However, the proof offered at trial failed to show that she treated other political parties differently than she treated the Republican party.... Unlike the Republican mail-out, the Democratic mail-out did not suffer from the general omission of the voter identification numbers. Therefore, there was no need for the Democrats to request access to the request forms to correct them, and in fact, there was no evidence that such a request was made by the Democratic party or any other political subdivision. Consequently, there was no evi-

dence that the request of any representative, including any Democrat, was denied by the Supervisor. Thus, there was no adequate showing that there was disparate treatment of Republicans as opposed to any other individuals or groups with regard to the ballot request forms.

There was no allegation or evidence that any of the absentee votes counted were not "cast by qualified, registered voters who were entitled to vote absentee and who did so in a proper manner." [Boardman v. Esteva, 323 So.2d 259 at 269 \(Fla.1975\)](#). The effect the irregularities complained of could have had on the election was the prevention of voting by certain requesters for absentee ballots whose requests lacked the voter identification number and who were unwilling or unable to go to their precinct to cast their vote on election day. There was no evidence that any absentee ballot requests were excluded or denied solely because they lacked the required voter registration identification number.

... The evidence presented in this case does not support a finding of fraud, gross negligence, or intentional wrongdoing in connection with any absentee ballots.... That the Supervisor's judgement may be seriously questioned, and that her actions invited public and legal scrutiny, do not rise to the level of a showing of fraud, gross negligence, or intentional wrongdoing.

[Jacobs v. The Seminole County Canvassing Board, No. 00-2816, 2000 WL 1793429 at \\*3-5 \(Fla.2d Cir.Ct. Dec. 8, 2000\)](#).

[4] We find competent, substantial evidence to support the trial court's conclusion that the evidence in this case does not support a finding of fraud, gross negligence, or intentional wrongdoing in connection with any absentee ballots. The record in this case is clear that the application forms in question contained the name, address, signature, and the last four digits of the social security number of the applicant. This information was sufficient to establish the qualifications of the applicant. [FN2] It was also stipulated by the parties that the application forms had already been signed by the applicant when the third parties corrected the omissions on the forms. Hence, we conclude that the trial court reached a proper conclusion guided by our prior case law.

[FN2] While there may be questions regarding the

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application forms in this case, there is no question that the ballots themselves conformed to the requirements of [section 101.68, Florida Statutes \(2000\)](#), which requires the signature and the last four digits of the social security number of the elector, and either subscription of a notary or identifying information from the attesting witness.

\*524 [5][6] We especially note, however, that at the conclusion of its order, the trial court found that the Supervisor of Elections of Seminole County exercised faulty judgment in first rejecting completely the requests in question, and compounded the problem by allowing third parties to correct the omissions on the forms. Nothing can be more essential than for a supervisor of elections to maintain strict compliance with the statutes in order to ensure credibility in the outcome of the election. [FN3] We find the Supervisor's conduct in this case troubling and we stress that our opinion in this case

[FN3](#). We note that chapter 104 of the Florida Election Code provides certain penalties for election officials and others who violate the Code. However, violations of the Code will not necessarily invalidate the votes of innocent electors.

is *not* to be read as condoning anything less than strict adherence by election officials to the statutorily mandated election procedures. Such adherence is vital to safeguarding our representative form of government, which directly depends upon election officials' faithful performance of their duties.... [T]his case [does not] concern[ ] potential sanctions for election officials who fail to faithfully perform their duties. It is for the legislature to specify what sanction should be available for enforcement against election officials who fail to faithfully perform their duties.

[Beckstrom v. Volusia County Canvassing Board, 707 So.2d 720, 725-26 \(Fla.1998\)](#).

Accordingly, we affirm the portions of the trial court's order that are set forth above and adopt them as our own. We also affirm the trial court's conclusion that appellant is entitled to no relief.

It is so ordered.

[WELLS](#), C.J., and [HARDING](#), [ANSTEAD](#), [PARIENTE](#), [LEWIS](#) and [QUINCE](#), JJ., concur.

[SHAW](#), J., recused.

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#### **Briefs and Other Related Documents ([Back to top](#))**

- [2000 WL 33998565](#) (Appellate Brief) Defendant-Intervenors' Answer Brief (Dec. 11, 2000)
- [SC00-2447](#) (Docket) (Dec. 08, 2000)
- [2000 WL 33998564](#) (Appellate Brief) Brief of Appellees George W. Bush, Dick Cheney, and the Republican Party of Florida (Dec. 2000)
- [2000 WL 33998566](#) (Appellate Brief) Brief of Appellant (2000)
- [2000 WL 33998567](#) (Appellate Brief) Brief of Appellees the Seminole County Canvassing Board, Sandra Goard, Kenneth McIntosh and John Sloop (2000)
- [2000 WL 33998936](#) (Appellate Brief) Answer Brief of Katherine Harris, as Florida Secretary of %Y(60)B2Canvassing Commission (2000)

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C

Court of Appeals of Kentucky.  
Patsy **JERNIGAN**, Appellant,

v.

Jessie Pearl **CURTIS**, Appellee.

**No. 81-CA-1996-MR**

Oct. 28, 1981.

Discretionary Review Denied Oct. 30, 1981.

Appeal was taken from judgment of the Monroe Circuit Court, Terrill A. Wilson, Special Judge, upholding political party primary election for office of circuit court clerk. The Court of Appeals, McDonald, J., held that: (1) vote that was illegally openly cast could not be counted at all; (2) with respect to precinct in which over 500 votes were cast, circuit judge did not err in refusing to throw out vote of precinct because of seven vote discrepancy between voting machine total and clerk's checklist, improper assistance given in less than ten voters' cases, and insubstantial open voting; and (3) where officers in a second precinct made little effort to properly perform their functions, husbands and wives entered voting booths together, voters were illegally assisted, and there was evidence of bribery of voters on significant scale, precinct election was so tainted with fraud that result must be discarded and election determined on basis of remaining votes.

Order accordingly.

West Headnotes

[\[1\] Elections](#)  **154(9.1)**

[144k154\(9.1\) Most Cited Cases](#)

(Formerly 144k154(91/4), 144k154(9), 144k154, 144k154(1/4))

Since election contest was filed and summons issued within time period required by statute and contestee received actual service of the summons, contestee could not complain of any technical defect in service of summons if there was one.

[\[2\] Elections](#)  **158**

[144k158 Most Cited Cases](#)

Vote that was illegally openly cast could not be counted at all.

[\[3\] Elections](#)  **154(10)**

[144k154\(10\) Most Cited Cases](#)

Evidence supported finding that voters had not been assisted in any way when they voted, contrary to their contention that they had received improper assistance at precinct and that their votes were not cast for candidate they had intended to vote for.

[\[4\] Elections](#)  **154(10)**

[144k154\(10\) Most Cited Cases](#)

In election contest, evidence supported finding that two persons who voted at one precinct had not been residents of county and were therefore not entitled to vote at that precinct or in the political party primary election for county of office.

[\[5\] Elections](#)  **158**

[144k158 Most Cited Cases](#)

In action contesting results of primary election in precinct in which over 500 votes were cast, circuit judge did not err in refusing to throw out vote of precinct because of seven vote discrepancy between voting machine total and clerk's checklist, improper assistance given in less than ten voters' cases, and insubstantial open voting.

[\[6\] Elections](#)  **158**

[144k158 Most Cited Cases](#)

For vote of precinct to be thrown out for irregularity in conduct of election, the proof must be of such flagrant, extensive and corrupt violations of election laws as to destroy the fairness and equality of election.

[\[7\] Elections](#)  **158**

[144k158 Most Cited Cases](#)

Where precinct officers made little effort to properly perform their functions at primary election, husbands and wives entered voting booths together, voters were illegally assisted, and there was evidence of bribery of voters on significant scale, precinct election was so tainted with fraud that result must be discarded and election determined on basis of remaining votes.

\***687** James C. Jernigan, Tompkinsville, David L. Williams, Burkesville, for appellant.

Joe L. Travis, Tompkinsville, for appellee.

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OPINION AND ORDER

Before HOWERTON, McDONALD and WINTER-SHEIMER, JJ.

McDONALD, Judge.

This appeal has been taken from a judgment upholding the Republican primary election for the office of circuit court clerk of Monroe County held on May 26, 1981. Patsy Jernigan, a defeated candidate, initiated the contest seeking to set aside the election based upon certain specific illegal votes and extensive violations of the Kentucky voting laws that occurred in two precincts.

In the primary election conducted on May 26, 1981, three candidates contested the Republican nomination for the office of circuit court clerk of Monroe County. The following table sets out the candidates, the total votes they received in the election, and the number of votes that they received in each of the two disputed precincts.

CINCT NO. 1 CANDIDATES (Fountain Run)	PRECINCT NO. 6 TOTAL VOTES (West Tompkinsville)	PRE-
Jessie Pearl Curtis	1,861	
153	167	
Patsy Jernigan	1,857	
61	158	
Melva Jean Headrick	889	
12	107	
-----		
	4,607	
226	432	

\*688 On June 9, 1981, Mrs. Jernigan initiated this election contest challenging the legality of five specifically named voters who cast their votes at the two precincts listed above, and also seeking to have the vote of both of those precincts thrown out because of alleged extensive violations of the election law. The respondent filed a motion to quash the

summons and to have the contest dismissed because the summons was not served on her personally by the sheriff within 15 days of the date of the election.

As part of her answer, Curtis filed a counterclaim alleging violations of [K.R.S. 121.055](#) in that certain poll workers had expended money and other things of value directly and indirectly to persons in consideration of the vote of that person.

Extensive evidence was heard by the circuit court which is contained in over 900 pages of transcript in the record. On September 30, 1981, the trial court entered a 73-page resume of evidence, findings of fact, conclusion and judgment. The judgment found two of the specifically named voters to have voted illegally, found that two others had voted legally, and failed to make any finding as to the fifth voter. The judgment found that the contests had been timely initiated. Finally, the judgment found that any violations of the election laws in the precincts named in the petition did not amount to such widespread irregularity that the votes of those precincts should be discarded, and declared Curtis to be the winner of the election.

The issues presented by this appeal are as follows: (1) Whether or not this election contest was timely initiated; (2) whether the voters specifically named in the petition cast their votes illegally; and (3) whether there was such widespread illegal conduct at either the Fountain Run or the West Tompkinsville precincts that the vote of that precinct should be discarded.

1. Whether or not the contest was timely initiated.

The contestee filed a motion to quash the summons and dismiss the appeal on the grounds that the summons had not been delivered to a sheriff or other individual authorized to serve summons within fifteen (15) days.

It is not disputed that the complaint was filed within fifteen days of the date of the primary election and that summons was issued by the clerk and delivered to the contestee by the contestant's attorney on that same day. The statute covering procedure in primary elections provides that the summons may be personally served on the contestee in any county, or

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it may be served by leaving a copy at his home with a member of his family over sixteen years of age, or by posting a copy on the door of his residence. The statute does not address who may serve a summons in an election case.

[1] It would appear that since the contest was filed and summons issued within the time period required by the statute and since the contestee did receive actual service of the summons, the contestee cannot complain of any technical defect if indeed there was one.

## 2. Illegal Voting.

[2] Callie Gillenwater. The circuit court concluded that the vote of Callie Gillenwater was illegally cast for Mrs. Jessie Pearl Curtis. It cannot be said that this finding was clearly erroneous, and therefore, it cannot be disturbed upon appeal. However, the circuit court was erroneous in adding the vote to Mrs. Jernigan's total \*689 after deducting it from Mrs. Curtis' total. The illegality here was not that Mrs. Gillenwater's vote was cast for someone other than the candidate for whom she wished to vote, but rather was that the vote was openly cast. A vote that is illegally cast cannot be counted. See *Sims v. Atwell*, Ky., 556 S.W.2d 932 (1977).

[3] G. C. Key and Joanne Key. The Keys testified that they received improper assistance at the Fountain Run precinct, such that their votes were improperly cast for Mrs. Curtis when they intended to vote for Mrs. Jernigan. There was contradictory testimony from the individual who allegedly assisted them and several election officers that the Keys were not assisted in any way at the polls. The lower court found that they were not assisted in any way. There was adequate evidence to support this finding.

[4] Levi Waller and Vera Waller. Levi Waller and his wife, Vera Waller, voted at the Fountain Run precinct. In the complaint it was alleged that they were not residents of Monroe County and were therefore not entitled to vote at that precinct or in this race. The circuit court found that the Wallers were actual residents of Allen County and should not have been allowed to vote in the Monroe County race. The tax records appeared to have been particularly persuasive. They showed that Mr. Waller paid taxes on the residential part of his property in Allen County and qualified for

the homestead exemption in Allen County. There is no reason to disturb the finding that the Wallers are residents of Allen County rather than of Monroe County.

The circuit court found, based on Mr. Waller's testimony, that he had voted for Mrs. Curtis. This vote was properly deducted from Mrs. Curtis' majority.

The circuit court was unable to obtain the testimony of Mrs. Waller, in spite of repeated efforts, and the circuit court made no actual finding as to how she had voted. The circuit court did state that it was sure that if her testimony had been obtained, she would have testified that she voted for Mrs. Curtis. It may be that given her husband's reputation for bringing out the vote in the precinct, and the effort that was expended to avoid having her testify, the circuit judge could have made a finding that she had voted for Mrs. Curtis. However, little would be served by the making of such a finding at this point because of the earlier finding the court made regarding the votes cast by G. C. and Joanne Key.

Deducting the votes of Callie Gillenwater and Levi Waller from Mrs. Curtis' total, leaves her with a total of 1,859 votes. This is still two more than the number of votes received by Mrs. Jernigan. Even if it were determined that Mrs. Waller had cast an illegal vote for Mrs. Curtis, this would still leave Mrs. Curtis with a majority of one vote. Therefore, the result of the election is not altered by the rulings on the illegal votes.

## 3. Precinct Irregularities.

West Tompkinsville Precinct. It is the opinion of this panel of this Court that the circuit judge was extremely gentle in reflecting on the conduct of the election officers in these two precincts. The conduct of this election smacks of almost incredible misfeasance and in one case, at least, deliberate malfeasance.

There were two significant errors alleged in the West Tompkinsville precinct. The first was that there was a discrepancy between the number of votes cast on the machine and the number of voters casting their ballots at the polling place. Second, it was alleged that open voting occurred in the precinct in that assistance was provided to various voters by

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election officials without the administration of the oath required by statute.

The numbered discrepancy arises in two different fashions. It was admitted by at least one election official that when the polls were closed, the voting machine showed that 531 votes had been cast during the day, but that the clerk's check list of voters voting showed that only 526 voters had voted at that precinct. Rather than turn in such a report, the election officials \*690 wrote in five additional names on the check list to cause the totals to balance. However, there is an additional problem. The name of Eugene Russell appears twice on the check list, at numbers 291 and 346. The name of Mary Goad also appears twice, at numbers 120 and 175. There is only one person with each of those names registered in the precinct. Each of those individuals testified that they had voted only once. Therefore, there is an additional two-vote discrepancy which no one has attempted to explore.

That this should be so is not too surprising. Mr. Condra testified that at one point they sent a Republican into the polling booth when the machine was set up to allow a Democrat to vote. The Republican voter pointed out to the election officials that he was unable to pull levers in his party's primary. To avoid the problem, the election officials cast a vote for one of the Democratic sheriff candidates and then switched the machine to allow the Republican to vote. Mr. Condra testified that he knew that this happened once for sure.

It was testified by several of the election officials that no one was allowed to vote more than once in the precinct. The discrepancy was acknowledged by all of the election officials except a Mr. Goad, who denied the problem existed.

It was also admitted by all of the election officials, with the exception of Mr. Goad, that assistance was provided to various voters without the administration of the statutorily required oath and the completion of the affidavit. Mr. Goad contended that the forms had been completed but then stolen from the table at the precinct. It does not appear from the transcript that anyone took this contention very seriously. It is undisputed that when the election materials were returned to the county clerk, they contained only one partially completed form for a Mr. Fred Adams.

The number of voters who were so assisted is subject to dispute. One election official, Mr. Hagan, testified that three or four people were assisted. He identified Fred Adams and Lee Henry as having received assistance. Mr. Condra also testified that Fred Adams received assistance, and that as many as four people were in the booth at once when the Dyers came in to vote. Four individuals testified that they received assistance to vote in the West Tompkinsville precinct. These were A. Dyer, M. Dyer, R. Humes, and M. Humes. Mr. Goad, an election official, testified that Lee Kingerly had received assistance. The contestant's husband, an attorney, testified that he was present at the precinct when Coomer Tooley voted and that he saw this individual assisted by Mr. Condra. Mr. Tooley was never called to testify; Mr. Condra doesn't remember.

The contestant's husband also testified that in the several hours he was at the precinct during the course of the day he was able to look into the polling place through the door and that on many occasions, he saw four legs under the curtain of the voting booth. That open voting occurred was not disputed by any of the election officials who admitted that it was the normal practice to allow married couples to go into the voting booth together. How frequently this occurred on May 26, 1981, was never even speculated on.

[5] Although the above indicates that the election officials at the West Tompkinsville precinct were either ignorant of their function or didn't care how they performed it, it is our opinion that the circuit judge was not erroneous in refusing to throw out this precinct. The count discrepancy was only shown to be seven votes. Improper assistance was proven in less than ten cases. The instances of improper open voting were not even estimated, and it cannot be assumed that it was substantial. There were over 500 votes cast in this precinct on May 26. It has not been demonstrated that the errors set out above so destroyed the fairness of the election in this precinct that the votes of this precinct should be discarded.

Fountain Run Precinct. Fountain Run precinct (Precinct No. 1) is a smaller precinct than No. 6. The clerk's voter check list shows that 291 voters cast their ballots at that precinct on election day. Two hundred \*691 and twenty-six (226) votes were cast in this disputed contest. The election of-

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ficers at the Fountain Run precinct were Brenda Hunt, Eual Hunt, Adrian Lee, and Marguerite Duncan.

There are a variety of errors which should be noted in the conduct of the election in this precinct. Principally it was alleged that open voting was permitted in that assistance was provided to voters without the administration of the necessary oath and the completing of the necessary affidavits and that there was such bribery and corruption in the conduct of the election in the precinct that the election in the precinct was rendered unfair.

The most insignificant problem is that the name of one voter, Roy Lee York, appears twice on the voters' check list at numbers 65 and 166. The precinct clerk, Brenda Hunt, was unable to explain this, although she testified she was sure that Roy Lee York did not vote twice. She testified that she was almost certain that he did not receive any assistance in voting. The voter signature list shows that Roy Lee York signed his name with a mark.

When the polls were opened at Fountain Run, there were only three election officials present. One of the officials who had been chosen to serve on the basis of past service, informed the county clerk shortly before the election that he would not serve. The clerk was unable to get another Democrat from this heavily Republican precinct to serve as an election officer, and it was not until election morning that he secured Adrian Lee from another precinct to serve at Fountain Run. Mr. Lee did not arrive at the polling place until sometime between 10:00 and 11:00 o'clock. Until that time, the election proceeded with, at most, three election officials. During that same time period, Brenda Hunt was also absent from the polling place for brief periods while she attempted to get through to the county clerk to inform him of the missing election official. Her task was complicated by the fact that many phones in the area were inoperative. Thus, for some period of time, there were only two election officials at the poll.

There are some interesting discrepancies in the return sheet for this precinct. First is the fact that Adrian Lee signed the certification as to the settings on the voting machine when the polls were opened. Mr. Lee did not arrive at the polls until sometime between 10:00 and 11:00 a. m. Secondly, the

number shown as registering on the protective counter when the polls opened in the morning is the same as that shown on the protective counter when the polls closed. The number of the seal used to seal the machine at 6:00 p. m. is exactly the same as the seal number on the machine when it was opened at 6:00 a. m.

The simple fact is that both certificate No. 1 (for opening the machine) and certificate No. 2 (for closing the machine) were filled out at the same time. This was admitted by the precinct clerk, Brenda Hunt. No one read the protective counter in the morning or noted the number of the seal that was broken to open the machine. It appears that the opening counter number shown in certificate No. 2 was arrived at by subtracting 291 (the number of names on the clerk's check list of voters voting) from the closing reading. While this avoids embarrassing discrepancies such as that which occurred in precinct No. 6, it is clearly improper practice. It prevents the discovery of problems such as Roy York's name appearing twice on the clerk's list. Brenda Hunt also admitted that she alone signed the return sheet. She also wrote in the names of the other precinct election officials.

The above items are individually not significant, but when considered accumulatively with the material that follows, they are pieces of a very sorry picture of the May 26 primary at Fountain Run.

The first major problem is that of open voting. Marguerite Duncan testified that husbands and wives were allowed to enter the polls together. How frequently this happened on May 26 was never speculated on.

There were no voter assistant's affidavits completed at Fountain Run. It is admitted \*692 that assistance was provided. Brenda Hunt testified that some but not many voters were assisted. Her father, Eual Hunt, estimated that he assisted no more than 25 people to vote. Adrian Lee testified that as many as 50 people voted with assistance.

Under Kentucky law, the completion of an affidavit and the administration of an oath is mandatory before a person may be assisted in voting. This was not done at all in Fountain Run on May 26. Usually such failure is due to ignorance on the part of the election officials. This is not the case here.

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Brenda Hunt, a college graduate and schoolteacher who claimed to have studied the precinct officer's manual and who was aware of the requirement of the law, decided that oaths and affidavits were unnecessary: "Because, I told you, if you can't trust the judges (precinct officers), you shouldn't have the election anyway. That's the way I feel about it." "And I won't the next time ...."

The circuit judge split the difference between 3 and 50 and decided that since 27 was 11% of the 291 votes cast in the precinct, it was insufficient to throw out the result in the precinct. It is the law that the 20% rule is irrelevant in determining whether or not to invalidate the vote of a precinct. It would appear that standing alone, the amount of proven open voting would not justify throwing out the result in this precinct. However, the open voting, the technical failures of the election officers and their defiance of the law in providing assistance to voters create an ominous backdrop for the activities of Levi Waller and Bo Tooley.

It should be noted at the outset that this is not a corrupt practices case. The contestant did not seek to disqualify Mrs. Curtis as a candidate because of her participation in bribery. Not one item of evidence was introduced to connect Mrs. Curtis with any corrupt scheme or any wrongdoing. What is alleged is that the corrupt activities of Mrs. Curtis' supporters, together with the misfeasance (and malfeasance) of the election officers, so destroyed the fairness of the election in the Fountain Run precinct that the result obtained in that precinct must be discarded.

Levi Waller admitted buying votes. How many he purchased is uncertain. He admits spending between \$100 and \$200. Waller denies going to the bank on election day, but a teller testified that Waller did obtain a supply of \$5.00 bills at the bank. This is only one of many lapses of memory on Mr. Waller's part.

This was not Waller's first effort at vote buying. The Tompkinsville police chief, the Fountain Run city clerk, and the contestant's husband (who was qualified as being knowledgeable about Monroe County politics) testified that Waller had a reputation of vote buying in the Fountain Run precinct. The same reputation evidence was offered against Bo Tooley, who also worked the Fountain Run precinct on May

26 on Mrs. Curtis' behalf. Tooley denied any wrongdoing, but at least one voter testified that Tooley offered her \$10.00 to vote his way. Tooley's excessive concern with the presence in the area of an individual who was taking pictures appears suggestive. Billie Jo Dunn testified that she witnessed Waller and Tooley bribing voters. Adrian Lee testified that he saw Waller give money to two women.

Waller did go frequently to the precinct clerk to check to see if certain voters were registered. He says that he was checking on the registration of people he didn't know at their request. He is unable to explain why they would request that he check when they were going in anyway, and did not know Waller prior to coming to the poll. The same explanation of Waller's activities was offered by Eual Hunt, an election officer. He was also unable to explain the reason for the procedure.

Mitchell Taylor, a defeated magisterial candidate, testified that Brenda Hunt told him about two weeks before the election that "(t)hey bring the people to the door and have the names already written out on a piece of paper, and we take them and vote them. That way we don't have to fill out all those papers." Brenda Hunt specifically denied making that statement.

\*693 Adrian Lee testified that Eual Hunt had a "slate" card. A "slate" was defined as a group of candidates who pooled their money and efforts in an election. Hunt denied that he had such a card. Lee testified that Hunt told him that the practice was for him alone to assist the voters who so requested. Lee stated that Mrs. Curtis was on Hunt's slate. Hunt also denied making any such statement to Lee.

That Waller and Tooley were working on behalf of Mrs. Curtis, among others, is not disputed. At one point, Waller identifies the slate of candidates which he supported. At several other points he denies remembering who he supported. The candidates which he listed as being on the slate did very well at Fountain Run. Only one of Waller's candidates lost the precinct; most won by very substantial margins.

There was other evidence offered to indicate that something was amiss at Fountain Run: (1) Mrs. Curtis received only 12 votes in the Fountain Run precinct in a prior election where

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she did not have Waller's support; (2) Mrs. Jernigan had significant ties to the Fountain Run area; Mrs. Curtis did not. However, Mrs. Curtis won the precinct by a 3-1 margin; (3) Things were normally pretty "loose" in Fountain Run. The city clerk testified that 80% of the voters were "floaters" or votes for sale. The city clerk further testified that there were large numbers of people there who were unable to write and for whom he had to endorse checks. James Jernigan testified that he and his wife were among the few husbands and wives who didn't go into the polls together when they voted at Fountain Run, and that individually, they were among the few who didn't have someone peering through the curtain watching them vote.

When the vote of a precinct is challenged on the grounds that the election conducted in the precinct was unfair, the law is:

(1) that the vote of a precinct can be thrown out for irregularities in the conduct of the election therein of such magnitude as effectively to destroy any hope that the results as tabulated were a fair indication of the sense of the voters in that precinct and

(2) that the result of the election can be determined on the basis of the votes from the remainder of the election territory unless the number of votes in the precinct constituted a substantial portion (20% or more) of the votes in the entire territory. [Upton v. Knuckles, Ky., 470 S.W.2d 822, 825 \(1971\)](#).

[6] The proof must be of such flagrant, extensive, and corrupt violations as to destroy the fairness and equality of the election. [Upton v. Knuckles, supra, at 827](#).

[7] It is the opinion of this Court that there was overwhelming evidence of dereliction of duty on the part of the precinct officers, such that it appears that the officers made little if any effort to properly perform their function. There was evidence of an extensive amount of open voting in that husbands and wives were permitted to enter the poll together and that voters were improperly and illegally assisted in casting their votes. That there was evidence of bribery of voters on a determined and significant scale. This combination of factors compels a finding that the election in Fountain Run was so tainted with fraud that the result must be discarded and the election determined on the basis of re-

maining votes.

It is ORDERED that the judgment appealed from is reversed and the case is remanded to the Monroe Circuit Court for the entry of a judgment declaring Patsy Jernigan to be the Republican nominee for the office of circuit court clerk. It is further ORDERED that, in exercise of this Court's option under [K.R.S. 120.075\(3\)](#), this opinion be final immediately upon rendition.

All concur.

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**C**

Supreme Court of Minnesota.  
 Charles E. **JOHNSON**, contestant, Respondent,  
 v.  
 Frank **TANKA**, contestee, Appellant.  
**No. 40805.**

Aug. 25, 1967.  
 Rehearing Denied and on Appeal from Taxation  
 of Costs Oct. 27, 1967.

Appeal from judgment of the District Court of Isanti County, William T. Johnson, J., growing out of an election contest. The Supreme Court, Murphy, J., held that where number of ballots found in election box, including six ballots not initialed by election judges, exceeded number of registered voters by two, it was improper to resolve issue of excess ballots by withdrawing at random two ballots from the election box, but rather unmarked ballots should have been laid aside and not counted.

Reversed and remanded.

West Headnotes

**[1] Elections**  **177**

[144k177 Most Cited Cases](#)

Statutory requirement that all ballots must be initialed by the election judges is intended to assure the voter that he is given an authentic ballot, to enable the public to identify the actual ballot cast in the event of an election contest, and to prevent fraud. [M.S.A. § 204.05](#), subd. 1.

**[2] Elections**  **227(1)**

[144k227\(1\) Most Cited Cases](#)

No person should be deprived of his right to vote because of the neglect or carelessness of election officials unless that conduct has been carried to such an extent as to affect the true outcome of the election and put the results in doubt.

**[3] Elections**  **227(8)**

[144k227\(8\) Most Cited Cases](#)

Rule that neglect and carelessness of election officials should not deprive a person of his right to vote must yield to express provisions of statute relating to the disposition of excess ballots. [M.S.A. § 204.20](#) and subds. 1, 2.

**[4] Elections**  **227(1)**

[144k227\(1\) Most Cited Cases](#)

The outcome of an election should rest upon ballots received according to law and should not be determined by illegal votes.

**[5] Elections**  **239**

[144k239 Most Cited Cases](#)

For purposes of statute providing that if there is an excess of properly marked ballots, the judges shall replace them in the box, and one judge, without looking, shall withdraw from the box a number of ballots equal to the excessive number, and the withdrawn ballots shall be preserved but not counted, a "properly marked ballot" is one marked with the initials of the judges. [M.S.A. § 204.20](#), subd. 2.

**[6] Elections**  **239**

[144k239 Most Cited Cases](#)

Statute relating to the disposition of excess ballots applies to the conduct of election judges only where, after removing the uninitialed ballots, it is found that there is still an excess of properly marked ballots. [M.S.A. § 204.20](#), subd. 2.

**[7] Elections**  **239**

[144k239 Most Cited Cases](#)

Where number of ballots found in election box, including six ballots not initialed by election judges, exceeded number of registered voters by two, it was improper to resolve issue of excess ballots by withdrawing at random two ballots from the election box, but rather unmarked ballots should have been laid aside and not counted. [M.S.A. § 204.20](#), subd. 2.

**[8] Elections**  **307**

[144k307 Most Cited Cases](#)

In view of meritorious claims of both election contestant and contestee on appeal, the costs and disbursements incurred should be shared equally between the parties. [M.S.A. § 607.01](#).

**\*\*186** Syllabus by the Court

**\*468** [Minn.St. 204.20](#), relating to election procedures, requires that in the counting process election judges shall count the ballots to determine whether the number of ballots corresponds with the number that the election register or registration file shows were cast. Where there is found to be a

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greater number of ballots in the box than appears in the election register, the judges are required to withdraw from the box those ballots which are not initialed by the judges and to preserve but not count such ballots.

Parker & Olsen, Cambridge, for appellant.

Dablow & Johnson, Cambridge, for respondent.

#### OPINION

MURPHY, Justice.

This is an appeal from a judgment of the district court growing out of an election contest by which it was determined that Charles E. Johnson \*469 was elected auditor of Isanti County by a margin of 2 votes. The issue presented must be resolved by interpretation of [Minn.St. 204.20](#),<sup>[FN1]</sup> which relates to election procedures to be followed with reference to ballots not properly marked by the judges under circumstances where the ballots cast are in excess of the number found in the election register.

<sup>[FN1]</sup> [Minn.St. 204.20](#) provides: 'Subdivision 1. The judges shall remove all the ballots from the box, and without considering how the ballots are marked they shall ascertain that each ballot is single, and count them to determine whether the number of ballots corresponds with the number that the election register or registration file shows were cast.

'Subd. 2. If two or more ballots are found so folded together as to appear like a single ballot, the judges shall lay them aside until all of the ballots in the box have been counted, and if it is evident from the number that the election register or registration file shows were cast that the ballots folded together were cast by one voter, the judges shall preserve but not count them. If there is an excess of ballots in one box, the judges shall examine all the ballots in the box to ascertain that all are properly marked with the initials of the judges, and if any are not so marked, they shall preserve but not count them. If there is still an excess of properly marked ballots, the judges shall replace them in the box, and one judge, without looking, shall withdraw from the

box a number of ballots equal to the excessive number, and the withdrawn ballots shall be preserved but not counted.

'Subd. 3. If the judges find ballots in a ballot box that are different from the kind properly belonging therein, they shall lay the different ballots aside. If the number of ballots in any box equals or exceeds the number that the election register or registration file shows were cast, then ballots proper to have been placed therein, but found in another box, may not be counted. But if the number is less than that shown by the election registers or registration file, and ballots properly belonging in that box are found in another box, they shall be counted the same as those in the proper box, but only to the extent of the deficiency and selected by lot when necessary.

'Subd. 4. When the number of ballots as finally counted agrees with the number that the election register or registration file shows were cast, those ballots not counted shall be attached to a certificate made by the judges, stating why the ballots were not counted, and the certificate and uncounted ballots shall be sealed in a separate envelope and returned with the other returns to the officer from whom they were received.'

In the general election held in Isanti County on November 8, 1966, \*470 Charles E. Johnson opposed Frank Trnka, the incumbent, for the office of county auditor. The Isanti County Canvassing Board declared Trnka to be the winner by a vote of 2,543 to 2,539.

<sup>[1][2]</sup> In the contest which followed, the court ordered an inspection of the ballots, \*\*187 as a result of which certain errors were found. We think that the trial court correctly disposed of all of the issues except those relating to the questioned ballots which were marked exhibits A17, A18, A19, A20, B2, and B3. These ballots were not properly initialed by the election judges, as required by [Minn.St. 204.05](#), subd. 1, which provides:

'Before the voting begins, or as soon thereafter as possible, two judges shall place their initials on the backs of all the ballots they have, directly under or opposite the

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facsimile of the official signature, and they may not otherwise mark the ballots.'

The foregoing is a common statutory requirement and is intended to assure the voter that he is given an authentic ballot, to enable the public to identify the actual ballot cast in the event of an election contest, and to prevent fraud. 29 C.J.S., Election, s 172; [Morandi v. Heiman](#), 23 Ill.2d 365, 178 N.E.2d 314; [State ex rel. Braley v. Gay](#), 59 Minn. 6, 60 N.W. 676; [Truelsen v. Hugo](#), 87 Minn. 139, 91 N.W. 434; [Moyer v. Van De Vanter](#), 12 Wash. 377, 41 P.2d 60, 29 L.R.A. 670; 6 Dunnell, Dig. (3 ed.) s 2919. These purposes must be considered in light of the numerous decisions of this court which express the well-established policy of giving effect to the votes of legal voters regardless of irregularities in the election. No person should be deprived of his right to vote because of the neglect or carelessness of election officials unless that conduct has been carried to such an extent as to affect the true outcome of the election and put the results in doubt. [Clayton v. Prince](#), 129 Minn. 118, 151 N.W. 911; [Taylor v. Taylor](#), 10 Minn. 81 (107); [McEwen v. Prince](#), 125 Minn. 417, 147 N.W. 275; 6 Dunnell, Dig. (3d ed.) s 2960. We said in [In re Contest of Election of Vetsch](#), 245 Minn. 229, 238, 71 N.W.2d 652, 658:

'\* \* \* (A)fter an election is over, statutory regulations are usually construed to be directory rather than mandatory unless the departure from the statutes casts uncertainty upon the result.'

\*471 With these preliminary observations, we may focus upon the provisions of [s 204.20](#), which specifically directs the procedure to be followed as applied to the facts before us. It appears that in the Township of Cambridge 505 voters were registered in the election register. 507 ballots were found in the box. Six of the ballots were not initialed by the election judges. Of the 6 uninitialed ballots, 4 were for Johnson and 2 were for Trnka. The court held that these were properly counted and resolved the issue of the excess ballots by withdrawing at random 2 ballots from the box containing 507 ballots, thus reducing the number of ballots to the correct total as shown by the register. This left contestant Johnson with a majority of 2 votes.

[\[3\]\[4\]\[5\]](#) It should be kept in mind that [s 204.20](#) expressly provides what should be done when an excess of ballots is

found in an election box. The liberal principles which generally hold that neglect and carelessness of election officials should not deprive a person of his right to vote must yield to the express provisions of this statute as it applies to the disposition of excess ballots. [Section 204.20](#), subd. 1, requires that the first thing the judges shall do in the counting process is to ascertain that each ballot is single, 'and count them to determine whether the number of ballots corresponds with the number that the election register or registration file shows were cast.' The outcome of an election should rest upon ballots received according to law and should not be determined by illegal votes. Obviously, 2 of the votes which were cast cannot be said to be legal. Under the circumstances, it was the duty of the election judges, as required by [s 204.20](#), subd. 2, to examine the ballots in the box 'to ascertain that all are properly marked with the initials of the judges, and if any are not so marked, they shall preserve but not count them.' As we understand the language of the statute, a 'properly marked \*\*188 ballot' is one 'marked with the initials of the judges.' The statute specifically provides that uninitialed ballots should not be counted.

[\[6\]\[7\]](#) Apparently, the trial court felt that, since there was no evidence of actual fraud here, a result should be reached in some manner and therefore employed the method provided for in the last part of [s 204.20](#), \*472 subd. 2, by withdrawing 2 ballots from the total of the ballots cast. That part of the statute provides:

'\* \* \* If there is still an excess of properly marked ballots, the judges shall replace them in the box, and one judge, without looking, shall withdraw from the box a number of ballots equal to the excessive number, and the withdrawn ballots shall be preserved but not counted.'

We are of the view that the method used in attempting to determine the outcome was not correct. The above provision of the statute applies to the conduct of election judges only where, after removing the uninitialed ballots, it is found that there is 'still an excess of properly marked ballots \* \* \*.' Here, of course, there was no excess of properly marked ballots. If the uninitialed ballots were laid aside and not counted, as the statute requires, the total number of ballots would be within the limit of registered voters as shown by the election register or registration file.

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This interpretation is consonant with views expressed in *Truelsen v. Hugo*, supra, where the court discussed the predecessor statute which contains practically the same provisions.[\[FN2\]](#)

[FN2.](#) The only significant change in [Minn.St. 204.20](#), subd. 2, is that the phrase, 'properly marked ballots,' has been added in the last sentence relating to disposition of uninitialed ballots.

Since the 6 uninitialed ballots should not have been counted, it would appear that the election resulted in a tie vote. Accordingly, the judgment is reversed and remanded for further proceedings provided by statute.

Reversed and remanded.

UPON APPEAL FROM CLERK'S TAXATION OF  
COSTS

PER CURIAM.

[\[8\]](#) Because of the nature of this appeal, which involves meritorious claims of both contestant and contestee following an election contest, this court exercises its discretion ([Minn.St. 607.01](#); [Oehler v. Falstrom](#), [273 Minn. 453, 461, 142 N.W.2d 581, 587](#)) and determines that the costs and disbursements incurred shall be shared equally by the parties.

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421 S.E.2d 706  
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 (Cite as: 262 Ga. 468, 421 S.E.2d 706)

C

Supreme Court of Georgia.  
**JONES**, et al.  
 v.  
**NORRIS**.  
**No. S92A1502**.  
 Oct. 21, 1992.

Candidate for superintendent of schools filed action to contest election after election superintendent declared another candidate to be victor. The Superior Court, Wayne County, [Faye Sanders Martin](#), J., ruled that run-off election was required, and other candidate appealed. The Supreme Court, Clarke, C.J., held that: (1) cardboard ballot "marked" by a punch is subject to statute providing, with respect to conduct of elections using paper ballots, that votes cast for candidates who have died, withdrawn, or been disqualified shall be void and shall not be counted in primaries, and (2) votes cast for candidate who had withdrawn from race were void and should not have been counted in determining whether any candidate received majority of votes, and therefore whether run-off election was required.

Reversed.

#### West Headnotes

#### [\[1\]](#) Elections 158

##### [144k158 Most Cited Cases](#)

Absent contrary statutory authority, cardboard ballots "marked" by a punch are governed by statute providing, with respect to conduct of elections using paper ballots, that votes cast for candidates who have died, withdrawn, or been disqualified shall be void and shall not be counted in primaries. [O.C.G.A. § 21-2-438\(a\)](#).

#### [\[2\]](#) Elections 158

##### [144k158 Most Cited Cases](#)

Votes cast in primary election for candidate who had withdrawn from race for superintendent of schools were void and should not have been counted in determining whether any candidate received majority of votes cast, and therefore whether run-off election was required, even though vote recorder ballots, rather than paper ballots, were used in elec-

tion. [O.C.G.A. §§ 21-2-438\(a\), 21-2-501\(a\)](#).

**\*\*707 \*469** [James G. Johnson, Jr.](#), [Alvin Leaphart](#), Leaphart & Johnson, P.C., Jesup, for Jones, et al.

[Leon A. Wilson, II](#), Waycross, for Norris.

[Dennis R. Dunn](#), [Kathryn Allen](#), Asst. Attys. Gen., State Law Dept., Atlanta, for amicus appellant.

[Michael J. Bowers](#), Atty. Gen., Atlanta.

**\*468** CLARKE, Chief Justice.

Larry Hulvey, appellant Jerry Jones and appellee David Norris qualified as candidates for the office of Superintendent of Schools for Wayne County. Approximately two weeks before the primary election, Hulvey withdrew from the race. Finding that there was not time to have the ballots reprinted, the Superintendent of Elections for Wayne County caused signs to be posted at each voting precinct informing voters that Hulvey had withdrawn from the race. Additionally, Hulvey's withdrawal from the race was reported several times in the local medial.

Nonetheless Hulvey received 213 votes. Appellant Jones received 3,190 votes, and appellee Norris received 3,161 votes. The Election Superintendent declared void those votes cast for Hulvey, and declared appellant Jones the victor. Norris then filed this action for contest of the election.

**\*469** [OCGA § 21-2-501\(a\)](#) provides, in pertinent part, that "no candidate shall be nominated for public office in any primary ... unless such candidate shall have received a majority of the votes cast to fill such nomination...." Construing this Code section, the trial court found that although Hulvey had withdrawn from the race, the "votes cast" for him were required to be counted in determining whether any candidate received a majority of votes. Thus, the trial court found that 3,283 votes were necessary for a candidate to receive a majority of votes cast, and as neither appellant nor appellee had received this number, the trial court held that a run-off election was required.

[\[1\]\[2\]](#) Title 21 of the Code, governing the conduct of primaries and general elections, makes no provision for this situation where vote recorder ballots are used to cast votes

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for the candidates, as was done here. However, [OCGA § 21-2-438\(a\)](#), governing the conduct of elections using paper ballots, provides that "[i]n primaries, votes cast for candidates who have died, *withdrawn*, or been disqualified shall be void and shall not be counted." (Emphasis supplied.) We make no distinction between a paper ballot marked by a pencil and a cardboard ballot "marked" by a punch. We hold that the vote recorder ballots used by Wayne County are governed by the provisions of [OCGA § 21-2-438\(a\)](#) in absence of statutory authority to the contrary. As such, the votes cast for Larry Hulvey were void and should not have been counted. The judgment of the trial court is therefore reversed.

*Judgment reversed.*

[BELL](#), P.J., and HUNT, [BENHAM](#), [FLETCHER](#) and [SEARS-COLLINS](#), JJ., concur.

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508 N.E.2d 503

155 Ill.App.3d 774, 508 N.E.2d 503, 108 Ill.Dec. 342

(Cite as: 155 Ill.App.3d 774, 508 N.E.2d 503, 108 Ill.Dec. 342)

**C**Appellate Court of Illinois,  
Second District.Dennis **KEATING**, Emil "Bud" Vittorio, and Larry Dean  
(Mieszcak), as Candidatesfor Village Trustee of Villa Park, Petitioners-Appellees,  
v.Mike **IOZZO**, Objector, Municipal Officers Electoral  
Board of the Village of  
Villa Park, Dan Nelson, Douglas Brandow, and Paul Hyde,  
Respondents-Appellants.**No. 2-87-0214.**

May 18, 1987.

Local electoral board struck names of candidates for village office from ballot. The 18th Circuit Court, DuPage County, John A. Darrah, J., reversed. On appeal, the Appellate Court, Hopf, J., held that: (1) candidates were not barred from raising issue of timeliness of objections to their nominating petitions on appeal from election board decision, and (2) statutory deadline for those objections would not be extended notwithstanding absence of clerk to file those objections during afternoon business hours on deadline day, as objector had notice of that absence and opportunity to comply with deadline and showed no hardship from limits on that opportunity.

Affirmed.

West Headnotes

**[1] Appeal and Error** 169[30k169 Most Cited Cases](#)

Question never considered by trial court may not be raised for first time on appeal, though question of jurisdiction may be raised at any time.

**[2] Elections** 154(6)[144k154\(6\) Most Cited Cases](#)

Candidates for village office were not barred from raising issue of timeliness of objections to their nominating papers for first time on appeal from election board decision, as it involved jurisdictional question.

**[3] Elections** 305(6)[144k305\(6\) Most Cited Cases](#)

Findings of electoral board will not be reversed unless they are against manifest weight of evidence.

**[4] Time** 3[378k3 Most Cited Cases](#)

When party has no opportunity to comply with statutory deadline or no notice of such an opportunity, it is likely that deadline will be extended; on other hand, when party had notice of opportunity to comply and can show no hardship resulting from limitations on that opportunity, extension of statutory deadline is disfavored.

**[5] Elections** 151[144k151 Most Cited Cases](#)

Deadline for filing of objections to nominating petitions for village office would not be extended notwithstanding that no clerk was available during afternoon business hours on deadline day to file those objections where objector had both notice of clerk's absence and opportunity to file and showed no hardship from limits on his opportunity.

**\*\*504 \*774 \*\*\*343** Foss, Schuman, Drake & Barnard, George C. Pontikes, Sheldon Gardner, Chicago, Daniels & Sheen, Terence M. Sheen, Elmhurst, for respondents-appellants.

Law Office of Hubert J. Loftus, Ltd., Patrick M. Loftus, Addison, for petitioners-appellees.

Justice HOPF delivered the opinion of the court:

Respondents appeal from a trial court ruling which reversed a decision\*775 of the local electoral board and ordered petitioners' names to be placed on the ballot for the Villa Park municipal election to be held on April 7, 1987. Respondents assert that the trial court erred in finding that objections to petitioners' nominating papers were not filed on time and that the nominations were thus valid.

Petitioners timely filed nominating petitions for the office of village trustee. Respondent Iozzo subsequently filed objections to petitioners' nominating papers. The municipal officers electoral board of the village of Villa Park (Board) convened on February 11, 1987, to hear the objections. At the outset of the proceedings a motion was made by peti-

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tioner Mieszczak to cancel the hearing on grounds that the objections were not filed on time and the Board thus lacked jurisdiction.

Evidence was heard on the motion which indicated that on February 2, 1987, the undisputed final date for filing objections, the village clerk was in her office at the village hall to receive objections only between the hours of approximately 10:30 a.m. and 12 noon. Around 10:50 a.m. she called all the candidates, including objector Iozzo, and informed them that she would be available only until noon. Iozzo told her he would be filing his objection at 3 p.m. According to Iozzo's testimony, the clerk responded, "Okay" but did not indicate she would be present at that time to accept his objections. There was some evidence that the village hall itself was open all day that day.

Iozzo appeared at the village hall shortly after 3 that afternoon, but the village clerk was not in her office. Nor was there a deputy clerk available. Thus, candidate Iozzo was not able to file his objections until the following day.

On these facts the Board found that the objector had attempted to file during business hours on February 2, 1987, but was unable to do so due to misfeasance on the part of the village clerk. Business hours, according to the Board's order, were from 9 a.m. to 5 p.m. The Board concluded that objections filed on February 3 were timely and thus subject to its jurisdiction. Accordingly, the Board heard evidence on and ultimately sustained objections to the sufficiency of the signatures on the petitioners' nominating petitions. Petitioners' names were stricken from the ballot on this basis.

Petitioners subsequently filed a petition with the circuit court for review of the Board's decision. The court reversed the Board's finding that the objections were timely filed and ordered petitioners' names to be placed on the ballot. Respondents then filed this appeal.

[1][2] Respondent Iozzo first asserts that the motion to the Board to cancel the hearing based on his allegedly untimely filing was made \*776 only by petitioner Mieszczak. He insists that the other petitioners, Keating and Vittorio, may not raise the issue for the first time. Petitioners answer that Iozzo makes his allegations regarding Keating and Vittorio

now for the first time. They claim he did not present this matter to the trial court. According to the record, this claim is not entirely correct. Respondent alleged in his answer to the petition for judicial review that Keating and Vittorio had not raised the matter of untimely filing during the Board hearing and should be precluded from raising it before the trial court. However, respondent subsequently failed to preserve the issue. No testimony or evidence on the point was taken at trial, and respondent did not ask the court to \*\*505 \*\*\*344 resolve it. A question never considered by the trial court may not be raised for the first time on appeal. ([Kravis v. Smith Marine, Inc. \(1975\), 60 Ill.2d 141, 147, 324 N.E.2d 417; Pannett v. Schnitz \(1977\), 50 Ill.App.3d 128, 133, 7 Ill.Dec. 906, 365 N.E.2d 191.](#)) Moreover, Mieszczak's motion raised the question of jurisdiction which may be raised at any time. If the Board lacked jurisdiction over the objections to Mieszczak's nominating papers on the basis of untimeliness, it also lacked jurisdiction over the other objections which were filed at the same time. Thus, none of the petitioners are barred from raising the timeliness issue on appeal.

[3] It is worthy of note at the outset of discussion of timeliness that judicial review of decisions of an electoral board is not intended to provide a *de novo* hearing but rather to provide a remedy against arbitrary or unsupported decisions. ([Williams v. Butler \(1976\), 35 Ill.App.3d 532, 538, 341 N.E.2d 394.](#)) The findings of an electoral board will not be reversed unless they are against the manifest weight of the evidence. ([35 Ill.App.3d 532, 538, 341 N.E.2d 394.](#)) In this case the trial court reversed the Board's conclusion that the objections were filed on time. The inquiry is whether the Board's decision was against the manifest weight of the evidence.

The Board decided the objections had been filed on time because, as revealed by the transcript, it was their understanding that the law required that the office of the village clerk be open between the hours of 9 a.m. and 5 p.m. on the last day for filing objections. Since the office was not open during those hours, the Board excluded that day as the final day for filing. However, the Board was mistaken in its understanding. The law the Board alluded to was probably the statute mandating that offices in which *nominating petitions*

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must be filed are to remain open for the receipt of such petitions until 5 p.m. on the last day of the filing period. (Ill.Rev.Stat.1985, ch. 46, par. 1-4.) There is no comparable provision for the filing of objections. Thus, the Board was operating from a mistaken legal premise.

\*777 Since it based its decision on what it thought to be the law, the Board did not consider whether, under all the circumstances in evidence, respondent Iozzo's failure to file on February 2 rendered his objections untimely. After review of the record and the law, it is our opinion that the trial court correctly reversed the decision on this issue since the Board's unsupported conclusion was contrary to the manifest weight of the evidence.

While the precise issue now before the court is one of first impression, there are numerous cases in which a party sought to extend a statutorily prescribed time period for performance of an act because the last day of the period fell on a Saturday, Sunday, or a holiday; the office where performance was to take place was closed; and the deadline could not be met. In the instant case the problem is not with the lack of Saturday or Sunday hours, but with an election official who was neither personally present all day on a weekday to accept objections nor represented by a deputy clerk appointed to accept in her place. (The last day for filing here, February 2, 1987, was a Monday.) Nevertheless, some of the cases, particularly those where Saturday was the last day, provide some guidance.

*Pettigrove v. Parro Construction Corp.* (1963), 44 Ill.App.2d 421, 194 N.E.2d 521, involved the final date for filing a petition to reinstate a previously dismissed cause of action. The plaintiff was unable to file on the last day because it was a Saturday and the office of the clerk of the circuit court was closed all day. The court held that the time for filing had been extended to the next day the clerk's office was open.

The *Pettigrove* court noted that a statute authorized the closing of the clerk's office by rule of court. However, no determination was made as to whether such a rule had been adopted by the circuit court. Rather, the court said: "But whether closed by rule or not, as a practical matter the office was closed so that there was no opportunity for the plaintiffs

to file their petition." (\*\*506\*\**345 Pettigrove v. Parro Construction Corp.* (1963), 44 Ill.App.2d 421, 426, 194 N.E.2d 521.) The court then noted that it is commonly known that circuit clerk's offices in Illinois usually close on Saturday and explained that the legislature did not intend for any rule to require a litigant to do something which cannot be done. It was logical to find that where the last day fell on a Saturday and the office was closed on Saturday, the plaintiffs could not follow the statute or an order of the court. Thus, the exclusion of the day the office was closed was proper. The court focused on what it called the practical application of the law and said: "[W]here an office is closed on the final day for the doing of any act provided by law \*778 to be done, that day shall also be excluded." (44 Ill.App.2d 421, 426, 194 N.E.2d 521.) The plaintiff's petition was held to be filed on time.

In *Burgess v. Erickson* (1966), 72 Ill.App.2d 85, 218 N.E.2d 111, a record on appeal was filed two days late because the office of the clerk of the appellate court was closed on the last day for filing which was a Saturday. Following *Pettigrove*, the court stated that the time for filing is computed by excluding the first day and including the last day, unless the last day is a Sunday, a legal holiday, "or a day on which the office of the clerk of this court is closed." (72 Ill.App.2d 85, 86, 218 N.E.2d 111.) The late filing was allowed.

Although *Pettigrove* and *Burgess* involved offices which were closed on Saturday, the significant factor in those cases was not that the last day for filing was a Saturday, but that the office was closed all day on Saturday. The *Burgess* court made this clear when it said that a day when the office is closed should be one of the exclusions from computation of the time period. Thus, the day the office was closed could just as easily have been a Monday as a Saturday. In this sense these cases are similar to the case at bar.

The *Pettigrove* court adhered to the principle that the legislature did not intend to require something of a litigant which could not be done and noted that the litigant there did not even have an opportunity to file. In the present case respondent cannot claim that he had no opportunity to file. Unlike the offices in *Pettigrove* and *Burgess* which were closed all day, it is undisputed here that the village clerk was present in her office for at least part of the morning and

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that the candidates were informed as to when she would be there. Moreover, Iozzo did not tell the clerk that the hours she specified were not adequate time for him to file. At no point did he assert that he was unable to file while the clerk was present. Since the objector had an opportunity to file, albeit a limited opportunity, it cannot be said that he was required to do something which could not be done.

The issue in [John Allen Co. v. Sesser Concrete Products Co. \(1969\)](#), 114 Ill.App.2d 186, 252 N.E.2d 361, was whether the period for redemption of real estate sold for delinquent taxes should be extended despite the fact that the county clerk's office was open from 8 a.m. until noon on the last day for redemption. The final day to redeem fell on a Saturday but the redemption fees were not paid until the following Monday.

The *Sesser* court cited *Pettigrove* and *Burgess* and then looked to the statutory provisions for the office hours of county clerks. Under the statute the subject clerk's office was to be closed on Saturday unless the county board properly passed a resolution to the contrary. No \*779 such resolution had been passed. Nevertheless, the county clerk's office was open on that Saturday from 8 a.m. until 12 noon. The court found that, under the statute, the clerk could lawfully have closed the office at any time before noon or even never have opened it at all on the day in question. The court concluded that, even though the office was open, it was not open under any legal requirement which would give notice that redemption fees could be paid on that date. The redemption period was extended to Monday.

While *Sesser* also involved a final date which fell on Saturday, it differs from *Pettigrove* and *Burgess* in that the office of the county clerk in *Sesser* was subject to a statute which became a pivotal factor in the court's opinion. The statute did not \*\*507 \*\*\*346 require the office to be open on Saturday. On the contrary, it provided for the office to be closed unless the county board resolved otherwise. Thus, the fact that the office was actually open was irrelevant. The redeeming party had no notice that the office would be open to accept redemption fees and could not be bound by a final date falling on a Saturday. The case at bar differs from *Sesser* on the matter of notice. Iozzo does not contest that he received notice directly from the clerk as to when she would

be in her office to accept objections.

[Mierswa v. Kusper \(1984\)](#), 121 Ill.App.3d 430, 77 Ill.Dec. 14, 459 N.E.2d 1110, a case cited by petitioners, was an appeal from denial of a petition for *mandamus* which sought to force the convening of the Cook County electoral board to hear an objection to nominating papers. The objection had allegedly been untimely filed where the last day for filing was a Saturday and plaintiff did not file until the first possible day the next week. Plaintiff insisted the case was controlled by a statute which provided that, as a general rule, Saturdays should be excluded from the computation of statutory time periods when the last day falls on a Saturday. The court, however, decided that the statutory timetable for filing nominations and objections for the particular office relevant in the case showed an intentional legislative design that Saturday should be the last day for filing since the last day would always be a Saturday. The court refused to apply the general provision for excluding Saturday.

Since the statutory timetable analyzed in *Mierswa* is not the same as the one pertinent to the case now before us, the primary holding of that case is not relevant here. However, review of the facts and the *Mierswa* court's discussion of other arguments offered by plaintiff is enlightening. The clerk's office in *Mierswa* was mandated by statute to be open from 9 a.m. to noon on Saturdays. Plaintiff stipulated that the office had actually been open until 5 p.m. on the day in question. \*780 On these facts plaintiff made two very similar arguments. First, she claimed that holding Saturday as the last day for filing would work an injustice by allowing the actual time for filing to vary at the discretion of the county clerk. Plaintiff cited [John Allen Co. v. Sesser Concrete Products Co. \(1969\)](#), 114 Ill.App.2d 186, 252 N.E.2d 361, in support of her further argument that since the office could have been closed after noon and she could have been prevented from filing on time, holding Saturday as the last day resulted in insufficient notice to the public of the last day to file.

The court responded to plaintiff's first argument by noting that she did not argue that she could not have filed her objections on Saturday and that she stipulated that the office was open until 5 p.m. that day. The issue was then resolved on the basis that the office was open Saturday morning pur-

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suant to statute and the discretion of the clerk was irrelevant. The court disposed of plaintiff's second argument by distinguishing *Sesser* and expressly refusing to discuss the hypothetical situation where plaintiff could have come to the office to file her objections on Saturday afternoon and found it closed.

[4] Thus, while *Mierswa* did not resolve the issue we now confront, it is apparent that the court had before it many of the same factors now before us. Plaintiff in *Mierswa* had actual opportunity to file on that particular Saturday from 9 a.m. to 5 p.m. and had statutory notice that the opportunity was available from 9 a.m. to noon. Moreover, the court specifically noted that plaintiff stipulated that the office had been open until 5 p.m. and did not argue that she had been unable to file on Saturday. As noted above, two of these factors--opportunity and notice--were also pertinent in [\*Petitgrove v. Parro Construction Corp.\* \(1963\), 44 Ill.App.2d 421, 194 N.E.2d 521](#), [\*Burgess v. Erickson\* \(1966\), 72 Ill.App.2d 85, 218 N.E.2d 111](#), and [\*John Allen Co. v. Sesser Concrete Products Co.\* \(1969\), 114 Ill.App.2d 186, 252 N.E.2d 361](#). We conclude that when a plaintiff has no opportunity to comply with a statutory deadline, or no notice of such an opportunity, it is likely the deadline will be extended. On the other hand, when plaintiff has notice of the opportunity to comply, and can **\*\*508 \*\*\*347** show no hardship resulting from limitations on the opportunity, extension of a statutory deadline is disfavored.

In the case at bar there is no evidence that the village clerk was under any statutory or local obligation to be present in her office at any specific time or to provide deputy clerks to function in her stead. That the village hall may have been open does not establish that the clerk's presence was required during village hall hours. The evidence does not demonstrate, either, that the clerk voluntarily set up and **\*781** maintained regular office hours. In fact, it seems clear she was not customarily present in her office on a full-time basis.

Regardless, however, of what the clerk's hours were, or whether she even kept regular hours, on the last day for filing objections she personally contacted all the candidates by telephone to inform them she was in her office and indicated how long she would be there to accept any objections they

wished to file. Iozzo himself testified that he was so informed. Thus, even if Iozzo had believed the clerk would be available during the entire time the village hall was open, he was personally informed otherwise directly by the clerk.

[5] Finally, according to the record Iozzo made no showing, either at the time or at the subsequent hearing, that the limited hours set by the clerk worked a hardship on him or made it impossible for him to comply with the filing deadline. Since the objector had both notice and an opportunity to file, and showed no hardship from the limits on his opportunity, we cannot say that the filing deadline should have been extended. Iozzo's objections were not timely filed, and the petitioners' names were properly placed back on the ballot.

In accord with the views expressed above, the order of the circuit court of DuPage County is affirmed.

AFFIRMED.

WOODWARD and DUNN, JJ., concur.

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142 N.H. 288, 700 A.2d 1224  
(Cite as: 700 A.2d 1224)

**C**

Supreme Court of New Hampshire.  
Mary G. **KIBBE**  
v.  
TOWN OF MILTON, and another.  
**No. 96-771.**

Sept. 18, 1997.

Losing candidate in town election appealed from determination of town board of recount that ballots on which stickers had been used to vote for write-in candidate were valid and that write-in candidate was winner once those ballots were counted. The Superior Court, Strafford County, Fitzgerald, J., upheld determination, and losing candidate appealed again. The Supreme Court, Brock, C.J., held that: (1) statute prohibiting attachment of stickers to ballots applies to town elections; (2) statute is mandatory; (3) use of stickers violated statute; (4) violation was not minor one that could be ignored; (5) statute is reasonable exercise of legislative authority; and (6) applying statute did not impermissibly disenfranchise voters who used stickers.

Reversed and remanded.

West Headnotes

**[1] Towns**  **28**

[381k28 Most Cited Cases](#)

Statute prohibiting attachment of stickers to ballots applies to town elections. [RSA 656:21](#), [659:65](#), subd. 2(b), [669:22](#), [669:25](#).

**[2] Elections**  **182**

[144k182 Most Cited Cases](#)

Statute prohibiting attachment of stickers to ballots is mandatory. [RSA 659:65](#), subd. 2(b).

**[3] Statutes**  **176**

[361k176 Most Cited Cases](#)

**[3] Statutes**  **181(1)**

[361k181\(1\) Most Cited Cases](#)

**[3] Statutes**  **205**

[361k205 Most Cited Cases](#)

(Formerly 361k208)

In matters of statutory interpretation, Supreme Court is final arbiter of intent of legislature as expressed in words of statute considered as whole.

**[4] Statutes**  **188**

[361k188 Most Cited Cases](#)

In matters of statutory interpretation, Supreme Court looks first to language of statute, and where possible, ascribes plain and ordinary meanings to words used.

**[5] Statutes**  **227**

[361k227 Most Cited Cases](#)

Use of word "shall" in statute indicated legislature's intent that statute be mandatory.

**[6] Towns**  **28**

[381k28 Most Cited Cases](#)

Voters' use of stickers to cast write-in votes in town election violated statute prohibiting attachment of stickers to ballots. [RSA 659:65](#), subd. 2(b).

**[7] Elections**  **309**

[144k309 Most Cited Cases](#)

In cases involving violation of election law, court inquires whether there was substantial compliance with statute.

**[8] Elections**  **227(1)**

[144k227\(1\) Most Cited Cases](#)

When violation of election law consists of minor deviation from statutory requirements, court may find substantial compliance, and in such case court will not invalidate vote if voter's intent is clearly evident.

**[9] Elections**  **186(1)**

[144k186\(1\) Most Cited Cases](#)

**[9] Elections**  **227(8)**

[144k227\(8\) Most Cited Cases](#)

Statutes regulating form of ballots or votes should

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not be applied to disenfranchise voters because of technical irregularities. [Const. Pt. 1, Art. 11](#).

**[10] Elections**  **186(1)**  
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**[10] Elections**  **227(8)**  
[144k227\(8\) Most Cited Cases](#)

Application of doctrine that statutes regulating form of ballots or votes should not be used to disenfranchise voters because of technical irregularities is limited to situations in which defect or deviation is minor. [Const. Pt. 1, Art. 11](#).

**[11] Towns**  **28**  
[381k28 Most Cited Cases](#)

Voters' use of stickers to cast write-in votes in town election was neither minor deviation nor technical irregularity under statute prohibiting attachment of stickers to ballots, and thus did not substantially comply with statute; accordingly, doctrine that statutes regulating form of ballots or votes should not be used to disenfranchise voters because of technical irregularities could not be applied. [Const. Pt. 1, Art. 11](#); [RSA 659:65](#), subd. 2(b).

**[12] Elections**  **227(8)**  
[144k227\(8\) Most Cited Cases](#)

Even when voters' intent is clear, if means they employed to indicate their vote does not substantially comply with applicable statute, their attempt to vote is failure.

**[13] Elections**  **186(1)**  
[144k186\(1\) Most Cited Cases](#)

Statute providing that sticker votes "shall not be tabulated" is reasonable exercise of legislative authority; thus, applying statute to invalidate ballots of voters who used stickers to cast write-in votes in town election did not impermissibly disenfranchise those voters. [Const. Pt. 1, Art. 11](#); [RSA 659:65](#), subd. 2(b).

**[14] Elections**  **5**  
[144k5 Most Cited Cases](#)

Legislature is entitled to regulate time, place, and

manner of elections within state, and Supreme Court will enforce such regulations when they are reasonable. [Const. Pt. 1, Art. 11](#).

\***1225** McKittrick Law Offices, North Hampton ([J. Joseph McKittrick](#), on the brief and orally), for plaintiff.

McNeill & Taylor, P.A., Dover ([Lynne M. Dennis](#), on the brief, and [Malcolm R. McNeill, Jr.](#), on the brief and orally), for defendants.

[BROCK](#), Chief Justice.

The Superior Court ([Fitzgerald, J.](#)) ruled that the use of stickers bearing a particular candidate's name as write-in votes in a town election did not invalidate the election of that candidate because the "clear intent of the voters" should prevail over a statute prohibiting the attachment of stickers to ballots. [See RSA 659:65](#), II(b) (1996). The plaintiff, Mary G. Kibbe, an unsuccessful candidate in the election, appeals this ruling. We reverse and remand.

During a town election in the defendant Town of Milton (town) in March 1996, the plaintiff ran for the position of selectman. She and one other candidate, "Chip" Gehres, were the only two candidates for that position whose names appeared on the printed ballot. Just before the election, a third candidate, Joan Tasker Ball, entered the race by staging a write-in campaign. On election day, Ball distributed stickers to voters at the polls. Printed on the stickers was "Joan Tasker Ball" with an "X" to the right of the name to indicate a vote for Ball. The parties agree that the stickers fit precisely within the contours of the blank write-in space on the ballot. More than one hundred voters placed stickers in the write-in space provided on the ballot for the office of selectman. [See RSA 669:23](#) (1996).

At some point during election day, a question was raised as to the legality of the sticker votes. Following advice from the town's attorney that the stickers were illegal under [RSA 659:65](#), II(b), the election moderator declared the sticker votes invalid. Accordingly, when the votes for selectman

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were tallied, the sticker votes for Ball were not counted. The tally yielded the following results: 190 votes for the plaintiff, 174 votes for Gehres, and 107 handwritten write-in votes for Ball. The moderator disallowed 113 sticker votes for Ball, and the plaintiff was declared the winner of the selectman race.

Upon Ball's request for a recount, *see* RSA 669:30 (1996), the defendant Town of Milton Board of Recount (board) met to decide whether to count the sticker votes. By a three-to-two vote, the board decided to count those stickers that were placed exactly in the write-in space for selectman, with an "X," either on the sticker or handwritten, appearing in the proper place to the right of the candidate's name. Following a recount, Ball was declared the winner with a total of 215 votes. The plaintiff, with a recount total of 191 votes, appealed to the superior court. *See* RSA 669:35 (1996).

After ordering the parties to submit statements of fact and memoranda of law, the superior court upheld the board's decision. The court found that the use of stickers was not in accordance with the exception provided in RSA 659:65, II(b). Nonetheless, the court found that the voters who placed stickers in the write-in spaces intended to vote for Ball, and that invalidating the sticker votes as defective under the statute would disenfranchise those voters. *See* N.H. CONST. pt. I, art. 11. In light of these findings, the court ruled that RSA 659:65, II(b) is only \*1226 "directory in nature" in cases "where the clear intent of the voters is evident," and that, accordingly, the voters' intent to vote for Ball prevailed over the statute.

The plaintiff appeals, arguing that the superior court erred by ruling that the statute is "directory" in nature rather than mandatory, and that "the clear intent of the voters" is sufficient to override the express prohibitory language of the statute. The actual vote count is not in dispute; the parties agree that if the sticker votes are counted, Ball's election would stand, but if the sticker votes are invalidated as defective, the plaintiff would have a plurality of

votes.

RSA 659:65, II provides: "A ballot shall be regarded as defective in part and that part shall not be tabulated if ... (b) The ballot has attached to it an adhesive slip, sticker, or paster not prepared in accordance with RSA 656:21 in the space for any office, but the rest of the ballot admits to counting..." RSA 656:21 (1996), in turn, authorizes the use of stickers by election officials, in the event of a candidate's death or disqualification after the ballot has been printed, to affix the name of a substitute candidate to the ballots prior to the election. The superior court found that the stickers distributed by Ball were not prepared in accordance with RSA 656:21.

[1] As a preliminary matter, we address the defendants' suggestion that RSA 659:65, II(b) does not apply to town elections. RSA 669:25 (1996) provides that RSA chapters 658 and 659 apply in towns using the official ballot system. Both the board and the superior court assumed, in rendering their respective decisions, that the statute applied. The defendants do not contend that the town has not adopted the official ballot system, *see* RSA 669:25, and we note that the election procedures used in this case were inconsistent with the unofficial ballot system, *cf.* RSA 669:55 (1996) (providing no names of candidates shall be printed on unofficial ballots). On appeal, the defendants contend that applying RSA 659:65, II(b) to town elections would create an inconsistency with RSA 669:22 (1996), which permits a town clerk to remove a withdrawn candidate's name from printed ballots using pasters. They argue that RSA 659:65, II(b) would render the ballots prepared pursuant to 669:22 defective because they were not prepared in accordance with 659:21, the only enumerated exception to 659:65, II(b).

We perceive no inconsistency in applying RSA 659:65, II(b) to town elections. RSA 669:22 and RSA 656:21 allow the use of stickers or pasters in essentially the same circumstances: in the event of the disqualification of a candidate due to "age,

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domicile, or incapacitating physical disability," RSA 655:38 (1996); RSA 669:22, or death, RSA 655:39 (1996); RSA 669:22. Furthermore, RSA 669:25 expressly provides that when RSA chapters 658 and 659 are applied to town elections, the town clerk shall perform duties delegated to the secretary of state under those chapters; RSA 656:21 therefore would allow the town clerk to authorize the use of pasters in the same general circumstances provided in RSA 669:22. Construing these provisions in this manner does not create an absurd result. See *O'Brien v. O'Brien*, 141 N.H. 435, 436, 684 A.2d 1352, 1353 (1996).

[2][3][4] We turn now to the plaintiff's argument that the superior court erred in ruling that RSA 659:65, II(b) is directory, rather than mandatory, in nature. "In matters of statutory interpretation, this court is the final arbiter of the intent of the legislature as expressed in the words of a statute considered as a whole." *Gisonni v. State Farm Mut. Auto. Ins. Co.*, 141 N.H. 518, 519, 687 A.2d 709, 709 (1996) (quotation omitted). We look first to the language of the statute, "and where possible, we ascribe the plain and ordinary meanings to words used." *Appeal of Astro Spectacular*, 138 N.H. 298, 300, 639 A.2d 249, 250 (1994) (quotation omitted).

[5] We conclude that the statute is mandatory. But see *Keene v. Gerry's Cash Mkt., Inc.*, 113 N.H. 165, 168, 304 A.2d 873, 875 (1973) (statutes regulating form of ballots generally are regarded as directory rather than mandatory). As the plaintiff points out, the use of "shall" indicates the legislature's intent that the statute be mandatory. See *Wilkes v. Jackson*, 101 N.H. 420, 423, 145 A.2d 169, 170 (1958); cf. *In re Thomas M.*, 141 N.H. 55, 59, 676 A.2d 113, 116-17 (1996). \*1227 Furthermore, by providing a specific remedy for the violation of RSA 659:65, II(b)--that the sticker vote "shall be regarded as defective" and "shall not be tabulated"--the legislature stated in the clearest possible terms its intent to ensure compliance with the statute's prohibition. See *Wilkes*, 101 N.H. at 423, 145 A.2d at 170; cf. 26 Am.Jur.2d *Elections* § 370

(1996) (if statute specifies that violation will void ballot, statute is mandatory).

We turn next to the plaintiff's argument that the superior court erred in concluding that the voters' intent should prevail over the statute. The plaintiff initially contends that the superior court had insufficient evidence from which to conclude that voters who placed the stickers in the write-in space for selectman intended to cast their vote for Ball. This argument was not preserved for appeal, see *Appeal of Alton School Dist.*, 140 N.H. 303, 313, 666 A.2d 937, 944 (1995), and indeed appears to have been conceded by the plaintiff in the proceeding below. Accordingly, we proceed in reliance on the superior court's finding that "the clear intent of the voters" was evident.

[6] We agree with the superior court's implicit conclusion that because the stickers distributed to voters by Ball were not prepared in accordance with RSA 656:21, the use of those stickers to write in votes violated RSA 659:65, II(b). The statute's terms are plain, and we will not look beyond them for further evidence of legislative intent. See *Appeal of Booker*, 139 N.H. 337, 341, 653 A.2d 1084, 1087 (1995). By its terms, the statute prohibits the attachment of stickers or other adhesives to the ballot as it was officially prepared. See RSA 659:65, II(b). Accordingly, we are not swayed by the defendants' contention that the statute is intended only to prevent pre-election ballot tampering by election officials and does not contemplate the use of stickers by voters as a method of casting write-in votes.

[7][8][9] In cases involving the violation of an election law, we inquire whether there was substantial compliance with the statute. See, e.g., *Bridgham v. Keene*, 112 N.H. 84, 86, 289 A.2d 392, 393-94 (1972). When the violation consists of a minor deviation from the statutory requirements, we may find substantial compliance, and in such a case we will not invalidate a vote if the voter's intent is clearly evident. See *id.*; cf. *Opinion of the Justices*, 114 N.H. 784, 786, 330 A.2d 774, 775 (1974) (strict compliance with technical form of

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vote must yield to recognition of voter's indication of intent). We apply the doctrine of substantial compliance to effectuate our long-standing rule that statutes regulating the form of ballots or votes "should not be applied to disenfranchise voters because of technical irregularities." *Opinion of the Justices*, 114 N.H. at 786, 330 A.2d at 776; see N.H. CONST. pt. I, art. 11.

[10][11][12] Application of this doctrine is limited, however, to situations in which the defect or deviation is minor in nature. See *Barcomb v. Herman*, 116 N.H. 318, 320, 358 A.2d 400, 402 (1976). This is not such a case. Here, there was no substantial compliance; the statute clearly proscribes the use of stickers except by election officials in specifically enumerated circumstances. The use of stickers in this case was neither a minor deviation nor a technical irregularity. Cf. *Bridgham*, 112 N.H. at 86, 289 A.2d at 393-94. Nor is it evident that either Ball or the voters intended to comply with the statute. See *Attorney General v. Duncan*, 76 N.H. 11, 13, 78 A. 925, 926 (1911) (Walker, J.). Indeed, the plain language of RSA 659:65, II(b) is more than sufficient to warn candidates and voters that sticker votes will not be counted. Thus, this is not a case in which a voter could have thought he or she was voting in compliance with the statute. Cf. *Duncan*, 76 N.H. at 13, 78 A. at 926. Because there was no substantial compliance with the statute in this case, we are not at liberty to give controlling effect to the voters' intent. Even when the voters' intent is clear, if the means they employed to indicate their vote does not substantially comply with the applicable statute, "their attempt to vote ... is a failure." *Id.*; see also *State ex rel. Browne v. District Ct. of Third J. Dist., etc.*, 167 Mont. 477, 539 P.2d 1182, 1185 (1975).

[13][14] The defendants argue that application of the statute in this case would impermissibly disenfranchise the voters who used \*1228 stickers to cast their votes for Ball. This argument is unavailing. The right to vote is cherished and protected by our State Constitution. See N.H. CONST. pt. I, art.

. Recognizing that "[t]he object of election laws is to secure the rights of duly qualified voters, and not to defeat them," *Opinion of the Justices*, 116 N.H. 756, 759, 367 A.2d 209, 210 (1976) (quotation omitted), we strive, in resolving election disputes, to ascertain the legally expressed choice of the voters and avoid deciding cases on unwarranted technicalities. See *id.* As noted above, we employ the doctrine of substantial compliance to effectuate these goals. At the same time, we have long recognized that the legislature is entitled to regulate the time, place, and manner of elections in New Hampshire, see *Murchie v. Clifford*, 76 N.H. 99, 101, 79 A. 901, 902 (1911), and we enforce such regulations when they are reasonable. See *Wilkes*, 101 N.H. at 422-23, 145 A.2d at 170.

As applied in this case, RSA 659:65, II(b) regulates the manner by which a voter may *not* express his or her vote. Cf. *Opinion of the Justices*, 114 N.H. at 786, 330 A.2d at 775 (noting that prior election statutes afforded citizens several ways to express preference by ballot). This is not, despite the defendants' contention to the contrary, an unreasonable restriction on the voters' right to cast a write-in vote for the candidate of their choice. The legislature has the authority to prescribe the manner by which a voter may express his or her vote. See *Murchie*, 76 N.H. at 104, 79 A. at 903. Because the sticker votes in this case were not cast in a manner permitted by, or in substantial compliance with, the statute, they did not constitute the legally expressed choice of the voters, cf. *Opinion of the Justices*, 116 N.H. at 759, 367 A.2d at 210, and thus we do not now inquire into the voters' intent, cf. *Murchie*, 76 N.H. at 105, 79 A. at 903-04. Notably, a majority of this court has upheld the invalidation of sticker votes pursuant to a statute less clearly prohibitory than RSA 659:65, II(b), concluding that the statute mandated that stickers should not be counted, notwithstanding the intent of the voters. See *Duncan*, 76 N.H. at 16-17, 78 A. at 928 (Parsons, C.J.). We conclude that RSA 659:65, II(b)'s provision that sticker votes "shall not be tabulated" is a reasonable exercise of legislative

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authority, and thus does not impermissibly disenfranchise the voters in this case.

Accordingly, we defer to the legislature's determination that the attachment of stickers to ballots should be prohibited. Cf. *Opinion of the Justices (Furlough)*, 135 N.H. 625, 634-35, 609 A.2d 1204, 1210 (1992) (noting that courts typically defer to legislative judgment as to necessity and reasonableness of particular measures). Recognizing that the use of stickers has been both "lauded for facilitating voting and denounced as conducive to fraud and confusion," we are convinced that "[t]he propriety of stickers is a matter for legislative, not judicial[,] determination." *Allen v. State Board of Elections*, 268 F.Supp. 218, 220 (E.D.Va.1967), *vacated on other grounds*, 393 U.S. 544, 89 S.Ct. 817, 22 L.Ed.2d 1 (1969). Pursuant to RSA 659:65, II(b), the sticker votes should not have been counted. If the statute is to achieve a more liberal result in a case such as this, where the equities appear to weigh heavily in favor of the voters, this must be accomplished by legislative action and not by judicial decree. See *Wilkes*, 101 N.H. at 423, 145 A.2d at 170-71; see also *Colby v. Fuller*, 96 N.H. 323, 326, 76 A.2d 509, 511-12 (1950). The decision of the superior court is reversed, and the case is remanded for proceedings consistent with this opinion.

*Reversed and remanded.*

All concurred.

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C

Supreme Court of South Carolina.

Carl KNIGHT, Petitioner,

v.

The STATE BOARD OF CANVASSERS, The Dorchester  
Board of Canvassers, and J.C.

Woodberry, Respondents.

No. 22939.

Heard Dec. 8, 1988.

Decided Dec. 14, 1988.

Unsuccessful candidate for sheriff petitioned for writ of certiorari contesting decision of State Board of Canvassers affirming results of county sheriff's election. The Supreme Court held that: (1) Board's decision affirming counting of absentee ballots for sheriff which did not meet all technical absentee ballot requirements was not error of law, and (2) poll managers' failure to count all absentee ballots in sheriff's election without interruption and without adjournment did not affect result of election, and thus did not require that election be set aside, although conduct violated statute.

Petition dismissed.

West Headnotes

**[1] Elections** 227(1)

[144k227\(1\) Most Cited Cases](#)

**[1] Elections** 291

[144k291 Most Cited Cases](#)

Court employs every reasonable presumption in favor of sustaining contested election and mere technical irregularities or illegalities are insufficient to set aside election unless errors actually appear to have affected result of the election.

**[2] Elections** 298(1)

[144k298\(1\) Most Cited Cases](#)

Supreme Court's scope of review of decisions of State Board of Canvassers is limited to corrections of errors of law; findings of fact will not be overturned unless wholly unsupported by evidence.

**[3] Elections** 95

[144k95 Most Cited Cases](#)

**[3] Elections** 216.1

[144k216.1 Most Cited Cases](#)

Statute providing that provisions concerning absentee registration and absentee voting shall be liberally construed prohibits Supreme Court from subjecting to strict scrutiny procedures for submitting and counting absentee ballots. [Code 1976, § 7-15-20.](#)

**[4] Elections** 227(8)

[144k227\(8\) Most Cited Cases](#)

State Board of Canvasser's decision affirming counting of absentee ballots for sheriff which did not meet all technical absentee ballot requirements was not error of law. [Code 1976, § 7-15-20.](#)

**[5] Elections** 244

[144k244 Most Cited Cases](#)

Poll managers' failure to count all absentee ballots in sheriff's election without interruption and without adjournment did not affect result of election, and thus did not require that election be set aside, although conduct violated statute; evidence indicated that absentee ballots which had been set aside on election night were secured and that no tampering had occurred. [Code 1976, §§ 7-13-1110, 7-15-20.](#)

**\*\*686 \*56** Robert N. Rosen, of Rosen, Rosen & Hagood, Charleston, for petitioner knight.

Nancy D. Hawk, Charleston, for respondent J.C. Woodberry.

David B. McCormack, of Buist, Moore, Smythe & McGee, Charleston, for respondent Dorchester Bd. of Canvassers.

Deputy Atty. Gen. James P. Hudson, Columbia, for respondent State Bd. of Canvassers.

PER CURIAM:

This is a proceeding under a writ of certiorari. Petitioner, a candidate for sheriff, contests the decision of respondent State Board of Canvassers (State Board) affirming the results of the Dorchester County Sheriff's Election. He contends that due to various statutory irregularities in the submission of and counting of absentee ballots, a new election should be held. Respondents oppose the ordering of a new election. Respondent Woodberry seeks costs and attorney's

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fees.

[1] At the outset, petitioner concedes the general rule in this state is that this Court will employ every reasonable presumption in favor of sustaining a contested election and that mere technical irregularities or illegalities are insufficient to set aside an election unless the errors actually appear to have affected the result of the election. *Sims v. Ham*, 275 S.C. 369, 271 S.E.2d 316 (1980); *Gregory v. South Carolina Democratic Executive Committee*, 271 S.C. 364, 247 S.E.2d 439 (1978); *Berry v. Spigner*, 226 S.C. 183, 84 S.E.2d 381 (1954); *Bolt v. Cobb*, 225 S.C. 408, 82 S.E.2d 789 (1954). Petitioner further concedes that under this general rule his election protest would fail due to the \*57 facts developed in this record. Nevertheless, petitioner urges that, in the matter of absentee voting, we adopt a strict scrutiny approach. Specifically, petitioner argues that the procedures for submitting and counting absentee ballots should be subject to strict scrutiny. Petitioner relies on *Wichelmann v. City of Glencoe*, 200 Minn. 62, 273 N.W. 638 (1937), *Davis v. Bd. of Education of Beaufort County*, 186 N.C. 227, 119 S.E. 372 (1923), and *Hilliard v. Park*, 212 Tenn. 588, 370 S.W.2d 829 (1963), as authority for his argument.

[2] This Court's scope of review of decisions of the State Board of Canvassers is limited to corrections of errors of law; findings of fact will not be overturned unless wholly unsupported by the evidence. *Sims v. Ham*, *supra*; *Gregory v. South Carolina Democratic Executive Committee*, *supra*; *Redfearn v. Bd. of State Canvassers*, 234 S.C. 113, 107 S.E.2d 10 (1959).

[3][4] Petitioner's argument for a strict scrutiny standard for absentee voting must fail because our General Assembly has specified that statutes concerning absentee registration and absentee voting shall be liberally construed. *S.C.Code Ann. § 7-15-20 (Supp.1987)*; *see also, Gregory v. South Carolina Democratic Executive Committee*, *supra*. Because the General Assembly has required us to liberally construe those statutory provisions governing the registration for and submission of absentee ballots, we conclude the State Board's decision affirming the counting of those absentee ballots which did not meet all the technical absentee ballot requirements did not constitute an error of law.

[5] Further, we find that the poll managers' failure to count all the absentee ballots without interruption and without adjournment did not affect the result of the election, although the action was a violation of *S.C.Code Ann. § 7-13-1110 (Supp.1987)*. We find ample evidence in the record which supports the State Board's conclusion that the absentee ballots which were set aside on election night had been secured and that no tampering had occurred.

Accordingly, we affirm the decision of the State Board upholding the election. No costs or attorney's fees shall be awarded.

PETITION DISMISSED.

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689 N.W.2d 692  
277 Wis.2d 421, 689 N.W.2d 692, 2004 WI App 219  
(Cite as: 277 Wis.2d 421, 689 N.W.2d 692)

## H

### [Briefs and Other Related Documents](#)

Court of Appeals of Wisconsin.  
James **LOGIC**, Plaintiff-Appellant, [\[FN†\]](#)  
[FN†](#) Petition for Review Dismissed.

v.

**CITY OF SOUTH MILWAUKEE BOARD OF CAN-**  
**VASSERS**, Defendant-Respondent,  
David Kieck, Intervenor-Respondent.  
**No. 04-1642.**

Submitted on Briefs Oct. 6, 2004.  
Opinion Filed Oct. 19, 2004.

**Background:** Unsuccessful candidate for mayor brought action contesting recount of city board of canvassers. The Circuit Court, Milwaukee County, Jeffrey A. Kremers, J., dismissed action, for failure to serve notice of appeal on successful candidate. Unsuccessful candidate appealed.

**Holdings:** The Court of Appeals, Fine, J., held that:

- (1) failure to serve appeal on successful candidate was fundamental defect that deprived circuit court of jurisdiction to hear vote-recount appeal;
  - (2) "will of the electorate" rule did not apply; and
  - (3) service of appeal from recount on city clerk was not effective as to successful candidate.
- Affirmed.

West Headnotes

[\[1\] Appeal and Error](#) 426  
[30k426 Most Cited Cases](#)

[\[1\] Process](#) 48  
[313k48 Most Cited Cases](#)

Failure to follow statutory requirements in commencing an action, serving a party, or taking an appeal deprives the court from which relief is sought of jurisdiction over the action, party, or appeal if the defect of process is "fundamental" rather than merely "technical."

[\[2\] Appeal and Error](#) 426

[30k426 Most Cited Cases](#)

[\[2\] Process](#) 153  
[313k153 Most Cited Cases](#)

A defect in commencing an action, serving a party, or taking an appeal is "fundamental" if it defeats the purpose of the underlying rule.

[\[3\] Elections](#) 305(4)  
[144k305\(4\) Most Cited Cases](#)

Failure of unsuccessful mayoral candidate to serve appeal from recount of city board of canvassers on successful candidate, as was required by statute, was "fundamental" defect that deprived circuit court of jurisdiction to hear vote-recount appeal, even if success candidate knew about appeal, and sought and was permitted by circuit court to intervene in appeal of recount. [W.S.A. 9.01\(6\)\(a\)](#).

[\[4\] Elections](#) 305(4)  
[144k305\(4\) Most Cited Cases](#)

Failure to comply with requirement in statute governing appeals from a recount determination by the board of canvassers that a vote-recount appeal to the circuit court had to be served "on the other candidates" defeats purpose of statute and is thus "fundamental." [W.S.A. 9.01\(6\)\(a\)](#).

[\[5\] Elections](#) 305(4)  
[144k305\(4\) Most Cited Cases](#)

Fundamental purpose of statute governing appeals from a recount determination by the board of canvassers was to guarantee that "other candidates" had notice of a recount-appeal filed by a candidate, which was a neutral requirement to which the will-of-the-electorate rule did not apply; no vote's validity was affected directly by application of statute's service requirement. 9.01(6)(a).

[\[6\] Elections](#) 227(1)  
[144k227\(1\) Most Cited Cases](#)

The "will of the electorate" rule is designed to ensure that an elector's vote will be counted even though there has been noncompliance with the election law as long as the defect is de minimis.

[\[7\] Elections](#) 227(1)  
[144k227\(1\) Most Cited Cases](#)

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Even under the "will of the electorate" rule, votes will be discarded despite the apparent good faith of the electors if noncompliance with the election law is not de minimis.

### [\[8\] Elections](#) [305\(4\)](#)

#### [144k305\(4\) Most Cited Cases](#)

Even if the "will of the electorate" rule applied, requirement in statute governing appeals from a recount determination by the board of canvassers that challenger serve "other candidates" was a core protection that was hardly de minimis and, thus, was mandatory rather than directory. [W.S.A. 9.01\(6\)\(a\)](#).

### [\[9\] Elections](#) [305\(4\)](#)

#### [144k305\(4\) Most Cited Cases](#)

Unsuccessful mayoral candidate's service of appeal from recount of city board of canvassers on city clerk was not effective as to incumbent candidate; incumbent was running for office in his personal, not his official, capacity, and there was no evidence that incumbent had either authorized or appointed clerk to accept service for him in his capacity as a candidate. [W.S.A. 9.01\(6\)\(a\)](#).

**\*\*693 \*423** On behalf of the plaintiff-appellant, the cause was submitted on the briefs of [Basil M. Loeb](#), Mequon.

On behalf of the defendant-respondent, the cause was submitted on the brief of [Joseph G. Murphy](#), South Milwaukee. Intervenor-respondent represented by [Michael S. Maistelman](#), Milwaukee, joins in the brief of defendant-respondent.

**\*424** Before WEDEMEYER, P.J., FINE and CURLEY, JJ.

¶ 1 FINE, J.

James Logic, a candidate for mayor of the City of South Milwaukee in the April 6, 2004, election, appeals the circuit court's dismissal of his action contesting a recount by the City of South Milwaukee Board of Canvassers. The circuit court held that Logic's failure to serve his notice of appeal on the other and, according to the Board of Canvassers, successful, mayoral candidate meant that the court had no jurisdiction over the appeal. We affirm. [\[FN1\]](#)

[FN1](#). This is an expedited appeal under [Wis. Stat. Rule 809.17](#).

### I.

¶ 2 Both Logic and the then incumbent, David Kieck, ran for mayor of South Milwaukee. The initial tally had them tied at 2,783 votes apiece. Kieck sought a recount under [Wis. Stat. § 9.01](#). As a result of that recount, the Board of Canvassers determined that Kieck won by one vote. Logic, contending that the Board of Canvassers erred in the recount, sought review by the circuit court. See [Wis. Stat. § 9.01\(6\)\(a\)](#). [Section 9.01\(6\)\(a\)](#) provides, as material to this appeal:

Within 5 business days after completion of the recount determination by the board of canvassers ... any candidate ... may appeal to circuit court. The appeal shall commence by serving a written notice of appeal on the other candidates.... The appellant shall serve the notice by certified mail or in person.

Logic did not serve Kieck either personally or by certified mail, and, as noted, the circuit court dismissed Logic's appeal. Our review is *de novo*. See **\*\*694**[Burnett v. Hill](#), 207 Wis.2d 110, 118, 557 N.W.2d 800, 803 (1997).

### \*425 II.

A. "Fundamental" versus "Technical" Defect.

[\[1\]\[2\]](#) ¶ 3 Failure to follow statutory requirements in commencing an action, serving a party, or taking an appeal deprives the court from which relief is sought of jurisdiction over the action, party, or appeal if the defect of process is "fundamental" rather than merely "technical." See [American Family Mut. Ins. Co. v. Royal Ins. Co.](#), 167 Wis.2d 524, 533, 481 N.W.2d 629, 632 (1992). A defect is "fundamental" if it defeats "the purpose of the rule." [Jadair Inc. v. United States Fire Ins. Co.](#), 209 Wis.2d 187, 208, 211-213, 562 N.W.2d 401, 409, 411 (1997) (overriding purpose of preventing non-lawyers from practicing law rendered ineffective a notice of appeal filed on corporation's behalf by its non-lawyer president); [Burnett](#), 207 Wis.2d at 123-125, 557 N.W.2d at 805-806 ("mailing of an unauthenticated copy of the publication summons along with authenticated copies of the original summons and complaint, although not in strict compliance, fulfilled the purpose" of statute and was, therefore, a "technical" defect); [Gaddis v. LaCrosse Prods., Inc.](#), 198 Wis.2d 396, 405-407, 542 N.W.2d 454, 457-458 (1996) (serving unsigned summons together with signed complaint

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was "technical" defect because purpose of summons is to give notice only and that the unsigned summons did); *American Family*, 167 Wis.2d at 535, 481 N.W.2d at 633 (service of unauthenticated photocopy of authenticated summons and complaint was fundamental defect).

[3][4] ¶ 4 The purpose of Wis. Stat. § 9.01(6)(a)'s requirement that a vote-recount appeal to the circuit court be served "on the other candidates" is to give them \*426 notice of the appeal so they can seek to protect their interests. Failure to comply with this requirement defeats that purpose and is thus "fundamental." See *Jadair*, 209 Wis.2d at 208, 562 N.W.2d at 409. Thus, that Kieck knew about the appeal, and sought and was permitted by the circuit court to intervene in Logic's appeal of the recount is immaterial to the validity of that appeal. See *id.*, 209 Wis.2d at 212- 213, 562 N.W.2d at 411 ("once we determine that a defect is fundamental, we need not consider prejudice"); *American Family*, 167 Wis.2d at 530, 481 N.W.2d at 631 ("[A]ctual notice alone is not enough to confer jurisdiction upon the court. Service must be made in accordance with the manner prescribed by statute.") (internal quotation marks and quoted source omitted).

#### B. "Directory" versus "Mandatory."

[5] ¶ 5 Logic argues that because election laws are generally interpreted as directory rather than mandatory, in order to preserve the electorate's will, see Wis. Stat. § 5.01(1); *Gradinjan v. Boho*, 29 Wis.2d 674, 682, 139 N.W.2d 557, 561 (1966), strict compliance with Wis. Stat. § 9.01(6)(a) is not required. We disagree.

[6] ¶ 6 The "will of the electorate" rule is designed to ensure that an elector's vote will be counted even though there has been noncompliance with the election law as long as the defect is *de minimis*. *Roth v. LaFarge Sch. Dist. Bd. of Canvassers*, 2004 WI 6, ¶¶ 19-27, 268 Wis.2d 335, 348-351, 677 N.W.2d 599, 605-607; *Roth v. LaFarge Sch. Dist. Bd. of Canvassers*, 2001 WI App 221, ¶¶ 27-37, 247 Wis.2d 708, 726-733, 634 N.W.2d 882, 889-893. As we have seen, however, the fundamental purpose of Wis. Stat. § 9.01(6)(a) is to guarantee that \*427 "other candidates" have notice of a recount-appeal filed by a candidate; this is an electorate-will neutral requirement--no vote's validity is affected \*\*695 dir-

ectly by the application of § 9.01(6)(a). Accordingly, the will-of-the-electorate rule does not apply here.

[7][8] ¶ 7 Moreover, as *Gradinjan* recognizes, even under the "will of the electorate" rule votes will be discarded despite the apparent good faith of the electors if noncompliance with the election law is not *de minimis*. See *id.*, 29 Wis.2d at 682-683, 139 N.W.2d at 562 (requirement that absentee ballots bear either the name or the initials of the town clerk is to prevent possible fraud; thus, absentee ballots without either the town clerk's name or initials may not be counted). This is consistent with the "fundamental defect"/" technical defect" analysis of irregularities in commencement of either an action or appeal. Wis. Stat. § 9.01(6)(a)'s requirement that those challenging recounts serve "other candidates" is, as we have seen, a core protection that is hardly *de minimis*. Thus, in the terminology of the election-law cases upon which Logic relies, § 9.01(6)(a)'s command that "other candidates" be served with the appeal is mandatory rather than directory.

#### C. Service on City Clerk.

[9] ¶ 8 In a one-paragraph and undeveloped argument, Logic contends that service of the appeal was made on Kieck because, as recounted in an affidavit submitted to the circuit court by a law clerk employed by the law firm representing Logic, the law clerk "personally served the City of South Milwaukee Board of Canvassers and Mayor David Kieck, by serving the \*428 Notice of Appeal in the above-captioned action on Jacqueline Johnson, in her official capacity as the City Clerk for the City of South Milwaukee." Without citation to authority other than Wis. Stat. Rule 801.11(1)(d), which provides that personal service on a defendant may be made "by serving the summons ... upon an agent authorized by appointment or by law to accept service of the summons for the defendant," Logic argues that service on Johnson was service on Kieck because he was the City's mayor at the time. We disagree. Kieck's persona in the contested election was *qua* candidate not mayor; he was running for office in his personal, not his official, capacity. Although Johnson might have been a proper person to serve if Kieck were being sued in his official capacity for some act done or not done as mayor, she was not the proper person to serve here because there is nothing in the record that indicates that

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Kieck had either authorized or appointed her to accept service for him in his capacity as a candidate. See [Useni v. Boudron](#), 2003 WI App 98, ¶ 11, 264 Wis.2d 783, 791-792, 662 N.W.2d 672, 676-677 (person who is named in a dual capacity must be properly served in each capacity).

### III.

¶ 9 The circuit court properly determined that it lacked jurisdiction over Logic's appeal because Logic did not personally serve Kieck as required by [Wis. Stat. § 9.01\(6\)\(a\)](#). Accordingly, we do not address either Logic's contention that the circuit court erred in permitting Kieck to intervene in the action, or Logic's argument that the Board of Canvassers improperly gave the election to Kieck. See [Gross v. Hoffman](#), 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (only dispositive issue need be addressed); \*429 [State v. Blalock](#), 150 Wis.2d 688, 703, 442 N.W.2d 514, 520 (Ct.App.1989) (cases should be decided on the "narrowest possible ground").

Judgment affirmed.

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#### **Briefs and Other Related Documents ([Back to top](#))**

- [2004 WL 3662855](#) (Appellate Brief) Reply Brief of the Plaintiff-Appellant (Sep. 08, 2004)
- [2004 WL 3640632](#) (Appellate Brief) Brief of the Defendant-Respondent (Aug. 20, 2004)
- [2004 WL 3640631](#) (Appellate Brief) Brief of the Plaintiff-Appellant (Aug. 04, 2004)

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Supreme Court of Wisconsin.  
Lillian McNALLY, Agnes A. Nelson, and Martha Johnson,  
on behalf of themselves  
and all others similarly situated, Plaintiffs-Respondents-Petitioners,  
v.  
Charles TOLLANDER and Burnett County, Defendants-Appellants.  
No. 78-783.

Argued Jan. 5, 1981.  
Decided March 3, 1981.

The Circuit Court, Burnett County, Douglas S. Moodie, J., declared void a county seat removal referendum election, and appeal was taken. The Court of Appeals, Dykman, J., [97 Wis.2d 583, 294 N.W.2d 660](#), reversed, and appeal was taken. The Supreme Court, Day, J., held that exclusion of 2,578 voters, approximately 40% of the electorate, from casting ballots in county seat removal referendum election so undermined appearance of fairness in election that election must be set aside.

Judgment of a Court of Appeals reversed.

#### West Headnotes

#### [\[1\] Counties](#) 55

##### [104k55 Most Cited Cases](#)

Exclusion of 2,578 voters, approximately 40% of the electorate, from casting ballots in county seat removal referendum election so undermined appearance of fairness in election that election must be set aside. [W.S.A.Const. Art. 3, § 1](#); Art. 13, § 8; [W.S.A. 59.11](#).

#### [\[2\] Elections](#) 271

##### [144k271 Most Cited Cases](#)

In a case where deprivations of the right to vote are so significant in number or so egregious in character as to seriously undermine the appearance of fairness, such an election must be set aside, even when outcome of election might not be changed. [W.S.A.Const. Art. 3, § 1](#); Art. 13, § 8.

**\*\*441 \*490** Thomas D. Bell, New Richmond, argued for plaintiffs-respondents-petitioners; Doar, Drill, Norman,

Bakke, Bell & Skow, New Richmond, on brief.

Earl Munson, Jr., and David E. McFarlane, Madison, argued for defendants-appellants; Mary E. Wendorff **\*491** and La Follette, Sinykin, Anderson & Munson, Madison, on brief.

DAY, Justice.

This is a review of a decision of the Court of Appeals published at [97 Wis.2d 583, 294 N.W.2d 660 \(Ct.App.1980\)](#) reversing the judgment of the Circuit Court for Burnett County: DOUGLAS S. MOODIE, Circuit Judge for Douglas County, Presiding.

This case presents a challenge to the validity of a referendum election held November 2, 1976, to remove the Burnett county seat from the village of Grantsburg to the town of Siren. Numerous procedural irregularities occurred in the election and approximately forty percent of the registered voters were not given the opportunity to vote. We hold that the deprivation of the right to vote of forty percent of the electorate demands that this Court set aside the election. We reverse the decision of the Court of Appeals.

Burnett County is located in northwestern Wisconsin on the Minnesota border. The county seat in the village of Grantsburg in the western part of the county. The idea of relocating the county seat to a more central location has been a subject of discussion in the county for many years. The courthouse in Grantsburg is about seventy-five years old and generally considered inadequate. The jail, also located in Grantsburg was built in 1888.

The Wisconsin Department of Corrections had informed the county that it would close and condemn the jail by August 2, 1976. The need for a new jail and courthouse was part of the argument for removing the county seat to the centrally located town of Siren.

The removal of a county seat is governed by [sec. 59.11, Stats. \(1975\)](#). [\[FN1\]](#) To initiate the process, [sec. 59.11\(4\)](#), requires that:

[FN1](#). "59.11. County seat; change. (1) The county seat shall be fixed and designated by the county board at the first regular meeting after the organiz-

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ation of any county; and no county seat shall be changed except as provided in this section.

"(2) If two-fifths of the legal voters of any county, to be determined by the poll lists of the last previous general election held therein, the names of which voters shall appear on some one of the poll lists of said election, shall present to the county board a petition signed by them asking a change of the county seat to some other place designated in such petition, such board shall submit the question of removal of the county seat to a vote of the qualified voters of the county. Such election shall be held only on the day of the general election, notice thereof shall be given and the same shall be conducted as in the case of the election of officers on that day, and the votes shall be canvassed, certified and returned in the same manner as other votes at such election. The question to be submitted shall be 'Shall the county seat of ... county be removed to ...,' and the ballots on such question shall be deposited in a separate ballot box.

"(3) If a majority of all the votes cast at such election on that subject are in favor of the proposed change, the chairman of the county board shall certify the same, with the attestation of the county clerk, to the governor, who thereupon shall issue his proclamation to that effect and cause the same to be published in the official state paper, and from the date of such publication the place so designated shall be the county seat of such county, and the county board shall not again submit the question of removal within five years.

"(4) However, when a county seat has been established in one place for a period of fifteen years or more, and the county has there erected permanent buildings of the value of not less than ten thousand dollars, the county seat shall not be removed, nor shall any application for its removal be submitted to a vote of the electors of the county unless a petition signed by at least one-half of the resident freeholders of the county as evidenced by the recorded deeds in the office of the register of deeds of the county, in favor of such removal, shall first be presented to the county board and filed in the office

of the county clerk; and no such election to change any county seat shall be held for a period of five years after the year in which a courthouse or other county building costing three thousand dollars or more was built at the county seat and occupied for county purposes."

**\*492** "... a petition signed by at least one-half of the resident freeholders of the **\*\*442** county as evidenced by the **\*493** recorded deeds in the office of the register of deeds of the county, in favor of such removal, shall first be presented to the county board and filed in the office of the county clerk."

On November 20, 1975, George Benson, a Siren attorney who chaired a citizen's group in favor of removal, presented such a petition with some 2,000 signatures urging removal of the county seat to Siren.

On December 16, 1975, the county board established a "Petition Committee" to determine the number of resident freeholders in the county and the validity of signatures on the removal petition. Before the committee was appointed, the county finance committee and attorneys for a group opposed to the removal agreed that no names would be added or subtracted from the petition after November 20, 1975. This agreement was affirmed by the district attorney.

The committee, once appointed, prepared a list of resident freeholders. The petition was obtained by the committee on July 23, 1976 and the signatures compared to the freeholder list.<sup>[FN2]</sup> The number of qualified signatures on the original petition was 2,486 of a total of 5,727 resident freeholders, or 43.4%.

<sup>[FN2]</sup> The county clerk on July 12, 1976, refused to turn the petition over to the committee without a release. Such a release was eventually signed by the members of the committee.

Four more petitions containing additional signatures were filed on July 15, August 19 and August 27, 1976.

Upon the advice of the district attorney that the agreed cut-off date was "improper," these petitions were joined with the original petition. In September of 1976, the committee

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determined that there were a total of 3,092 qualified petitioner signatures, of the total 5,727 resident freeholders.

**\*494** On September 17, 1976, the district attorney informed the county board that there was a sufficient number of petition signatures to hold the election.

The board found the number of petition signatures sufficient under [sec. 59.11\(4\), Stats.](#), and voted to submit the county seat removal question to the voters in the November, 1976 general election.

On September 29, 1976, the board directed the county clerk to prepare and distribute county seat removal ballots. The county clerk refused, based on a August 18, 1976 letter he had received from the executive director of the State Elections Board which stated it was too late to hold the referendum on the November 2nd ballot because notice was not published on the last Tuesday in May and the first Tuesday in June as required by [sec. 10.06\(2\)\(f\), Stats. \(1973\)](#).

A county board member then contacted the State Elections Board and, by a letter dated October 13, 1976, was informed by the legal counsel to the State Elections Board that "if the total vote on the county seat question were a significant percentage of the total votes on other offices, the election on the county seat question would be valid."

On October 21, 1976, the county board passed a resolution directing the county clerk to distribute ballots for the referendum and if he refused, directing the county board chairman to distribute ballots for the election.

The county clerk again refused, and the county board chairman appointed a committee which had ballots printed and distributed to all municipal precinct clerks between October 23 and 25, 1976.

On October 26, the county clerk sent a letter drafted by the attorney for the "Concerned Taxpayers," a group opposed to the removal of the county seat, to all election clerks directing them not to distribute the ballots and advising them that they could be subject to criminal liability if they did distribute the ballots.

**\*495** On October 28, 1976, the district attorney sent letters

to each of the election clerks informing them that it was not illegal to distribute the ballots and urging them to do so.

**\*\*443** On October 27, 1976, formal notice of the referendum election was published in the official county newspaper. The published notice also appeared in two other weeklies on October 27 and October 28.

On October 30, a "telelecture" seminar was conducted by the University of Wisconsin Extension for county election officials. A number of Burnett county municipal election clerks attended, and the clerk for the town of Daniels asked the legal counsel for the State Elections Board whether ballots printed and delivered nine days prior to election by someone other than the county clerk would be legal. The legal counsel responded that the statutes provide that the county clerk has the exclusive authority to distribute and print ballots and that there are "possible criminal penalties for any election official who allows one to vote on a ballot other than an official ballot printed and distributed by the only means provided for in the statutes."

On the November 2, 1976, general election, 6,558 persons voted in Burnett county. Election clerks in eight western Burnett county towns refused to distribute the referendum ballots. The referendum ballots were distributed in the sixteen eastern towns. [\[FN3\]](#)

[FN3.](#) Forty-nine absentee voters in the sixteen eastern towns did not receive referendum ballots.

2,578 people, some forty percent of the voters in Burnett county, all residing in the western part of the county were denied referendum ballots and the opportunity to vote on the removal issue. Of those who were given ballots, 3,257 voted for removal, 588 voted against removal and eighty-six did not vote on the referendum.

**\*496** The referendum ballots were sealed in ballot bags and delivered with completed tally sheets to the county clerk, who placed the ballots in his vault.

In January of 1977, the Burnett County district attorney requested an opinion on the legality of the election from the Attorney General. The Attorney General opined that the election was valid despite various procedural irregularities.

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60 Op.Atty.Gen. 219 (1977).

A canvass of the referendum votes was finally conducted in August of 1977. On August 17, the chairman of the Burnett county board certified the results of the county seat removal election to acting Governor Martin Schreiber. This certification was not attested to by the new Burnett County Clerk as required by [sec. 59.11\(3\), Stats.](#) The new county clerk refused to do so because he was not county clerk at the time of the election. On September 9, 1977, the results were re-certified and the new clerk did attest to the County Board Chairman's signature.

On September 27, 1977, acting Governor Schreiber sought further clarification as to the validity of the election from the Attorney General. The Attorney General responded on November 3, 1977, that he would be "unable to say with the same assurance as before that the election would be held valid if a court test were brought," given notice of further procedural irregularities in the election. Nonetheless, Schreiber issued a proclamation on November 25, 1977, designating and establishing the Town of Siren as the Burnett County seat and this proclamation was published in the official state newspaper. [\[FN4\]](#)

[FN4.](#) The proclamation was revoked by the acting Governor in December, 1978.

This action was commenced on December 9, 1977. The named plaintiffs are the wives of three members of the Burnett County Board of Supervisors who opposed the \*497 relocation of the county seat. The action was brought as a class action on behalf of the plaintiffs and other persons who were allegedly without notice of the referendum or were denied the opportunity to vote. The plaintiffs sought judgment against the defendant county and the chairman of the county board declaring the election invalid and a permanent injunction restraining any action to effectuate the removal of the county seat. A three day trial was held in April of 1978. The trial court, finding "reasonable doubt overall that the election fairly \*\*444 represented the will of the voters of Burnett County," entered judgment on October 18, 1978, amended November 7, 1978, in which he declared the election void, granted the injunction and awarded costs against Burnett County in the amount of \$1,633.91. The

Court of Appeals reversed the judgment of the trial court. The plaintiffs-respondents-petitioners' (plaintiffs) petition for review was granted on July 10, 1980.

This Court has decided many election contest cases. Typically, these actions are brought by losing candidates who have discovered irregularities in election procedures and sought to overturn the election results through quo warranto actions. In cases of that kind, the Court has traditionally looked to the specific statutory election provisions involved to determine whether they were "directory or mandatory" provisions. [Lanser v. Koconis, 62 Wis.2d 86, 214 N.W.2d 425 \(1974\).](#) The Court has consistently sought to preserve the will of the electors by construing election provisions as directory if there has been substantial compliance with their terms. [Gradinjan v. Boho, 29 Wis.2d 674, 682, 139 N.W.2d 557 \(1966\).](#) This approach is consistent with [sec. 5.01\(1\), Stats. \(1977\)](#) which provides:

"5.01. Scope. (1) Construction of Title II. Title II shall give effect to the will of the electors, if that can be ascertained from the proceedings, notwithstanding \*498 informality or failure to fully comply with some of its provisions."

This case, however, is fundamentally different from other election cases considered by this Court. Here, in addition to numerous procedural irregularities, some forty percent of the qualified voters were actually denied the opportunity to cast ballots. Whether such an election can be valid is a question of first impression in this Court. We hold that the election must be set aside.

The Court of Appeals identified six instances of noncompliance with election statutes that occurred in this referendum election:

"(1) Notice was defective contrary to [secs. 10.06\(2\)\(h\), 10.01\(2\)\(a\), \(b\) and \(c\), and 10.06\(2\)\(m\), Stats.;](#) (2) Printing of the referendum ballots was arranged by a county board committee and not the county clerk contrary to [secs. 7.10\(2\) and 7.50\(1\)\(a\), Stats.;](#) (3) Ballots were distributed by a county board committee, not the county clerk contrary to [sec. 7.10\(3\), Stats.;](#) (4) Ballots were not distributed to voters in eight districts contrary to [sec. 7.15\(1\)\(c\), Stats.;](#) (5) Ballots were canvassed by a county board committee, not the county clerk contrary to [sec.](#)

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[7.60, Stats.:](#) (6) The ballots provided by the county board committee were cast and counted in the election contrary to [sec. 7.50\(1\), Stats.](#)" [McNally v. Tollander, 97 Wis.2d 583, 602, 294 N.W.2d 660 \(Ct.App.1980\).](#)

These election defects were not discovered after the election results were in. Rather, the record shows that the election statutes were intentionally ignored by public officials who were anxious to put the referendum issue on the November 1976 general election, even though the statutory requirements could not be timely met. Proper notice and simple compliance with the clear language of the election statutes would have avoided the problems now before us, that have now delayed resolution of the county seat question for over four years.

\*499 Because we hold that the failure to provide ballots to forty percent of the voters by itself requires that the election be set aside, we need not consider whether the several other defects involved mandatory provisions that would provide additional bases for setting aside the election.

The Court of Appeals relied on this Court's decision in the very early case of [State ex rel. Wold v. Hanson, 87 Wis. 177, 58 N.W. 237 \(1894\)](#), in sustaining this election, despite the massive exclusion of qualified voters.

Hanson was a quo warranto action in which the plaintiff, a losing candidate in a circuit court clerk election, sought to be placed in that office and to have the winning candidate excluded. The plaintiff's action was premised on the fact that eighteen qualified voters who desired to vote \*\*445 for him were excluded from the polling place because election clerks erroneously believed they were not qualified voters. If all eighteen disenfranchised voters had cast their ballots for the plaintiff, he would have won the election by five votes.

This Court let the election stand, stating that:

"The exclusion of legal votes not fraudulently, but through error in judgment will not defeat an election. It is an error which there is no mode of correcting, even by the aid of the courts, since it cannot be known with certainty afterwards how the excluded electors would have voted; and it is obvious that it would be dangerous to receive and

rely upon their subsequent statements as to their intentions, after it is ascertained precisely what effect their votes would have had upon the result.... An election honestly conducted under the forms of law ought generally to stand, notwithstanding individual electors may have been deprived of their votes, or unqualified voters have been allowed to participate. Individuals may suffer wrong in such cases, and a candidate who was the real choice of the people may sometimes be deprived of his election; but, as it is generally impossible to arrive at any greater certainty of result by resort to oral evidence, public policy is best subserved \*500 by allowing the election to stand, and trusting to a strict enforcement of the criminal laws for greater security against the like irregularities and wrongs in the future." (Quoting Cooley, Const.Lim., 781 (6th ed.) (emphasis added). [Hanson, supra, 87 Wis. at 179, 58 N.W. 237.](#)

We agree with this statement as a general rule. But the facts of the case before us set it apart from the usual election contest case. First, the number of voters who were denied ballots in the present case was very substantial. Some 2,500 voters, approximately forty percent of the electorate, were denied ballots.

Second, this is not a quo warranto action brought by a losing candidate for elective office. Instead, we are confronted with an entire class of voters whose right to participate in a referendum election was denied through no fault of theirs.

In [Clapp v. Joint School District, 21 Wis.2d 473, 124 N.W.2d 678 \(1963\)](#), this Court suggested that a case involving deprivation of the right to vote would be treated differently from the run of cases involving procedural irregularities. The Court in Clapp stated:

"We do not have a case of a resident demanding an absentee ballot for himself and being refused by a school-district clerk and without such an affirmative proof, the election ought not to be held void if it is considered the furnishing of absentee ballots is mandatory." [Clapp, supra, 21 Wis.2d at 481, 124 N.W.2d 678.](#)

The case now before us does present that affirmative proof of voters denied ballots. And, while absentee voting is a privilege, [Clapp, supra, 21 Wis.2d at 481, 124 N.W.2d 678,](#)

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the right to vote is constitutionally protected. [Article III, Section 1 of the Wisconsin Constitution](#) establishes the right to vote generally.<sup>[FN5]</sup> In addition, the right to vote \*501 on the removal of a county seat is \*\*446 specified in Article XIII, Section 8 of the Wisconsin Constitution.<sup>[FN6]</sup>

<sup>[FN5]</sup> ["ARTICLE III. SUFFRAGE. Electors. Section 1.](#) (As amended Nov. 1882, Nov. 1908 and Nov. 1934). Every person, of the age of twenty-one years or upwards, belonging to either of the following classes, who shall have resided in the state for one year next preceding any election, and in the election district where he offers to vote such time as may be prescribed by the legislature, not exceeding thirty days, shall be deemed a qualified elector at such election:

"(1) Citizens of the United States,

"(2) Persons of Indian blood, who have once been declared by law of congress to be citizens of the United States, any subsequent law of congress to the contrary notwithstanding.

"(3) The legislature may at any time extend, by law, the right of suffrage to persons not herein enumerated; but no such law shall be in force until the same shall have been submitted to a vote of the people at a general election, and approved by a majority of all the votes cast on that question at such election; and provided further, that the legislature may provide for the registration of electors, and prescribe proper rules and regulations therefor."

<sup>[FN6]</sup> ["Removal Of County Seats. SECTION 8.](#) No county seat shall be removed until the point to which it is proposed to be removed shall be fixed by law, and a majority of the voters of the county voting on the question shall have voted in favor of its removal to such point."

The right to vote is the principal means by which the consent of the governed, the abiding principal of our form of government, is obtained. As this Court stated in [State ex rel. Frederick v. Zimmerman, 254 Wis. 600, 613, 37 N.W.2d 473 \(1949\)](#):

"The right of a qualified elector to cast a ballot for the election of a public officer, which shall be free and equal,

is one of the most important of the rights guaranteed to him by the constitution. If citizens are deprived of that right, which lies at the very basis of our democracy, we will soon cease to be a democracy. For that reason no right is more jealously guarded and protected by the departments of government under our constitutions, federal and state, than is the right of suffrage. It is a right which was enjoyed by the people before the adoption of the constitution and is one of the inherent rights which can be surrendered only by the \*502 people and subjected to limitation only by the fundamental law."

Because the right to vote is so central to our system of government, this Court has consistently sought to protect its free exercise.

In [State ex rel. Symmonds v. Barnett, 182 Wis. 114, 195 N.W. 707 \(1923\)](#), the ballots of certain voters were not counted, because the voter's names did not appear on the voter registration list. These voters were, however, duly registered voters who had voted in the preceding primary election. Only the failure of the registration board to update the registration list explained the omission of their names. This Court ordered that the votes of these voters must be counted, stating:

"As a general rule a voter is not to be deprived of his constitutional right of suffrage through the failure of election officers to perform their duty, where the elector himself is not delinquent in the duty which the law imposes on him. *State ex rel. Wood v. Baker*, 38 Wis. 171; 9 Ruling Case Law, 1093." [Barnett, supra, 182 Wis. at 127, 195 N.W. 707.](#)

In [Ollmann v. Kowalewski, 238 Wis. 574, 300 N.W. 183 \(1941\)](#), 305 ballots had been initialed by one election clerk on behalf of both election clerks, rather than being initialed by each election clerk individually, in violation of the statutes. This Court held that the 305 ballots were properly counted stating that:

"The voter would not knowingly be doing wrong. And not to count his vote for no fault of his own would deprive him of his constitutional right to vote... A statute purporting so to operate would be void, rather than the ballots." [Ollmann, supra, 238 Wis. at 578, 300 N.W. 183.](#)

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Citing [State ex rel. Wood v. Baker, 38 Wis. 71, 89 \(1875\)](#), this Court held that:

"... The voters' constitutional right to vote 'cannot be baffled by latent official failure or defect.' " [Ollmann, supra, 238 Wis. at 579, 300 N.W. 183.](#)

**\*503** While in Barnett and Ollmann, the right to vote could be vindicated by counting the defective ballots and upholding the election, that remedy is unavailable when the ballots were neither distributed nor cast.

[1] We conclude that the exclusion of these 2,578 voters so undermines the appearance of fairness in the election that the election must be set aside.

The Court is not unmindful of the stringency of the remedy of setting aside an election. However, this is not a case where that remedy will render an elective office vacant or otherwise unduly burden the administration of government in Burnett County. Rather, by setting the election aside, the status quo, as it has been for more than one hundred years, will be preserved. If the electors of Burnett County choose to remove the county seat to Siren, that change may be accomplished by a regularly conducted referendum in which all qualified voters participate.

**\*\*447** The defendants argue that, notwithstanding the deprivation of the right to vote of forty percent of the voters, the election should not be overturned because the outcome of the election could not have been changed. [FN7] The defendants have cited several cases, from among the many to be found in the reports, standing for the proposition that the "outcome test" is widely recognized in other jurisdictions. None of these cases involve the wholesale deprivation of the right to vote that makes the present case an anomaly of American law. In fact, the courts in some of the cited cases expressly noted that no deprivation of the right of qualified voters to vote was involved. [Jardon v. Meadowbrook-Fairview Metropolitan District, 190 Colo. 528, 549 P.2d 762, 765 \(1976\)](#); [McNulty v. Board Of Supervisors Of Elections, 245 Md. 1, 224 A.2d 844, 848 \(1966\).](#)

[FN7. For purposes of discussion, we assume that the outcome of this election could not have been changed even if all qualified voters who did not re-

ceive ballots voted "no."

**\*504** The recent case of [Files v. Hill, Ark., 594 S.W.2d 836 \(1980\)](#), cited to us by defendants, did present a claim of deprivation of the right to vote. In Files, one of two consolidated cases was a class action brought by a representative of persons allegedly denied the right to vote for a write-in candidate.[FN8] The plaintiffs sought to have the election voided on the basis of an Arkansas constitutional provision guaranteeing the free exercise of the right of suffrage. The Supreme Court of Arkansas found the plaintiffs had failed to state a claim because no allegation had been made that the election results would have been different if the votes of the plaintiff class had been counted. While Files does support the application of the outcome test in an action involving deprivation of the right to vote, the maximum number of alleged deprivations **\*505** in that case equalled only about three percent of the electorate.[FN9]

[FN8. The following is a list of problems that allegedly resulted in the inability of the members of the class to vote:

"A. Instructions concerning write-in votes were not sufficiently clear.

"B. Pencils were not furnished for the convenience of voters.

"C. Voting machines did not function properly and it was impossible for many voters to cast a write-in vote for plaintiff Files.

"D. Voters were instructed that long lines waiting at the polls were caused by write-in voters and that electors could vote more quickly by using machines that were not functioning to accept write-in votes.

"E. Instructions for voting for write-in candidate Files were given by election officials, resulting in ballots not being counted although the instructions were followed.

"F. Electors, attempting to vote for plaintiff Files and following instructions of election officials, wrote plaintiff's name on masking tape, and on parts of the voting machine in an effort to cast votes for plaintiff Files, with the result that said votes were not counted.

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"G. In some instances it was physically impossible for a voter to cast his ballot for plaintiff Files on a voting machine." [Files, supra, 594 S.W.2d at 838.](#)

[FN9.](#) The complaint alleged that 1,522 voters were deprived of the right to vote. The total number of votes cast was 47,401.

Because the case before us involves clear deprivations of more than forty percent of the voters, we do not find the Files decision persuasive.

The Court of Appeals held the outcome test applicable to this case, stating:

"... in order to successfully challenge an election a plaintiff must show the probability of an altered outcome. He must prove that the will of the electors would have favored the opposite result actually reached." [McNally, supra, 97 Wis.2d at 609, 294 N.W.2d 660.](#)

The only exception to this "outcome rule" acknowledged by the Court of Appeals, would be where a candidate would stand to benefit from his own wrongdoing or where fraud was involved. [McNally, supra, 97 Wis.2d at 610, 294 N.W.2d 660.](#)

[\[2\]](#) We agree with these statements as they apply to most cases of election irregularities. But in a case where deprivations of the right to vote are so significant in number or so egregious in character as to seriously undermine the appearance of fairness, we hold such an election must be set **\*\*448** aside, even where the outcome of the election might not be changed.

"... courts should use their discretion to avoid elections where proven violations have undermined the appearance of fairness of an election. For example, when many voters see election officials stuffing ballot boxes, or when large numbers of voters are prevented from voting, public confidence in the integrity of the election and popular acceptance of the winner may be severely impaired. In such cases a new election might be justified to remedy these effects, regardless of the likelihood that the election's outcome was altered." *Developments \*506 In The Law Elections*, 88 Harv.L.Rev. 1111, 1330 (1975). (emphasis added).

This approach was applied in [Bell v. Southwell, 376 F.2d 659 \(5th Cir. 1967\)](#). In Bell, a number of black voters were intimidated from voting by a large crowd of whites and a number of qualified black women were denied the right to cast their ballot in the "white women's" voting booth. Although it was clear that the infringement of these voter's rights did not change the outcome of the election, the Court held that the election must be set aside.

"The fact is that there are certain discriminatory practices which, apart from any demonstrated injury or inability to do so, so infect the processes of the law as to be stricken down as invalid." [Bell, supra, 376 F.2d at 662.](#)

The Court in Bell, recognized, as we do, that a deprivation case differs from an election contest in which the winner is challenged because of irregularities.

"Mrs. Bell and her co-plaintiffs alone or as members of the class did not challenge the eligibility of Mr. Southwell or the fact that he received an overwhelming majority. Indeed, Mrs. Bell as a former candidate did not seek to be selected over Southwell or any other opponent. What, and all, she and others sought was an election conducted free of such indefensible, racial distinctions. That being so, it was not the usual simple case of counting votes and denying relief for want of affirmative proof of a different result." [Bell, supra, 376 F.2d at 664-665.](#)

As the trial court found this case involved no fraud. Nor does it involve the kind of "indefensible, racial distinctions" that tainted the election in Bell. However, the disenfranchisement of such a substantial number of voters, make this a case where the processes of the law are so infected as to require nullification of the election.

**\*507** The Court of Appeals expressed concern with the effect of setting aside the election on the majority of voters who did vote. [\[FN10\]](#) We conclude the temporary "disenfranchisement" of those voters is preferred to the permanent disenfranchisement of the forty percent of voters who were denied the right to vote.

[FN10.](#) The court stated that:

"... were this court to set aside the election on the basis of ballot deprivation to some voters, we would disenfranchise the majority of voters who

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did express their preference at the polls." [McNally, supra, 97 Wis.2d at 595, 294 N.W.2d 660.](#)

The decision of the Court of Appeals is reversed.

ABRAHAMSON, J., not participating.

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**C**

Court of Common Pleas of Ohio,  
 Hamilton County.

**MIRLISENA**

v.

**FELLERHOFF et al. [FN\*]**

**[FN\*]** No appeal has been taken from the decision of the court.

**No. A-83-09561.**

Jan. 4, 1984.

Losing candidate brought action to contest results of city councilmanic election. The Court of Common Pleas, Hamilton County, Crush, J., held that candidate failed to meet his burden of proving that alleged irregularities in election procedures were of such magnitude and affected sufficient votes to warrant judicial interference with election results.

Election held valid.

West Headnotes

**[1] Action** 6

[13k6 Most Cited Cases](#)

Any irregularities complained of in action contesting results of election were mooted unless they were significant enough to have rendered results of election uncertain.

**[2] Elections** 227(1)

[144k227\(1\) Most Cited Cases](#)

**[2] Elections** 229

[144k229 Most Cited Cases](#)

In election contest, acceptance of votes illegally cast and denial of right to vote to qualified voters are equally irregularities which might serve to void election.

**[3] Elections** 298(1)

[144k298\(1\) Most Cited Cases](#)

In election contest, court need not look behind votes illegally rejected to determine for which candidate voter would have voted.

**[4] Elections** 291

[144k291 Most Cited Cases](#)

Although it is generally necessary for contestor in election contest to prove that irregularities would have changed result of election, it is not always necessary to show precise number of irregularities.

**[5] Elections** 203

[144k203 Most Cited Cases](#)

Requirements pertaining to change of polling place are mandatory before election, directory thereafter. [R.C. § 3501.18.](#)

**[6] Elections** 203

[144k203 Most Cited Cases](#)

Choice of polling place by board of elections will not be disturbed by court unless it is so arbitrary, unreasonable, and capricious as to constitute plain abuse of discretion. [R.C. § 3501.18.](#)

**[7] Constitutional Law** 70.1(12)

[92k70.1\(12\) Most Cited Cases](#)

Court must be ever mindful in election contest that it has been delegated responsibility in basically political matter and is not free to create criteria that may, in its opinion, be more suitable than those legislature has established.

**[8] Elections** 203

[144k203 Most Cited Cases](#)

Board of elections did not abuse its discretion in changing polling place for councilmanic election from its original location, where original location became unavailable, and new place selected was reasonably calculated to be located relatively midway up hill on which precinct was located. [R.C. §§ 3501.18, 3501.29\(B\).](#)

**[9] Elections** 101

[144k101 Most Cited Cases](#)

Registration officials are public officers; they are generally regarded as agents of state and not of political party designating them or of applicant for registration.

**[10] Elections** 295(1)

[144k295\(1\) Most Cited Cases](#)

Circumstantial evidence may be used to decide election contests.

**[11] Elections** 291

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[144k291 Most Cited Cases](#)

Petitioner in election contest action must make affirmative showing that enough votes were affected by alleged irregularities to change result of election.

[\[12\] Elections](#)  [295\(1\)](#)

[144k295\(1\) Most Cited Cases](#)

In absence of direct evidence that voters with registration application receipts or notice postcards were qualified voters who were improperly denied right to vote, or that sufficient voters were so denied as to have affected results of election, candidate contesting councilmanic election failed to prove that exclusion of voters whose names were not on buff cards or voters' signature lists constituted irregularity which warranted judicial interference in election.

[\[13\] Elections](#)  [295\(1\)](#)

[144k295\(1\) Most Cited Cases](#)

In absence of direct evidence that sufficient number of voters were actually prevented from voting, certain alleged notification failures with respect to councilmanic election were not sufficient to warrant judicial interference with results of election.

[\[14\] Elections](#)  [291](#)

[144k291 Most Cited Cases](#)

Every reasonable inference is required in law to be made in favor of validity of election.

**\*\*116 \*7** John A. Lloyd, Jr., Cincinnati, for plaintiff.

Donald J. Mooney, Jr., and Timothy M. Burke, Cincinnati, for defendant Fellerhoff.

Arthur M. Ney, Jr., Pros. Atty. and James Harper, Asst. Pros. Atty., for defendant Hamilton County Bd. of Elections.

CRUSH, Judge.

The petitioner, John Mirlisena, has filed the within action pursuant to R.C. Chapter 3515 to contest the results of the 1983 city of Cincinnati councilmanic election, as such results pertain to petitioner and to respondent, Sally Fellerhoff.

The results of such election, as recounted, show that Mirlisena received 38,265 votes and that Fellerhoff received

38,327 votes. Thus, Fellerhoff was the winner by sixty-two votes in an election where Fellerhoff and Mirlisena together received a total of 76,592 votes.

The court is limited to one of four possible judgments, to wit:

1. Fellerhoff was elected, or
2. Mirlisena was elected, or
3. The election resulted in a tie vote, or

**\*\*117** 4. Neither Fellerhoff nor Mirlisena was elected and the election is set aside. (R.C. 3515.14; Hitt v. Tressler [1983], 7 Ohio St.3d 11, 455 N.E.2d 667.)

[\[1\]](#) The various irregularities in the election, alleged by Mirlisena, are not to be considered abstractly. In the final analysis, any irregularities complained of are mooted unless they are significant enough to have rendered the results of the election uncertain, *i.e.*, to have changed the results of the election:

"An election contest may not be maintained unless the matters complained of would have changed the result of the election." 29 Corpus Juris Secundum (1965) 690, Elections, Section 249.

"The petition \* \* \* avers that the contestor was duly and legally elected to \* \* \* office. It necessarily follows \* \* \* that it is the claim of the contestor that these errors, mistakes and irregularities complained of, prevented a fair count of the ballots cast for him and his opponents, and that by reason thereof the wrong result was declared. Any further allegation in this respect would be unnecessary and redundant." Thompson v. Reddington (1915), 92 Ohio St. 101, 112, 110 N.E. 652.

"Next we turn to the merits of this appeal; namely, whether the record supports a finding that this election was **\*8** altered as a result of the voting machine failure. A court may not set aside an election unless the proved irregularities demonstrate that the result is uncertain. \* \* \* In re Election of Swanton Twp. (1982), 2 Ohio St.3d 37 [442 N.E.2d 758]." Hitt v. Tressler (1983), 4 Ohio St.3d 174, 177, 447

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" \* \* \* [T]his court has consistently held that there must be an affirmative showing that enough votes were affected by the alleged irregularities to change the result of the election." *In re Election of Swanton Twp.* (1982), 2 Ohio St.3d 37, 39, 447 N.E.2d 1299.

[2] Acceptance of votes illegally cast and the denial of the right to vote to qualified voters are equally irregularities:

"An election is void if enough persons were unlawfully deprived of an opportunity to vote, or legal votes were thrown out, to change the result \* \* \*." 29 Corpus Juris Secundum 596, Elections, Section 211.

[3] It is evident that the court need not look behind the votes illegally rejected to determine for which candidate the voter would have voted:

" \* \* \* [O]ne hundred forty votes were unaccounted for [the voting machines having failed to work]. Appellee needed only seventy-four of those to defeat appellant. This is sufficient to demonstrate that the election's result is uncertain." *Hitt v. Tressler* (1982), 4 Ohio St.3d 174, 177, 447 N.E.2d 1299.

[4] Although it is generally necessary for the contestor in an election contest to prove that the irregularities would have changed the result of the election, it is not always necessary to show the precise number of irregularities:

" If, however, the irregularities are so widespread and general and of so flagrant a character as to raise a doubt as to how the election would have resulted had they not occurred, they are deemed to be fatal and will warrant the rejection of the entire vote of the election district \* \* \*." *Otworth v. Bays* (1951), 155 Ohio St. 366, 370, 98 N.E.2d 812 [44 O.O. 343].

The basic factual question before the court is, therefore, whether sixty-two or more voters were illegally denied the right to vote (there being no claim that votes were illegally cast), or whether widespread, flagrant irregularities have raised a doubt as to the entire election.

Various presumptions and burdens are applicable to election contests:

"In a contest proceeding, the action of the election officers in conducting the election, and in \* \* \* declaring the result thereof, is attended with a prima facie presumption of regularity. \* \* \* " 37 [Ohio Jurisprudence 3d \(1982\) 566, Elections, Section 209](#).

\*\*118 "In an election contest the burden ordinarily rests upon the contestor to establish his claims." *Id.* at 567.

"Every reasonable intendment must be in favor of the validity of an election, and against holding it void for uncertainty." *Mehling v. Moorehead* (1938), 133 Ohio St. 395, 403, 14 N.E.2d 15 [11 O.O. 55].

We will now proceed to discuss irregularities specifically alleged by petitioner.

The polling place for precinct 11D was changed from its previous location. Petitioner claims that the location was selected contrary to mandatory statutory requirements, and was so inconvenient as to have disenfranchised many voters, specific examples of whom are Charlie Matthews and Gail Buschard.

[R.C. 3501.18](#) provides in pertinent part as follows:

"The board of elections may divide a political subdivision \* \* \* into precincts and \* \* \* rearrange \* \* \* the several election precincts \* \* \* and change the location of the polling place \* \* \* to provide for the convenience of the voters. \* \* \*

" \* \* \* In order to provide for the convenience of the voters, the board may locate polling places for voting \* \* \* outside the boundaries of precincts, provided that the nearest public school or public building shall be used if the board determines \*9 it to be available and suitable for use as a polling place. \* \* \* "

[5] The requirements pertaining to change of polling place are mandatory before an election, directory thereafter:

"In order to constitute a valid election the place of holding it

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must either be fixed by law or designated by legally authorized officials. With respect to the calling of \* \* \* an election, statutory provisions relating to the place of an election are mandatory, and will be strictly enforced in a direct action instituted before an election; but after an election such statutory requirements have been held to be directory." 29 Corpus Juris Secundum 176, Elections, Section 78.

"Most courts generally follow the rule that before an election statutory regulations governing place of voting are construed as mandatory and subject to strict enforcement. After the election, however, such regulations are ordinarily construed as merely directory." 26 American Jurisprudence 2d (1966) 61, Elections, Section 228.

"As voters have no absolute right to vote at any particular place, polling places may be changed by legislative sanction." 29 Corpus Juris Secundum 177, Elections, Section 177.

The question here is basically whether the board of elections abused its discretion in the selection of the polling place:

[6] "Where the statute [regarding selection of polling place] vests discretion in officials or boards, the choice by them of a polling place will not be disturbed by the courts unless it is so arbitrary, unreasonable, and capricious as to constitute a plain abuse of discretion." 29 Corpus Juris Secundum 554, Elections, Section 199.

In this case, the polling place was changed after the board was informed that the previous polling place was no longer available. The new place selected was reasonably calculated to be located relatively midway up the hill on which the precinct is located. Thus, the new location may have been more convenient for those voters living higher up the hill, less convenient for those living lower on the hill. The old location was lower on the hill, and thus may have been more convenient for higher voters. The new location was selected with a view to complying with [R.C. 3501.29\(B\)](#) which requires that a polling place be free of barriers for the benefit of the handicapped. It is certainly arguable that a better site could have been selected or that more work might have been done in selecting the site. However, petitioner has not shown that the site was located fraudulently or with deliber-

ate intent to disenfranchise voters.

[7] The court must be ever mindful in an election contest that it has been delegated \*\*119 responsibility in a basically political matter and is not free to create criteria that may, in its opinion, be more suitable than those the legislature has established:

"It has been definitely held by this court that an election contest is a political and not a judicial matter \* \* \*." [Williams v. O'Neill \(1944\)](#), 142 Ohio St. 467, 468, 52 N.E.2d 858 [27 O.O. 400].

" \* \* \* [M]any highly technical requirements in election laws exist.

" \* \* \* [C]ourts should be careful not to read requirements into election laws which are not specifically there." [State, ex rel. Leslie v. Duffy \(1955\)](#), 164 Ohio St. 178, 183, 129 N.E.2d 632 [57 O.O. 371].

" \* \* \* The test for *reversing* a decision of a board of elections is not necessarily whether this court agrees or disagrees with such decision, but it is whether the decision of the board of elections is procured by fraud or corruption, or whether there has been a flagrant misinterpretation of a statute or a clear disregard of legal provisions applicable thereto." [State, ex rel. Hanna v. Bd. of Elections \(1959\)](#), 170 Ohio St. 9, 11, 161 N.E.2d 891 [9 O.O.2d 332].

[8] In view of the foregoing, the court finds that the board of elections did not intend to disenfranchise voters or flagrantly \*10 abuse its discretion in selecting the polling place for precinct 11D.

Another irregularity alleged by petitioner is that many validly registered voters were denied the right to vote, or were improperly not registered, based on the appearance at various polling places of persons with "voter registration application receipts." These voters were not allowed to vote because their names were not on the buff cards or voters' signature lists.

The voter registration application receipt is part of a larger buff-colored form. The receipt is torn off. The larger part of the form becomes the "buff card," or basic proof of registra-

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tion, at such time as board of election personnel have verified that the voter may properly be registered.

Petitioner alleges that volunteer registrars, appointed pursuant to [R.C. 3503.11\(B\)\(2\)](#), failed in many cases to turn in applications for registration to the board of elections; that this failure resulted in the disenfranchisement of many voters; that this disenfranchisement is the fault of the board of elections because the volunteer registrars are agents of the board; and that the number of voters disenfranchised in this manner is sufficient to invalidate the election.

[R.C. 3503.11\(B\)\(2\)](#) reads in pertinent part as follows:

"Every board of elections shall, upon request, supply registration forms to any person who resides in the county \* \* \*. Any person who serves as a voter registrar under this paragraph shall \* \* \* sign a statement \* \* \* specifying the duties imposed on such person by the law \* \* \*."

There are no Ohio cases interpreting whether such volunteer registrars are agents of the board of elections. On this point, however, we read generally as follows:

[9] "Registration officials are public officers. They are generally regarded as agents of the state and not of the political party designating them or of the applicant for registration." 25 American Jurisprudence 2d (1966) 792, Elections, Section 103.

"Registration officials are public officers. Ordinarily, they are agents of the state, and not of the city, or political party designating them, or of the applicant for registration \* \* \*." 29 Corpus Juris Secundum 112, Elections, Section 41.

Respondent argues that the legislature could not have intended that the volunteer registrars be agents of the board of elections because virtually no control over them is established in the board of elections; and, further, the mere number of them (in Hamilton County alone exceeding four thousand) makes control impossible.

Whatever the merits of these arguments, the immediate issue can be decided on other grounds.

[10] Circumstantial evidence may be used to decide election

contests:

**\*\*120** "Resort may be had to circumstantial evidence in an election contest as well as in any other proceeding." 29 Corpus Juris Secundum 751-752, Elections, Section 282.

No direct evidence has been presented that voters with registration application receipts were qualified voters and improperly denied the right to vote. Petitioner has, therefore, relied upon circumstantial evidence.

The proper application of circumstantial evidence is set out in 1 O.J.I. (1983), Section 5.10, at 144:

"4. Circumstantial Evidence. Circumstantial evidence is the proof of facts or circumstances by direct evidence from which you may reasonably infer other related or connected facts which naturally and logically follow, according to the common experience of mankind.

" \* \* \*

"6. Inference Upon Inference. You may not build one inference on another inference; but you may make more than one inference from the same facts or circumstances."

**\*11** With regard to the voter registration application receipt question, numerous inferences must be made before the board of elections can be held to have erred, even if the volunteer registrars are considered agents of the board:

1. That the receipt was furnished the voter by a volunteer registrar;
2. That the buff card was not turned in by the volunteer registrar;
3. That, if the buff card was turned in, the applicant was qualified for registration;
4. That the application was made before the deadline;
5. That the voter presented himself to vote at the proper polling place;
6. That the voter did not, in fact, vote somewhere else;
7. That the person with the receipt was the person to whom

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it was originally given; and

8. That the receipt was obtained for the current election.

A simple review of the eight inferences just delineated quickly makes it apparent that inference upon inference upon inference must be made to justify petitioner's position. This simply cannot be done. Additionally, we read as follows:

"Ordinarily, a person who is honestly refused the right to vote does not become a rejected voter until he \* \* \* qualifies by showing his right to vote \* \* \*." 26 American Jurisprudence 2d 106, Elections, Section 278.

[11] " \* \* \* this court has consistently held that there must be an *affirmative* showing that enough votes were affected by the alleged irregularities to change the result of the election \* \* \*."

"In short, contestors \* \* \* simply failed to prove their case. It is indeed noteworthy that while contestors \* \* \* named seven individuals in their answers to interrogatories who allegedly were permitted to vote \* \* \* though ineligible, these individuals were not called as witnesses, nor were they named by the witnesses who did testify." *In re Election of Swanton Twp., supra*, 2 Ohio St.3d at 39, 442 N.E.2d 758.

"The record in the instant case well supports the conclusion of the trial court judge that contestors \* \* \* failed to make an *affirmative* showing that enough votes were affected \* \* \* to change the result of the election \* \* \*." (Emphasis added.) *Id.* at 39, 442 N.E.2d 758.

[12] In view of the foregoing, the court finds that petitioner has not proven his allegations pertaining to the alleged irregularities just discussed.

Another irregularity alleged by petitioner pertains to individuals who appeared at the polls with notice postcards and who were not allowed to vote because their names were not on the buff cards or on the voter signature lists.

Most of the pollworkers who testified about this alleged irregularity did not look at the postcards closely enough to determine \*\*121 what the names or the addresses were, what

precincts were involved, or what date of what year was on the postcard. In one case the precincts were checked on about a dozen cards, and found to involve the precinct in question, but no record was made of the name, address, or date of what year on each card.

This situation is closely allied to the situation involving the voter registration application receipts, to wit, there is no affirmative showing of irregularity, and too many inferences have to be made. Here, the inferences would involve, in any particular case, most or all of the following:

1. That the person bringing in the postcard was the person who received it;
2. That the card was for the precinct in question;
3. That the card pertained to the current election;
4. That the voter had not changed his address;
5. That the card was the most current one;
6. That the card was not in error; and
- \*12 7. That the person did not in fact vote.

Again, the lack of affirmative evidence prevents the court from reducing the inferences or choosing among them.

For the foregoing reasons, petitioner has failed to demonstrate the validity of this alleged irregularity.

[13] Another alleged irregularity involves a pollworker in precinct 17B telling a voter that he had to vote for nine council candidates, whereas in fact the voter could vote for zero to nine candidates. Respondent points out that the voter was given the correct information at the same time, and that the phrase "vote for not more than 9" was printed on the ballot.

The court has not found, nor have counsel cited, any law on the question of telling a voter that he must vote for the entire ticket. This is certainly, in any case, not a disenfranchisement, but some kind of over-enfranchisement.

Without deciding the issue, however, the court will for the

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moment deem this conduct to be an irregularity reducing the Fellerhoff total by one vote.

Another alleged irregularity is the alleged failure to send notice postcards to numerous new voters. The evidence for this was the computer notice lists which did not have a number of names of registered voters (over sixty people) listed on them; and, further, that these voters did not in fact vote. Respondent presented in opposition credible evidence that some computer notice lists had not been preserved; and that only about twenty-nine of these voters would have been on lists examined by petitioner.

Although the board of elections may well be faulted for not preserving in their entirety these obviously important lists, petitioner has again failed to present affirmative evidence of irregularity sufficient to allow the court to do more than speculate among possible inferences. Here the possible inferences are:

1. The voters were not notified;
2. The voters were notified but the notice lists were lost or destroyed;
3. The voters didn't vote because they didn't choose to do so, even after notice or with full knowledge of the location of the polling places; and
4. The voters were, in some cases, notified by an earlier mailing.

In this case, the failure of affirmative evidence is glaring and unnecessary. All names and addresses were known, but not one of the allegedly disenfranchised voters was subpoenaed to court by petitioner. In view of the presumption in favor of regularity in election matters (37 [Ohio Jurisprudence 3d 566, Elections, Section 209](#)), petitioner has failed to demonstrate irregularity affirmatively on this point.

Another irregularity allegedly arises out of the return as undeliverable of one hundred thirty envelopes mailed on November 4, 1983, by the Over-the-Rhine Community Council from the computer notification list of October 22, 1983. Certainly this mailing \*\*122 raises the possibility that the notification list was incorrect. However, it does not af-

firmatively establish that the board of election's mailing was equally unsuccessful; or that the addresses were in fact incorrect; or that the voters had not moved. The burden of proof is on the petitioner, and suspicion or possibility does not satisfy this burden.

Irregularities were claimed by petitioner in the notification of approximately twenty specifically named voters primarily in precinct 17D.

An examination of the exhibits revealed that three of the named individuals actually voted; that four of these individuals were in fact on the notification list; that one individual received two notices. As to the remaining twelve individuals, the court will, without deciding the issue at this point, deem them deleted from respondent's sixty-two vote total over petitioner.

Another irregularity alleged by petitioner is the failure of poll workers to contact \*13 the board of elections regarding the people who came into the various disputed precincts with notice postcards or registration application receipts, but for whom there were no buff cards and who were not on the signature lists.

The simple fact is that those people who entered polling places with registration application receipts or with notice postcards, but who were not in the buff books or on the signature lists, were on the face of it not eligible to vote in the particular precinct. Efforts on the poll workers' part to help them are laudable, but not required by the greatly detailed election laws. The court will not now, in the pursuit of some ill-conceived judicial affirmative action, create such an obligation. Here again the absence of any affirmative showing of irregularity will not allow the court to do other than speculate on the possibility of irregularity.

#### Summation

Counsel for petitioner stated in his final argument that it is not necessary to demonstrate the names and addresses of all disenfranchised voters. He asked rhetorically: how much evidence is enough?

Although it is theoretically possible that the court might infer that sixty-two or more voters were disenfranchised from

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a showing of a lesser number of disenfranchisements, the inference would have to be based on a solid, affirmative showing of patterns of irregularities. In this case, a total of approximately thirteen voters have been deemed by the court, without deciding the issue, as disenfranchised. Even in the case of these thirteen people, persuasive arguments can be made against disenfranchisement.

[14] Petitioner concedes that he has not proven disenfranchisement of sixty-two or more specifically named voters. Petitioner has also failed to present adequate affirmative evidence of a pattern of irregularities in the election in question. Possibilities as to irregularities have been advanced, but not pursued by the presentation of individual voters whose names and addresses are, in some cases, readily available, and, in other cases, discoverable. Every reasonable inference is required in law to be made in favor of the validity of an election. These inferences have simply not been met or overcome by petitioner.

For the foregoing reasons, the court finds that the election of defendant Sally Fellerhoff to the Cincinnati City Council was valid and proper.

*Judgment accordingly.*

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Supreme Court of Louisiana.  
 James A. **MOREAU**  
 v.  
 Richard A. **TONRY** et al.  
**Nos. 58791, 58792.**

Oct. 22, 1976.

Plaintiff brought action contesting election to select party nominee for Congress. The District Court, Parish of St. Bernard, discounted effect of irregularities and affirmed election, and plaintiff appealed. The Court of Appeal, [338 So.2d 791](#), reversed and annulled the election, and candidate, et al., appealed. The Supreme Court, Dixon, J., held that irregularities, in absence of showing that but for irregularities or fraud one contesting election would have been nominated, were not so pervasive that election would have to be nullified.

Court of Appeal reversed and District Court judgment reinstated.

Summers, J., dissented with reasons.

Sanders, C.J., dissented with reasons.

West Headnotes

**[1] Elections** 🔑291

[144k291 Most Cited Cases](#)

Even if number of "irregularities" exceeds difference in votes between candidates, candidate seeking to nullify election must prove either that he would have been elected but for irregularities or fraud or that proven frauds and irregularities are of such a serious nature that voters have been deprived of free expression of their will. LSA-R.S. 18:364, subd. B.

**[2] Elections** 🔑158

[144k158 Most Cited Cases](#)

Irregularities in election of party nominee for Congress, consisting of 43 forged signatures on precinct register and 315 more votes cast on voting machines than signatures on precinct registers, out of a total of almost 100,000 votes, in absence of showing by one contesting election that but for

irregularities or fraud he would have been nominated, were not so pervasive that the election would have to be nullified. LSA-R.S. 18:364, subd. B.

\*4 T. M. McBride, III, Chalmette, Martzell & Montero, John R. Martzell, New Orleans, for plaintiff-applicant.

Gilbert V. Andry, III, Sidney Provensal, Jr., New Orleans, Luke A. Petrovich, Buras, Gibson Tucker, Jr., New Orleans, for defendants-respondents.

DIXON, Justice.

In this election contest the Court of Appeal reversed the district court and annulled the election, vacating the certification of defendant Tonry, the Democratic nominee for Congress, leaving the nominee to be named by the appropriate Democratic Committee.

The factual findings to support the action of the Court of Appeal are: forty-three forged signatures on the precinct register and three hundred fifteen more votes cast on the voting machines than signatures on the precinct registers (out of a total of almost one hundred thousand votes). (The trial court had discounted the effect of such 'irregularities' because, among other reasons, it found only minimal differences between the number of voters on the poll lists and the number of votes cast on the machines). The Court of Appeal found that 'no inference can be made that these illegal votes were cast for Tonry.'

Nothing has been proved to us to compel a different conclusion.

The statutory rule in Louisiana is that an election may be upset only if the one contesting the election can show that 'but for irregularities or fraud he would have been nominated . . .' (R.S. 18:364(B)).

[1] The plaintiff Moreau argues that if the number of 'irregularities' exceed the difference between the candidates, the outcome of the election cannot be determined. This has never been the law. If the candidate cannot prove he would have been elected 'but for irregularities or fraud,' our jurisprudence refers to an alternative: if the court finds the proven frauds and irregularities are of such a serious nature that the voters have been deprived of the free expression of

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their will, the election will be nullified.

' . . . For this Court to render such a drastic order, there must be a clear showing that a course of fraudulent conduct was employed which effectually prevented the electors from expressing their will.' [Lewis v. Democratic Executive Committee, 232 La. 732, 95 So.2d 292 \(1957\)](#).

No case has been called to our attention (and we know of none) where an election has been upset because of serious and pervasive irregularities when the evidence falls short of proving that 'but for' the irregularities, the one contesting the election would have won.

The solution adopted by the Court of Appeal is innovative, and not necessarily productive of fair elections. The candidates are removed from the reach of the lawful election machinery, even though neither has been found responsible for fraud and irregularity, and neither can be held the winner 'but for' the irregular votes. As stated in [Landry v. Ozenne, 194 La. 853, 195 So. 14 \(1940\)](#):

' . . . If this were permitted it is easy to see that in every case in which a candidate was defeated by a small margin of the votes, two elections would inevitably be held—one at the polls and the other in the courts. . . . ' [195 So. 14, 23](#).

\*5 Law is derived from human experience over a long enough time to give validity to that experience. Fraud and illegality in elections are not to be condoned. However, we find it significant that in the long history of election contests in this State, although recognizing that there might be an election which should be upset for widespread fraud which cannot be proved to supply the winning margin, this court has consistently disallowed an election contest where the claims are similar to those of this plaintiff. See *Lewis v. Democratic Executive Committee*, supra.

[2] The irregularities found by the Court of Appeal are not so pervasive that the election must be nullified.

Therefore, the judgment of the Court of Appeal is reversed, and the judgment of the district court, dismissing plaintiff's suit, is reinstated; the stay order previously issued in this case is hereby annulled and recalled.

SANDERS, C.J., dissents and assigns written reasons.

SUMMERS, J., dissents and assigns reasons.

SUMMERS, Justice (dissenting).

I subscribe to the opinion of the Court of Appeal, [338 So.2d 791](#). On the facts found by that court the judgment nullifying the election is correct. Without setting forth why, this Court holds that the irregularities found by the Court of Appeal are not so pervasive that the election must be nullified. The carefully drawn unanimous opinion of the Court of Appeal refutes this conclusion in a nine-judge review. As Justice Dixon said on another occasion, these facts demonstrate

'This Court can and should annul elections when the irregularity or illegality permeates the entire election, Or when there is an irregularity which makes it impossible to determine which candidate the people lawfully elected.' (emphasis added). [LaCaze v. Johnson, 310 So.2d 86 \(La.1974\)](#)

Under the facts of this case, that principle is abrogated. This Court's opinion leaves open a situation in which widespread practices of fraud and irregularities provide no remedy unless the candidate can show that the practice deprives him of the election. Such a ruling under the facts of this case disregards the elaborate statutory procedure for contesting elections and decrees that no remedy is available in a most objectionable situation where the will of the people is in fact frustrated.

I respectfully dissent.

SANDERS, Chief Justice (dissenting).

Election frauds and irregularities are difficult to prove because of their clandestine nature and the limited time available to assemble evidence. Despite the difficulty of legal proof, however, the reviewing judges in both lower courts found frauds and irregularities in the present case.

The applicable rule, reiterated by this Court in several decisions, is as follows:

'(I)f the Court finds the proven frauds and irregularities are of such a serious nature as to deprive the voters of the

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free expression of their will, it will decree the nullity of the entire election . . .' See [Garrison v. Connick, La., 291 So.2d 778 \(1974\)](#); [Dowling v. Orleans Parish Democratic Committee, 235 La. 62, 102 So.2d 755 \(1958\)](#); [Lewis v. Democratic Executive Committee, 232 La. 732, 95 So.2d 292 \(1957\)](#).

I subscribe to the opinion of the Court of Appeal that the present case falls within the rule. See, [La.App., 338 So.2d 791 \(1976\)](#). As found by the Court of Appeal, the frauds and irregularities included forgery, multiple voting, voting in the name of deceased persons, and the voting of persons without supporting precinct registers.

These frauds and irregularities were both systematic and flagrant. They infected far more votes than the vote margin between the two competing candidates. This means that the voters have been deprived of the free expression of their will, because the outcome of the election cannot be determined.

As the Court of Appeal aptly stated:

\*6 'These fraudulent practices cannot be condoned under any circumstances and must be ferreted out if we are to insure that the free and honest expression of the will of the electorate is reflected in the democratic process.'

For the reasons assigned, I respectfully dissent.

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(Cite as: 816 So.2d 349, 36,366 (La.App. 2 Cir. 4/23/02))

**H**

Court of Appeal of Louisiana,  
Second Circuit.

Gleason **NUGENT**, Johnny Ray Carpenter, Doris Abrams  
and Shelia White,  
Plaintiffs-Appellants,

v.

Benji **PHELPS**, Fox McKeithen, Secretary of State and Suzanne Haik-Terrell,

Commissioner of Elections, Defendants-Appellees.

**No. 36,366-CA.**

April 23, 2002.

Writ Denied May 10, 2002.

Losing candidate for police chief and supporters brought election challenge, seeking to have election nullified, alleging irregularities and unlawful activities by successful candidate and his supporters. After losing candidate's supporters were dismissed pursuant to exceptions of no right of action, the Eighth Judicial District Court, Parish of Winn, No. 37,142, John R. Joyce, J., granted involuntary dismissal of suit. Losing candidate appealed. The Court of Appeal, [Norris](#), C.J., held that: (1) vote would not be cast out simply because voter was offered a bribe or accepted something of value for the vote, provided that voter still voted the way he originally intended; (2) copy of running tab from store at which successful candidate in election allegedly set up account to buy votes was inadmissible; (3) trial court did not have to tell witnesses that they could be given immunity from prosecution; and (4) votes of losing candidate's supporters did not have to be counted even though they were in jail when election took place.

Affirmed.

West Headnotes

**[1] Elections** 227(1)

[144k227\(1\) Most Cited Cases](#)

Although a party contesting an election is no longer limited to the "but for" standard, a party contesting an election still must show at least that because of fraud or irregularities, the outcome of the election is impossible to determine; thus, it is the effect of the irregularity on determining the outcome,

rather than the fact of an irregularity by itself, that guides the court. [LSA-R.S. 18:1432](#), subd. A.

**[2] Elections** 228

[144k228 Most Cited Cases](#)

A vote should not be cast out in an election challenge simply because a voter was offered a bribe, or even because a voter accepted something of value for the vote, provided that the voter still voted the way he originally intended.

**[3] Elections** 228

[144k228 Most Cited Cases](#)

Regardless of criminal implications, court's focus in an election challenge claiming irregularities by winner is on whether the alleged activities actually changed the result of the election by changing the vote totals, or at least made the election result impossible to determine.

**[4] Evidence** 373(1)

[157k373\(1\) Most Cited Cases](#)

**[4] Trial** 39

[388k39 Most Cited Cases](#)

Copy of list documenting a running tab from store at which successful candidate in election allegedly set up account to buy votes was inadmissible in election challenge, although challenger's counsel stated that he did not see list until store employee had testified and was released by the court, as challenger, as the result of his investigation, was aware of existence of list before case was tried, and copy of list was present in court when employee testified, but no attempt was made to introduce it into evidence at that time; challenger did not make list, did not keep records for store, and could not say who made list or the circumstances under which it was made.

**[5] Witnesses** 302

[410k302 Most Cited Cases](#)

When trial court informed all potential witnesses in election challenge case that their testimony could be used against them and that they could be convicted of violating statute prohibiting the bribery of voters, trial court did not have to tell witnesses that they could be given immunity from prosecution, as judge read to the potential witnesses that portion of statute dealing with immunity, and challenger failed

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to request any special instructions or object to statute as read. [LSA-R.S. 14:119](#).

**[6] Elections**  **239**[144k239 Most Cited Cases](#)

Votes of three potential voters did not have to be counted in election on ground that voters were in jail when election took place because the district attorney supported successful candidate, as arrests were the result of grand jury indictments, not arrests ordered by the district attorney, and election challenger had not proven a scheme by district attorney, which would have included district judge and grand jury.

**\*350** [Edward Larvadain, Jr.](#), Belle Rose, Counsel for Plaintiffs-Appellants.

[Stephen D. Hawkland](#), Baton Rouge, Counsel for Defendant-Appellee, Fox McKeithen.

Bobby L. Culpepper, Jonesboro, Martin Smith Sanders, Winnfield, III, Counsel for Defendant-Appellee, Benji Phelps.

[Michael Sean Walsh](#), [Juliet E. Thompson Rizzo](#), Baton Rouge, Counsel for Defendant-Appellee, Suzanne Haik-Terrell.

Before [NORRIS](#), [BROWN](#), [STEWART](#), [GASKINS](#) and [KOSTELKA](#), JJ.

**\*351\*\*1** [NORRIS](#), Chief Judge.

In this election contest case, the plaintiffs sought to have the April 6, 2002 election for Winnfield Police Chief nullified and a new election held. Plaintiffs asserted numerous irregularities and unlawful activities by defendant, Benji Phelps, and his supporters. However, plaintiffs Johnny Ray Carpenter, Doris Abrams, and Shelia White were dismissed early in the action pursuant to exceptions of no right of action because the court concluded that under [La. R.S. 18:1401 B](#) only the losing candidate is a proper plaintiff to challenge the election results. Only plaintiff Gleason Nugent, the incumbent Police Chief who lost the election by a margin of four votes, was held to be a proper plaintiff. This was not challenged on appeal. At the end of Nugent's case, the trial court granted an involuntary dismissal [\[FN1\]](#) of Nugent's suit, and this appeal followed. For the reasons set

forth below, we affirm the trial court's judgment.

[FN1](#). The dismissal was erroneously referred to as a "directed verdict," but the matter was not tried by jury.

## FACTS

The following is a summary of the factual allegations of the plaintiffs' petition:

Carpenter, Abrams, and White supported Nugent for Police Chief, and if free on election day, they would have gotten enough votes to get Nugent reelected. On the other hand, Terry Reeves, the District Attorney for Winn Parish, supported Mayor Deano Thornton and Benji Phelps who were working as a team to be elected to the positions of Mayor and Police Chief, respectively.

Reeves, as D.A. rules Winn Parish through "fear and terror." In the past, Shelia White had gotten along with Reeves who, along with Thornton, had got her the job of Executive Director of the Winnfield Housing Authority (WHA). However, Reeves' behavior toward White drastically changed when she refused to write a \$100,000 check on WHA funds as a donation to the city in connection with the building of a **\*\*2** community center. Subsequently, she was "terrorized" by Assistant District Attorney James Lewis to "break her" so that she would favor the donation.

Reeves, through Lewis, empaneled a grand jury to investigate the way White was operating the WHA. On June 4, 2001 she received a subpoena to produce all her records before a grand jury, but after taking the records to the jury and waiting four hours, she was told she could go home and take the records with her. Reeves sent an investigator to the WHA who investigated the records for more than seven months. White was subpoenaed again on January 29, 2002 to produce documents she already had produced. On February 8, 2002, Reeves' office issued another subpoena ordering document production. White also produced these documents, but still would not write the \$100,000 check.

As election day was approaching, Reeves had Lewis issue subpoenas to the plaintiffs, ordering them to appear before a grand jury during the week of the election, thus preventing them from campaigning. The cases against the

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plaintiffs were presented on April 3, 2002, and all plaintiffs were indicted except Gleason Nugent.

On April 4, 2002, Judge James Wiley signed arrest warrants for the indicted plaintiffs. Wiley was a former Assistant District Attorney under Reeves. All the arrests were made on the evening of \*352 April 4, 2002, except one which occurred the next morning. Thus plaintiffs were arrested on April 4, 2002, spent that night in jail and thought bond would be set the next day, but at a hearing on the morning of April 5, 2002, the court told the plaintiffs that the state had requested a bail hearing. The plaintiffs believed this was done to keep them in jail so that Reeves' candidates could be elected with "minimum opposition."

Judge Wiley refused to set bail without a hearing and would not set a hearing prior to the election. When the plaintiffs asked the court's permission to vote on election day, the judge told them it was up to the sheriff to transport them to the polls. However, Carpenter later learned that Judge Wiley and Reeves knew that the plaintiffs would not be able to vote.

At the election on April 6, 2002, Phelps received 911 votes, while Nugent received 907. The plaintiffs would have voted for Nugent, and would have gotten "many many other votes" for Nugent. But for "substantial irregularities, error, fraud, or other unlawful activity in the conduct of the election," Nugent would have been reelected.

Some of the substantial irregularities and unlawful activities conducted by Terry Reeves and his allies included vote buying. On March 22, 2002, Phelps bought votes by giving James Womack \$100 on an open account at the Winni-Mart, telling Womack that persons using the code word "Lip" \*\*3 would be able to purchase \$5.00 worth of items. Lip is the alias of Robert Hall, Jr. who paid seven individuals with liquor and cigarettes to vote for Phelps. These individuals otherwise would have voted for Gleason.

During the period for voting absentee, Thornton and Phelps paid four individuals to vote for them. These individuals were given a ballot marked with Thornton and Phelps' numbers, two and four, and were told that after they voted those numbers they would be taken to the Corner Store or Winni-Mart to purchase up to \$6.00 in merchandise. The majority of these four would have

voted for Nugent if their votes had not been bought. Thornton and Phelps committed these acts because they knew Reeves would not enforce the law against them, and knew that Reeves would enforce the law against their opponents.

On April 11, 2002, Judge Wiley recused himself and was replaced by a retired judge appointed by order of the Louisiana Supreme Court. Before the first witness testified, the court noted that there was an ongoing investigation by the Commissioner of Elections into alleged vote buying. The court was requested to read and did read the provisions of [La. R.S. 18:1461](#) concerning vote buying. The court also read the provisions of [La. R.S. 14:119](#) concerning bribery of voters, including that portion of the statute stating that in the trial of a person charged with bribery of voters, either the bribe-giver or the bribe-taker may give evidence or make an affidavit against the other, with immunity from the prosecution in favor of the first informer, except for perjury in giving such testimony.

The first witness to testify was Benji Phelps. He admitted to setting up an account at Winni-Mart with Mr. James Womack in the amount of \$100. He stated that the purpose of the account was to provide people who were helping him with "something to eat and drink." He denied using any code word in order to use the account, and he indicated that something to eat did not include beer or cigarettes. Phelps admitted knowing Lip and \*\*4 identified him as Robert Hall, Jr., but \*353 denied paying Lip to haul people to the polls, and denied telling him that he had money at Winni-Mart to pay people that Lip was able to get to vote for Phelps. Phelps also denied giving Lip a blue paper with the numbers two and four on it.

The next witness was James Womack, who worked at Winni-Mart. He admitted talking with plaintiff about the account and telling him how it was set up. However, other than plaintiff, Womack stated he had only talked to Phelps who "just mainly asked me what Mr. Nugent asked." According to Womack, the account was set up sometime in March in the amount of \$100, and Phelps told Womack "there would be some people coming in and charging on it." Womack stated that people did come in and charge on the account, charging cold drinks, candy, beer and cigarettes.

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No code word was used; instead, those charging on the account simply asked for their purchases to be put on "Benji's account."

Plaintiff's counsel asked Womack if he kept a running tab on the account, and Womack responded in the affirmative. He also admitted that he had the running tab with him. When plaintiff's counsel asked to see it, Phelps' counsel objected; plaintiff's counsel's stated: "I'm not going to question on this. I am going to question on the petition."

Womack stated that the entire \$100 was not used, but some five to ten people made charges on the account. There was a \$5.00 limit on purchases by any one person.

When Womack was questioned by Phelps' counsel, he indicated that Phelps had told him there might be "some workers in the area" and that he should let them charge. In response to a question by counsel for the \*\*5 Commissioner of Elections, Womack indicated that a list of purchases was prepared, but he did not give a copy of the list to Mr. Nugent. However, when asked if he gave a copy of the list to anybody, he responded "they received a copy of it." Apparently, Womack was referring to certain individuals in the courtroom, and when counsel asked to see a copy of the list, someone provided a list. However, the list was not entered into evidence.

On reexamination by plaintiff's counsel, no attempt was made to enter a copy of the list into evidence even though it was apparent that a copy was present in the courtroom. Counsel did ask Womack if he had the list with him, but Womack responded in the negative, although indicating that "he," a person unidentified in the transcript, got a copy of it. At the conclusion of Womack's testimony, he was released from his subpoena and allowed to leave the courthouse.

The next witness called was Robert Hall, Jr., a.k.a. "Lip." However, Hall chose not to testify, invoking his right against self-incrimination.

Walter Glynn testified next, stating that during absentee voting, Lip picked him up and took him to vote absentee. Later, Lip took him to the Corner Store where he bought Glynn a beer and a pack of cigarettes. According to Glynn, Lip had

given him a piece of paper with the numbers two and four on it, the numbers for Chief of Police and Mayor. However, Glynn indicated he did not ask for the beer and cigarettes, and that the way he voted had nothing to do with the beer and cigarettes. Instead, he voted for whom he wished to vote.

Michael McDonald testified next, stating that he voted absentee and \*\*6 ran into Lip at the courthouse where he went to vote. After McDonald voted, Lip took him to the Winni-Mart where each got a "40 ounce Magnum" to drink. Lip allegedly told the \*354 clerk to put it on "Benji's account." Lip told McDonald that Benji had given him \$100 to go and get people to vote for him, but McDonald indicated that he did not sell his vote for a beer; instead, he voted for whom he wished to vote.

The next witness, Gwendolyn Amos, testified that she was taken to the polls by a James Wilson. Objection to her testimony was made because there was nothing in the pleadings about a James Wilson. Ultimately, counsel for Nugent made a proffer of Amos' testimony. Amos candidly admitted selling her vote for two packs of cigarettes and stated that she had planned to vote for Mr. Nugent. Her vote for Phelps was made absentee.

The next witness was Theotis Duncan. Mr. Duncan's testimony also was made in the form of a proffer because he was not listed in the petition. He testified to being given \$40 on two occasions to haul people to the polls. However, he denied buying anyone cigarettes or beer. According to Duncan, the money was given to him by a John Scott who Duncan initially indicated worked in the District Attorney's office, but subsequently indicated did not work in that office, but "in the same building."

A third proffer was made with respect to the testimony of Lashonda Darby. Darby was taken to vote absentee by James Wilson at the same time as Gwendolyn Amos. She testified that she had never voted before, and Wilson told her he would show her how to vote. Wilson gave her a paper with the numbers two and four on it, and "halfway" he told her he would buy her "anything I wanted." After she had voted these numbers she was \*\*7 taken to the Corner Store by Wilson who bought her a pack of cigarettes and two

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beers. However, her testimony indicates that rather than voting for two and four in order to receive beers or cigarettes, she simply voted for two and four because she thought that was the way she was supposed to vote.

Teresa Morris testified next. She is the sister of dismissed plaintiff Johnny Ray Carpenter. She testified to voting absentee, and to being taken to vote by Lip. She stated she was given a paper for the Mayor and Phelps, and that Lip promised her \$5.00. However, she stated that she did not vote the two numbers she was given.

The next witness, Freddie Lee Jackson, also testified to being taken by Lip to vote. However, he indicated that Lip did not promise him anything, but bought him "a drink" after he voted. Although Lip gave him a card with the numbers two and four on it, he voted one and three.

Dycie Moore was the next witness. She is the wife of Uvonne Moore, also known as Slug. Like the witnesses before her, she testified to voting absentee and to being picked up by Lip who took her to the courthouse to vote. Afterwards, he bought her a cigar and a can of beer. Although Lip gave a paper with the numbers two and four on it, she voted one and four. When specifically questioned, she stated that she voted number four that day because she wanted to and would still vote that way. Likewise, she voted for number one on her own.

Plaintiff Johnny Ray Carpenter testified next. At this point, the testimony shifted from vote buying to the activities surrounding the plaintiffs' grand jury indictments and subsequent arrests. Essentially, Carpenter testified that in the week before the election he was occupied with **\*\*8** being called before the grand jury and was unable to get out and campaign. He stated that he would have been able to get between two and three hundred votes for Nugent if he had not had to be at the grand jury. He was indicted by the grand jury on 103 counts, and was arrested on a **\*355** Thursday night. He was unsuccessful in trying to get the judge to set bond, so he spent the night in jail along with Doris Abrams and Shelia White. The next morning he learned that the D.A. had filed a motion "to deny bond." Bond was not set until the Monday after the election, keeping Carpenter from voting. Carpenter testified he would have voted for Nugent

and would have campaigned for Nugent.

Winn Parish District Attorney Terry Reeves was next to testify. He stated that the grand jury that indicted the dismissed plaintiffs in 2002 had been impaneled in 2001 to investigate the WHA. Reeves denied as "absolutely, totally untrue" and "a specious lie" that he manipulated this grand jury to prevent the dismissed plaintiffs from getting out and politicking for plaintiff. He also denied telling Assistant District Attorney Lewis to file a motion to keep the plaintiffs in jail over the weekend. Reeves testified that he was aware that a bond motion was filed, [\[FN2\]](#) but he did not file it. The bond motion was filed by Lewis, and Reeves could not remember if he had discussed it with Lewis before the motion was filed.

[FN2.](#) While the testimony does not specify the nature of the bond hearing, the plaintiffs' petition alleges it was a [C.Cr.P. art. 330.1](#) hearing.

Next to testify was Shelia White. She indicated that she was indicted by the grand jury and was not allowed to vote on election day. The trial court did not allow her to testify concerning the alleged \$100,000 check **\*\*9** mentioned in the petition. She stated that her appearance before the grand jury prevented her from campaigning for her candidate, Chief Nugent, and that after being arrested she, like Carpenter, spent Thursday night in jail. On Friday morning, she learned that there must be a bond hearing before she could post bond. She was released from jail on Monday afternoon. She indicated that she had been indicted for three counts of theft, malfeasance in office, and injuring public records.

Doris Abrams testified next. Her testimony was very much like that of Carpenter and White--had she not been in jail, she would have politicked and voted for Nugent. She was indicted on 18 counts including theft, injuring public records, and fraud.

Before the last witness testified, counsel for plaintiff indicated that he had been told that Lip wanted to testify. The court noted that he initially had invoked his Fifth Amendment right not to testify, but now wished to recant. The court concluded that Lip obviously had talked to someone, and denied his request to testify. No proffer was attempted

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with respect to his testimony and no error was assigned to this ruling.

The last trial witness was the plaintiff, Gleason Nugent. He stated that "during the election," he was told of vote buying, that he investigated the allegations, and that he contacted the state about election fraud. He indicated that he went to the Winni-Mart where he talked to James Womack and discovered that an account had been set up. He recovered \$100 from Mr. Womack and asked to see the account set up at the store. Womack allegedly showed him an account. Plaintiff identified a document as the account, but said Womack never gave him a copy; he received the copy \*\*10 only "this morning." An objection then was made to the document because it was not entered into evidence through Mr. Womack who had testified previously. The court ruled that the document purported to be a business record of the Winni-Mart and would be properly identified by the custodian of the Winni-\*356 Mart records. The document was not identified when Mr. Womack was on the stand, and the court ruled that plaintiff could not identify business records that were not his own, whether they were shown to him or not. Plaintiff's counsel then made a proffer of the alleged copy of the list, with plaintiff indicating that the document had the word "Lip" on it. Plaintiff also testified that what caught his attention on the document was a notation, "five voters--a case of Bud."

With respect to the grand jury proceedings, plaintiff testified that he appeared before the grand jury from Monday through Thursday of the week preceding the election, and that his appearance there interfered with his ability to campaign. He felt this was done intentionally. On cross-examination denied that he had contested absentee votes. At the conclusion of cross-examination, plaintiff rested his case.

Immediately thereafter, a motion was made for involuntary dismissal, and after hearing the argument of the attorneys and reviewing the evidence briefly, the court stated that the burden was upon the plaintiff to establish that irregularities occurred that would have made a difference in the election. The court noted there was no challenge to any of the absentee voting as set out in the election code, so the court was left with the allegation that the three dismissed plaintiffs were

not allowed to vote due to the alleged scheme by the District Attorney which would include Judge Wiley and the grand \*\*11 jury proceedings. The court found that the plaintiff had not met its burden of proof as to that alleged scheme. Accordingly, the court granted the motion to dismiss.

#### ASSIGNMENTS OF ERROR

Appellant has raised the following assignments of error:

- (1) The trial judge erred when he failed to find that the number of persons, who were bribed for their votes by a worker for Benji Phelps was sufficient to change the outcome of the election, as required by the holding of [Savage v. Edwards](#), [98-1762 (La.App. 3 Cir. 11/23/98), 728 So.2d 428, affirmed, 98- 2929 (La.12/18/98), 722 So.2d 1004], and therefore, the election should have been declared null and void.
- (2) The trial judge erred and committed reversible error when he informed potential witnesses that their testimony could be used against them and that they could be convicted of violating [La. R.S. 14:119](#), bribery of votes [*sic*], without telling them that they could be given immunity from prosecution if they came forth with truthful testimony.
- (3) The trial judge erred when he failed to find that the votes of Johnny Ray Carpenter, Shelia White and Doris Abrams, ardent supporters of appellant, Gleason Nugent, should have been counted because they were intentionally incarcerated for the sole purpose of keeping them from campaigning and voting in the April 6, 2002 election for chief of police.
- (4) That the trial judge failed to find that District Attorney Terry Reeves, a strong supporter of Benji Phelps, abused the powers of his office when he subpoenaed appellant, Gleason Nugent, to appear before the trial jury a week leading up to the election.

#### DISCUSSION

Before discussing appellants' assignments of error, we note that appellee, Benji Phelps, filed a motion to dismiss this appeal, arguing that the appeal was untimely. \*357 However, at oral argument appellee abandoned his \*\*12 motion. [\[FN3\]](#)

[FN3](#). The motion was based on the requirement that an appeal under La. R.S. 14:1409 D must be

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taken within 24 hours of rendition of judgment. However, under the statute rendition means signing by the judge, and in this case the appeal was taken within 24 hours of signing.

Turning now to the appellant's assignment of errors, we note that his first assignment argues that the trial court erred in failing to find that the number of persons who were bribed for their votes by a worker for Phelps was sufficient to change the outcome of the election. In this regard, appellant asserts that the testimony revealed at least seven witnesses were bribed for their votes by Lip, and that all seven votes should be subtracted from Phelps' total regardless of whether the witnesses who received the bribes actually voted the way Lip requested them to vote. Thus, the result would be different. Appellant also argues that the court should have admitted into evidence the document allegedly from Winni-Mart showing two purchases with a notation "Lip," as well as the notation, "five voters--a case of Bud." We must disagree with appellant's arguments on this assignment of error.

Under [La. R.S. 18:1432](#) A, if the trial judge in an action contesting an election determines that (1) it is impossible to determine the result of the election, or (2) the number of qualified voters who were denied the right to vote by election officials was sufficient to change the result if they had been allowed to vote, or (3) the number of unqualified voters who were allowed to vote by election officials was sufficient to change the result if they had not been allowed to vote, or (4) a combination of the factors referred to in (2) and (3) would have been sufficient to change the result had they not **\*\*13** occurred, the judge may render a final judgment declaring the election void and ordering a new primary or general election for all the candidates. Considering this language, the Louisiana Supreme Court in [Adkins v. Huckabay](#), 99-3605 (La.2/25/2000), 755 So.2d 206, stated that a party contesting an election no longer must show that "but for" the irregularity he would have won the election.

[\[1\]\[2\]\[3\]](#) Although a party contesting an election is no longer limited to the "but for" standard, we note that a party contesting an election still must show at least that because of fraud or irregularities, the outcome of the election is impossible to determine. Thus, it is the effect of the irregular-

ity on determining the outcome, rather than the fact of an irregularity by itself, that guides us in these matters. Accordingly, we conclude that a vote should not be cast out simply because a voter was offered a bribe, or even because a voter accepted something of value for the vote, provided that voter still voted the way he originally intended. Regardless of criminal implications, our focus is on whether the alleged activities actually changed the result of the election by changing the vote totals, or at least made the election result impossible to determine. Based on this record, no more than two votes would be subtracted, a difference that would be insufficient to change the election result or make it impossible to determine.

[\[4\]](#) We also agree that the trial court did not err in excluding proffered copy of the list from Winni-Mart. Although appellant's counsel states in brief that he did not see the document until Womack had testified and was released by the court, it is plain that appellant, as the result of his investigation, was aware of its existence even before the case was tried, and **\*\*14** it was plainly present in court when Womack **\*358** testified. However, no attempt was made to introduce the list into evidence at that time. Womack, or some other Winni-Mart employee, would have been a proper person to identify the document. Appellant did not make the list, did not keep records for Winni-Mart, and could not say who made the list or the circumstances under which it was made.

We also observe that Louisiana's hearsay exception found in [La. C.E. art. 803\(6\)](#) is based substantially on [Federal Rule of Evidence 803\(6\)](#). The federal Fifth Circuit has stated that the primary emphasis of [FRE 803\(6\)](#)'s hearsay exception for business records relates to the trustworthiness of the records, and that the trial court has great latitude in resolving the issue of trustworthiness. [United States v. Parsee](#), 178 F.3d 374 (C.A.5 1999). Likewise, the Official Comments to the Introductory Clause to [La. C.E. Art. 803](#) state that the exceptions to the hearsay rule listed in the Article are based on the general conclusion that when the qualifying circumstances are met there ordinarily is a sufficient basis for crediting the trustworthiness of the out-of-court statement, and, generally, there must be sufficient indication from the circumstances that the declarant has firsthand knowledge of that of which he spoke. Part of the "qualifying circum-

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stances" for the business records exception is the firsthand knowledge requirement of Article 602 which prevents a witness from testifying to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter. In the instant case, we do not know who made the entries on the document from Winni-Mart, although presumably they were made by an employee or employees other than Womack. While there might be a sufficient basis for crediting the trustworthiness of the entries as to items purchased, there appears to be no sufficient basis for crediting the trustworthiness of the portion of the entry indicating "five voters." That is because we do not know enough about the circumstances to conclude that the unknown declarant had firsthand knowledge that the unknown parties were voters, or that the beer was being purchased by or for "five voters."

[5] In his second assignment of error, appellant notes that the trial judge informed all the potential witnesses that their testimony could be used against them and that they could be convicted of violating [La. R.S. 14:119](#). Appellant asserts that the trial judge erred by not telling these witnesses that they could be given immunity from prosecution if they came forth first with truthful testimony. However, a review of the transcript will show that the judge read to the potential witnesses that portion of the statute dealing with immunity. There was no requirement that the judge explain or rephrase the statute, and appellant's counsel failed to request any special instructions or object to the statute as read. This assignment of error has no merit.

[6] Appellant's third assignment of error concerns the grand jury proceedings and the subsequent arrests of Carpenter, Abrams and White, resulting in the three being in jail when the election took place. Appellant argues that these three votes should have been counted in the election and added to plaintiff's total.

We find no merit in this argument. The arrests of Carpenter, White, and Abrams were the result of grand jury indictments, not arrests ordered by the district attorney. Furthermore, the trial court's remarks at the end of the trial indicate that the judge simply did not believe that the plaintiff had met **\*\*16** its burden of proving a scheme by the District Attorney that would have included the district judge and **\*359**

the grand jury. Certainly, the District Attorney vehemently denied any such scheme when he testified. A court of appeal may not set aside a finding of fact by a trial court in the absence of manifest error or unless it is clearly wrong, and where there is a conflict in the testimony, reasonable evaluations of credibility and reasonable inferences of fact should not be disturbed on review. [Huckaby v. Hunter, 427 So.2d 1 \(La.App. 2 Cir.\), writ denied, 427 So.2d 1197 \(1983\)](#). We find no manifest error on the part of the trial court.

In his final assignment of error, appellant asserts that the trial court erred in failing to find that the District Attorney abused his powers when he subpoenaed appellant to appear before a grand jury in the week leading up to the election. As stated above with respect to assignment of error number three, the trial court held that appellant failed to carry his burden of proving a scheme by the District Attorney involving the grand jury. We find no manifest error. Accordingly, we reject appellant's assignment of error.

#### CONCLUSION

Although we ultimately conclude that there is no manifest error in the trial court's finding that plaintiff failed to carry his burden of proof to annul the election, this does not mean we find no evidence suggesting irregularities and/or fraud in this election. We also observe that the trial court was overly strict in refusing to consider the testimony concerning vote buying and in other evidentiary rulings. It is most curious that the Commissioner of Elections, who is currently investigating charges of fraud and vote-buying in this election, often objected to evidence that was relevant to these charges. **\*\*17** However, because some of this evidence was proffered, and rulings on admissibility have not been assigned as error, there is no ground for reversal. We also are cognizant of the difficulties of either proving or defending against allegations in an election contest in which time periods necessarily are short. However, there are other remedies for election offenses. See [La. R.S. 18:1461 et seq.](#)

For the reasons set forth above, the judgment of the trial court is affirmed at appellant's costs.

AFFIRMED.

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Supreme Court of Illinois.

Penny PULLEN, Appellant and Cross-Appellee,

v.

Rosemary MULLIGAN, Appellee and Cross-Appellant.

**No. 70496.**

Sept. 21, 1990.

After primary election was held and State Board of Elections certified one candidate as Republican nominee for representative in General Assembly for particular district, losing candidate filed petition of election contest. The Circuit Court, Cook County, ordered recount and then determined which category of ballots were to be considered in recount, directed lottery to determine nominee after candidates were determined to be tied, and declared originally-announced winning candidate to be winner of primary election based on result of coin flip. Losing candidate appealed and winning candidate cross-appealed. The Supreme Court, [Ward, J.](#), held that: (1) both county canvassing board and State Board of Elections would be considered to "canvass" returns of primary election at issue, so ten-day time for candidate to challenge election would be considered to commence after State Board of Elections canvassed returns; (2) absentee ballots not initialled by election judge, in violation of statute, were properly counted; (3) absence of precinct identification on ballots did not by itself invalidate those ballots; (4) ballots with wrong precinct number were properly counted, but ballots lacking precinct number and bearing designation of township outside of relevant district were uncountable; (5) ballots numbered by election judges with numbers corresponding to those appearing on voters' ballot applications would not be found invalid as violating secrecy of ballots; and (6) partially punctured ballots from which paper chads indicating vote were not completely dislodged were subject to visual inspection and manual counting to extent that voters' intent could be determined with reasonable certainty.

Affirmed in part; reversed in part.

West Headnotes

**[1] Elections** **270**  
[144k270 Most Cited Cases](#)

Courts have no inherent power to hear election contests, and may do so only when authorized by statute and in manner dictated by statute.

**[2] Elections** **278**  
[144k278 Most Cited Cases](#)

Failure to timely file election contest prohibits court from proceeding with contest.

**[3] Elections** **151**  
[144k151 Most Cited Cases](#)

Both county canvassing board and State Board of Elections would be considered to "canvass" returns of primary election to determine Republican nominee for representative in General Assembly, for purposes of measuring ten-day time after completion of canvass during which petition challenging election may be filed by candidate. S.H.A. ch. 46, ¶¶ 7-56, 7-63, 8-15, 22-1.

**[4] Elections** **227(9)**  
[144k227\(9\) Most Cited Cases](#)

Failure to comply with "mandatory" provision of Election Code renders affected ballots void, while technical violations of "directory provisions" of Election Code do not affect validity of affected ballots.

**[5] Statutes** **227**  
[361k227 Most Cited Cases](#)

Whether particular statutory provision is mandatory or directory depends upon intent of legislature, which is ascertained by examining nature and object of statute and consequences which would result from any given construction.

**[6] Elections** **158**  
[144k158 Most Cited Cases](#)

Absentee ballots which did not contain initials of election judge, in violation of statutory requirement, were properly counted in election; absentee ballots could be identified and distinguished from in-precinct ballots, and application of initialing requirement to absentee ballots was not necessary to safeguard integrity of election process. S.H.A. ch. 46, ¶ 7-44.

**[7] Elections** **227(8)**  
[144k227\(8\) Most Cited Cases](#)

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Absentee ballots not initialed by election judges, in violation of statute, may be counted only if absentee ballots can be identified and distinguished from in-precinct ballots and initialing requirement does not contribute to integrity of the election process. S.H.A. ch. 46, ¶ 7-44.

**[8] Elections** 158

[144k158 Most Cited Cases](#)

Absence of precinct identification on absentee ballots did not by itself invalidate those ballots, although statute requires designation of precinct to appear on primary ballot. S.H.A. ch. 46, ¶ 7-20.

**[9] Elections** 227(8)

[144k227\(8\) Most Cited Cases](#)

Technical irregularities in ballot form, including absence of precinct designation on ballot, do not justify voiding affected ballot.

**[10] Elections** 158

[144k158 Most Cited Cases](#)

Statutory provision that no ballots except those provided in accordance with provisions of Election Code shall be counted does not make ballot form printing requirements mandatory by prohibiting election judges from counting ballots which did not strictly comply with Election Code's provisions. S.H.A. ch. 46, ¶¶ 16-3, 17-16.

**[11] Elections** 227(8)

[144k227\(8\) Most Cited Cases](#)

Statute providing that no ballots except those provided in accordance with Election Code's provisions shall be counted was designed to require use of only official ballots provided by election authorities and to invalidate unofficial ballots which might be supplied by candidates, political parties, or prepared by voters themselves, not to void every ballot with printing irregularities. S.H.A. ch. 46, ¶ 17-16.

**[12] Elections** 158

[144k158 Most Cited Cases](#)

Absentee and in-precinct ballots with the wrong precinct number printed on them were properly counted, where there was no allegation or evidence that such ballots were fraudulently cast and it was not claimed that ballots were cast by voters residing outside particular district or not qualified to

vote in election; it could reasonably be assumed without evidence to the contrary that the ballots were properly cast in precinct where voter resided, as voter could receive ballot only after applying for ballot and satisfying election judge that he is qualified to vote and reside in precinct in question, and qualified voters should not be deprived of their right to have votes counted simply because of error on part of election officials.

**[13] Elections** 158

[144k158 Most Cited Cases](#)

Ballots which lacked precinct designation and bore designation of township outside of particular district were not countable in primary election to determine Republican nominee for office of representative in the General Assembly for the district; ballots bearing designation of township outside the district would be considered cast by voters who resided outside the district and were thus not qualified to vote for office at issue.

**[14] Elections** 154(10)

[144k154\(10\) Most Cited Cases](#)

**[14] Elections** 158

[144k158 Most Cited Cases](#)

Ballots of voters who did not sign ballot applications, in violation of statute, were properly counted, where no allegation was made that any unqualified voters voted in election or that failure to comply with statute requiring signature hindered rights of any person to challenge qualifications of any voter; it would be presumed without evidence to the contrary that election judges gave ballots to voters who did not sign ballot applications only after checking data on registration card and satisfying themselves that voters were entitled to vote. S.H.A. ch. 46, ¶¶ 5-29, 7-44.

**[15] Elections** 8.1

[144k8.1 Most Cited Cases](#)

(Formerly 144k8)

General purpose of all election laws is to obtain fair and honest elections.

**[16] Elections** 291

[144k291 Most Cited Cases](#)

Judges of election are presumed to perform duties required of them by statute.

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Statute providing that number corresponding to number of voter on poll books shall not be endorsed on back of ballot does not prohibit election judges from numbering ballots in primary election, even though numbers marked by judges on ballots correspond to number appearing on voter's application for ballot; the statute describes how voter shall mark ballot and should be construed as prohibiting voters, rather than judges, from marking number on back of ballot, and mark must be made with deliberate intention of violating secrecy of ballot to render ballot invalid. S.H.A. ch. 46, ¶ 17-11.

**[18] Elections**  **227(9)**[144k227\(9\) Most Cited Cases](#)

Not every marking which is sufficient to distinguish one ballot from another will invalidate ballot.

**[19] Elections**  **300**[144k300 Most Cited Cases](#)

Question of whether particular mark upon ballot is distinguishing mark sufficient to invalidate ballot is largely question of fact.

**[20] Elections**  **227(9)**[144k227\(9\) Most Cited Cases](#)

For mark on ballot to constitute distinguishing mark sufficient to invalidate ballot, mark must be one which has been placed on ballot by voter himself; marks placed on ballot by election officials without participation of voter do not constitute distinguishing marks sufficient to invalidate ballot.

**[21] Elections**  **227(9)**[144k227\(9\) Most Cited Cases](#)

Mark on ballot must be made with deliberate intention of violating secrecy of ballot to render ballot invalid; if it appears that marks were placed upon ballot as result of honest effort by voter to indicate his choice of candidate and not as attempt to signify identity of voter, ballot should not be invalidated.

**[22] Elections**  **158**[144k158 Most Cited Cases](#)

Numbers placed by election judges on ballots that corresponded with numbers appearing on voters' applications for

ballots were not distinguishing marks sufficient to invalidate ballots; election judges testified they only numbered ballots to make it easier to count ballots when polls closed, so marks were not made with intention of violating secrecy of ballots or identifying voters, and no evidence suggested that numbered ballots were actually traced to particular voters or that secrecy of ballots was violated at any time during or after voting process. S.H.A. Const. Art. 3, § 4.

**[23] Elections**  **227(1)**[144k227\(1\) Most Cited Cases](#)

Generally, ignorance, inadvertence, mistake, or even intentional wrong on part of election officials will not be permitted to disfranchise voters.

**[24] Elections**  **295(2)**[144k295\(2\) Most Cited Cases](#)

Returns of election officials are prima facie evidence of result of election, but ballots are original evidence of votes cast, and in election contest, court may accept ballots cast at election as better evidence of result than election returns if ballots have been properly preserved.

**[25] Elections**  **292**[144k292 Most Cited Cases](#)

Contestant who challenges announced result of election bears burden of proving that ballots have been kept intact to establish that ballots are better evidence of election result than returns from election officials.

**[26] Elections**  **295(2)**[144k295\(2\) Most Cited Cases](#)

If evidence discloses that ballots were exposed to reach of unauthorized persons and returns of election officials are not likewise discredited, ballots will not be regarded as better evidence of result of election than returns, but if evidence shows that there was no reasonable opportunity for tampering with ballots, they are best evidence of result of election.

**[27] Elections**  **300**[144k300 Most Cited Cases](#)

Question of whether ballots have been properly preserved, so that ballots rather than returns of election official are better evidence of election result, is question of fact to be determined from evidence.

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**[28] Elections** 🔑292

[144k292 Most Cited Cases](#)

Contestant challenging announced result of election may satisfy burden of proof that ballots have been kept intact by introducing evidence that election officials preserved ballots according to statutory requirements, to establish that ballots, rather than returns of election officials, are best evidence of election result.

**[29] Elections** 🔑295(2)

[144k295\(2\) Most Cited Cases](#)

Even where statutory provisions governing preservation of ballots are not complied with, contestant challenging announced election result may nevertheless prevail on claim that ballots, rather than returns, are best evidence of election result; preservation requirements are directory only, not mandatory.

**[30] Elections** 🔑298(1)

[144k298\(1\) Most Cited Cases](#)

Once trial court receives ballots into evidence for consideration of result of election, rules regarding ballot preservation cease, and sole question before court becomes whether ballots are legal or illegal.

**[31] Stipulations** 🔑18(1)

[363k18\(1\) Most Cited Cases](#)

Results of recount, rather than results on election night, would govern in all precincts, including precinct in which 160 ballots were counted on election night but only 159 ballots were found at recount, in view of stipulations in record and failure of party to object when stipulations were given legal effect.

**[32] Elections** 🔑158

[144k158 Most Cited Cases](#)

Partially punctured ballots in which paper chads through which votes were indicated were not completely dislodged could be visually inspected by court and manually counted to extent that voters' intent could be determined with reasonable certainty, notwithstanding statute providing that punch card ballots are to be recounted on automatic tabulating equipment and inability of electronic tabulating equipment to read ballots in which paper chads had not been completely dislodged. S.H.A. ch. 46, ¶ 24A-15.1.

**[33] Elections** 🔑227(9)

[144k227\(9\) Most Cited Cases](#)

Where statute directs that act shall be done in particular manner and states that failure to perform act in manner stated will render affected ballot void, Supreme Court must give statute mandatory construction.

**[34] Elections** 🔑227(9)

[144k227\(9\) Most Cited Cases](#)

Where effect of failure to comply with particular statutory requirement on validity of ballot is not specified, courts must consider nature and object of statutory provision and consequences which would result from construing statute as mandatory or directory.

**\*\*588 \*30 \*\*\*218** [Michael E. Lavelle](#) and [Robert M. Motta](#), Lavelle, Holden & Juneau, Oak Park, and Robert A. Mankivsky, West Chicago, for appellant and cross-appellee.

[Burton S. Odelson](#) and [Mathias W. Delort](#), Odelson & Sterk, Ltd., Evergreen Park; [Robert J. Downing](#), of Miller, Forest & Downing, Glenview; and [William T. Barker](#) and [Alan J. Mandel](#), Sonnenschein, Nath & Rosenthal, Chicago, for appellee and cross-appellant.

Justice [WARD](#) delivered the opinion of the court:

This appeal arises out of an election contest which the appellant, Penny Pullen, filed pursuant to section 7-63 of the Election Code (Ill.Rev.Stat.1989, ch. 46, par. \*31 7-63). A primary election was held on March 20, 1990, to determine the Republican nominee for the office of Representative in the General Assembly for the 55th Representative District. Rosemary Mulligan, the appellee here, was declared elected as the nominee and so certified by the State Board of Elections on April 9, 1990, as having received a majority of the votes cast, 7,431, for such office. Penny Pullen, the appellant here, was certified by the State Board of Elections as having received the second highest number of votes cast, 7,400, for such office. Pullen and Mulligan each filed a petition for a discovery recount, pursuant to section 22-9.1 of the Election Code (Ill.Rev.Stat.1989, ch. 46, par. 22- 9.1).

On April 19, 1990, 10 days after the State Board certified Mulligan as the Republican candidate, Pullen filed a "Petition of Election Contest" in the circuit court of Cook

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County, naming Mulligan as the respondent. The petition alleged various irregularities as to the voting procedure and count and asked the court to declare Pullen the winner of the election. Mulligan filed responsive pleadings, including a motion to dismiss the petition and a counterclaim alleging certain irregularities in tabulation. **\*\*589 \*\*\*219** The motion to dismiss alleged that the petition had not been filed within the statutory time limit for filing such petitions (Ill.Rev.Stat.1989, ch. 46, par. 7-63) and challenged the jurisdiction of the trial court to hear the contest. The trial court denied the motion to dismiss, and commenced trial on the issue of whether Pullen could demonstrate a reasonable likelihood that a recount would change the results of the election. After reviewing the results of a discovery recount and hearing evidence and the arguments of the parties, the trial court ordered a recount of all the Republican ballots cast in the election.

After the recount, each of the parties filed a number of motions urging the court to consider certain categories **\*32** of ballots and to disregard other categories of ballots, in determining the result of the recount. After hearing evidence and arguments on these motions, the trial court entered an order specifying which categories of ballots would be considered in the recount. After entering this order, the court determined that the recount resulted in a net gain of 1 vote for Pullen and a loss of 30 votes for Mulligan. The trial court then determined that each candidate had received 7,387 votes, producing a tie vote. The trial court then directed the State Board of Elections to conduct a lottery pursuant to section 7-59 of the Election Code (Ill.Rev.Stat.1989, ch. 46, par. 7-59), to determine the nominee. A lottery by coin flip was held on July 18, 1990, and resulted in Mulligan's favor. Accordingly, the trial judge entered an order declaring Mulligan the winner of the primary election. Pullen appealed and Mulligan cross-appealed certain rulings in Pullen's favor. We allowed Pullen's petition for leave to appeal directly to this court (107 Ill.2d R. 302(b)).

[1][2] We first consider whether Pullen timely filed her petition to contest the primary election. Courts have no inherent power to hear election contests, but may do so only when authorized by statute and in the manner dictated by statute. (*In re Contest of Election for Governor* (1983), 93 Ill.2d

463, 67 Ill.Dec. 131, 444 N.E.2d 170; Young v. Mikva (1977), 66 Ill.2d 579, 6 Ill.Dec. 904, 363 N.E.2d 851.) Section 7-63 of the Election Code (Ill.Rev.Stat.1989, ch. 46, par. 7-63) contains the enabling language and procedural requirements for an action challenging a candidate's nomination in a primary election. That section provides:

"Any candidate whose name appears upon the primary ballot of any political party may contest the election of the candidate or candidates nominated for the office for which he or she was a candidate by his or her political party, \* \* \* by filing with the clerk of the circuit court a petition in writing, setting forth the grounds of contest, **\*33** which petition shall be verified by the affidavit of the petitioner or other person, and which petition *shall be filed within 10 days after the completion of the canvass of the returns by the canvassing board making the final canvass of returns*. The contestant shall also file with that canvassing board (and if for the nomination for an office, certified tabulated statements of the returns of which are to be filed with the State Board of Elections, also with the county canvassing board), a notice of the pendency of the contest." (Emphasis added.) (Ill.Rev.Stat.1989, ch. 46, par. 7-63.)

Failure to timely file an election contest prohibits the court from proceeding with the contest. *Patterson v. Crowe* (1944), 385 Ill. 514, 53 N.E.2d 415; Orbach v. Axelrod (1981), 100 Ill.App.3d 973, 56 Ill.Dec. 319, 427 N.E.2d 399.

[3] Here we must consider whether the trial court correctly determined that Pullen's election contest petition was filed within 10 days after the completion of the canvass by the canvassing board making "the final canvass of returns." (Ill.Rev.Stat.1989, ch. 46, par. 7-63.) The appellant, Penny Pullen, argues that the State Board of Elections made the final canvass of returns on April 9, 1990. She argues that her petition was timely filed on April 19, 1990, 10 days after the State Board made its canvass of the returns. The appellee, Rosemary Mulligan, argues that the canvassing board making the final canvass of **\*\*590 \*\*\*220** returns in this case was the Cook County Canvassing Board (County Canvassing Board), which completed its canvass on March 23, 1990. She argues that the petition was not timely filed because it was not filed within 10 days after the County Can-

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vassing Board canvassed the returns. Accordingly, the specific issue which we must address here is whether the Cook County Canvassing Board or the State Board of Elections was the canvassing board making "the final canvass of returns" for the office in question.

**\*34** A general overview of the relevant provisions of the Election Code is helpful in addressing this issue. The Election Code codifies the laws governing primary and general elections in this State. Article 7 of the Election Code (Ill.Rev.Stat.1989, ch. 46, par. 7-1 *et seq.*) regulates the primary election process. In primary elections candidates compete for nomination as their party's candidate for State, congressional, judicial, city, county, village, municipal district, township, and other governmental offices. Precinct, township, ward and State central committeemen are also elected in primary elections, as well as delegates to national nominating conventions. Article 7 specifies the time for holding primary elections, the qualifications and registration of persons who vote in primary elections, nomination of candidates who run in primary elections, procedural aspects of the primary election, and the procedures governing post-election contests.

Article 8 of the Election Code (Ill.Rev.Stat.1989, ch. 46, par. 8-1 *et seq.*) is similar to article 7 in many respects, except that article 7 regulates the nomination and election of candidates for all elective offices considered in the primary, while article 8 specifically regulates the nomination and election of candidates for the General Assembly. The first 14 sections of article 8 specify the dates on which primary elections for legislative candidates shall be held, how petitions for nominations of legislative candidates may be filed, and generally describe the pre-election procedures for primary elections in which candidates for legislative offices are chosen. Article 8 does not, however, specifically delineate how primary elections involving legislative candidates shall be conducted, nor does it delineate the procedures for contesting the results of such primary elections. Section 15 of article 8, states that, except as article 8 expressly provides otherwise, article 7 "shall, so far as the same may **\*35** be applicable, apply to and govern primary elections and contests thereof held under the provisions of this Article 8." (Ill.Rev.Stat.1989, ch. 46, par. 8-15.) Section 8-15 also

states:

"The returns of such primary [in which candidates for legislative offices are nominated] shall be made to the county clerk or board of election commissioners as the case may be \* \* \*.

Tabulated statements of the returns of the primary for the nomination of candidates for legislative offices shall be made to the State Board of Elections, *canvassed by the Board*, proclamation of the result thereof made, and certificates of nomination issued, as in the case of other tabulated statements of returns made to the State Board of Elections, and the election of any person nominated may be contested by filing with the clerk of the circuit court a petition in writing and filing notice in writing with the proper canvassing boards as required by Article 7 hereof." (Emphasis added.) Ill.Rev.Stat.1989, ch. 46, par. 8-15.

Pullen points out that section 8-15 specifically requires the State Board to canvass the tabulated statement of returns which it receives from the County Canvassing Board before proclaiming the result of the primary election. She argues that section 8-15 is consistent with provisions in article 7 which delineate how the returns in primary elections in which candidates for legislative offices are nominated shall be canvassed.

Section 7-56 specifies the manner in which returns shall be canvassed in primary elections. The first sentence of section 7-56(5) provides:

"The officers who are charged by law with the duty of canvassing returns of general elections made to the county clerk, shall also open and canvass the returns of a primary made to such county **\*\*591 \*\*\*221** clerk." (Ill.Rev.Stat.1989, ch. 46, par. 7-56(5).)

**\*36** Section 22-1 of the Election Code identifies the officers who are charged with the duty of canvassing returns of general elections. That section states:

"Within 7 days after the close of the election at which candidates for offices hereinafter named in this Section are voted upon, the county clerks of the respective counties, with the assistance of the chairmen of the county central committees of the Republican and Democratic parties of the county, shall open the returns and make abstracts of the votes on a separate sheet for each of the fol-

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lowing:

\* \* \* \* \*

H. For Senators and Representatives to the General Assembly." (Ill.Rev.Stat.1989, ch. 46, par. 22-1.)

Reading section 7-56(5) and section 22-1 together, it is clear that the County Canvassing Board, which is responsible for canvassing the returns of general elections in which candidates for Representatives to the General Assembly are elected, is also responsible for canvassing such returns in primary elections. Section 7-56(5) outlines what the County Canvassing Board must do after it completes the canvass of returns. That section provides:

"Upon the completion of the canvass of the returns by the county canvassing board, said canvassing board shall make a tabulated statement of the returns for each political party separately, stating \* \* \* the total number of votes cast in said county for each candidate for nomination by said party \* \* \*. Within two (2) days after the completion of said canvass by said canvassing board the county clerk shall mail to the State Board of Elections a certified copy of such tabulated statement of returns. \* \* \* [S]aid officers shall also determine and set down as to each precinct the number of ballots voted by the primary electors of each party at the primary." Ill.Rev.Stat.1989, ch. 46, par. 7-56(5).

The appellee, Mulligan, argues that, under section 7-56(5), the canvassing process is completed once the \*37 County Canvassing Board canvasses the returns and sends a certified tabulated statement of returns to the State Board of Elections. She argues that, once the County Canvassing Board sends a certified tabulated statement of returns to the State Board, the State Board's only function is to proclaim the result. She argues that in the primary election at issue here, the County Canvassing Board was the only board which canvassed the returns and, thus, was the canvassing board which conducted "the final canvass of returns" within the meaning of section 7-63.

The appellant, Pullen, points out, however, that section 7-56(6) of the Election Code specifies that the State Board must canvass the certified tabulated statement of returns which it receives from the County Canvassing Board. Section 7-56(6) states:

"In the case of the nomination of candidates for offices, \* \* \* certified tabulated statement of returns for which are filed with the State Board of Elections, *said returns shall be canvassed by the board.*" (Emphasis added.) (Ill.Rev.Stat.1989, ch. 46, par. 7-56(6).)

Pullen argues that section 7-56(6) is consistent with section 8-15, which also states that the State Board of Elections shall canvass the certified tabulated statements of returns which are filed with the State Board.

Mulligan concedes that section 8-15 and section 7-56(6) require the State Board to canvass tabulated statements of returns. She argues, however, that the State Board did not, in fact, act as a canvassing body in this instance. Because the 55th Representative District is solely within suburban Cook County, she argues that the votes cast in that race are canvassed solely by the Cook County Canvassing Board, and that the State Board's only duty was to proclaim Mulligan the winner after it received a tabulated statement of returns from the Cook County Canvassing Board. As authority for her argument, \*38 Mulligan cites the opinion of the presiding judge of the county division of the circuit court of \*\*592 \*\*\*222 Cook County in *McDunn v. Williams* (Cir.Ct. Cook County), Docket No. 90-CO-116.

In *McDunn v. Williams*, the petitioner, Susan McDunn, brought an action to contest the primary election of James Williams, who was declared the Democratic nominee for the office of judge of the circuit court, Cook County Judicial Circuit. The petitioner in the McDunn case, as in this case, filed her election contest petition 10 days after the State Board of Elections certified Williams as the Democratic nominee for the judicial office. The trial court dismissed the petition as untimely, holding that it was not filed within 10 days after the completion of the canvass by the canvassing board making "the final canvass of returns," as required by section 7-63 of the Election Code.

In its memorandum opinion dismissing the petition in *McDunn v. Williams*, the trial court explained that only voters residing in the City of Chicago voted in the particular race at issue. The court determined that, under section 7-56(7) of the Election Code, the board of election commissioners for the City of Chicago was responsible for canvassing the returns of the judicial office in question. That section

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provides:

"Where in cities or villages which have a board of election commissioners, the returns of a primary are made to such board of election commissioners, said return shall be canvassed by such board, and, excepting in the case of the nomination for any municipal office, tabulated statements of the returns of such primary shall be made to the county clerk." (Ill.Rev.Stat.1989, ch. 46, par. 7-56(7).)

The trial court observed that, although the Election Code did not define the term "canvass," Black's Law Dictionary defined that term as "the act of examining \*39 and counting the returns of votes cast at a public election to determine authenticity." (As we shall point out, application of such a limited definition of canvass is simplistic in interpreting the significance of the term "canvass" in the statutory scheme here.) The court then concluded that, because all votes cast in the primary for the office at issue were cast in Chicago, the Chicago board of election commissioners was the only canvassing board which actually examined and counted the votes for the office in question. The court held that the Chicago board of election commissioners was, therefore, the "final canvassing board" within the meaning of section 7-63 of the Election Code.

The court determined that the State Board of Elections did not examine and count the returns, but simply proclaimed and certified the result of the election. The court concluded that the State Board's function was entirely different from that performed by the "final canvassing board" which "has the responsibility of counting the votes." The trial court determined that the State Board of Elections acts as the final canvassing board only in elections for offices which encompass more than one county, since, in such elections, the State Board must count the votes on the statements of returns received from various county canvassing boards in order to determine the outcome of the election.

The opinion in the McDunn case cannot be viewed as authority here, however, because it failed to consider the State Board's statutory duty to canvass primary election returns. (Ill.Rev.Stat.1989, ch. 46, par. 7-56(6).) Instead, it adopted a simplistic definition of the term "canvass" and determined that only those boards which examine and count the returns are canvassing boards within the meaning of section 7-63 of

the Election Code. Applying that definition, the trial court in the McDunn case concluded that the Chicago board of election \*40 commissioners was the only body that canvassed the returns for the office in question and, thus, was the board conducting the final canvass of returns.

The court in *McDunn v. Williams* found the appellate court's decision in [Orbach v. Axelrod \(1981\), 100 Ill.App.3d 973, 56 Ill.Dec. 319, 427 N.E.2d 399](#), controlling. Mulligan likewise cites *Orbach* as authority for her argument that the County Canvassing Board was the final canvassing board. *Orbach*, however, did not consider or decide which canvassing board conducted "the final \*\*593 \*\*\*223 canvass of returns" within the meaning of section 7-63. Rather, the issue in that case was whether the petitioner was required to file his election contest petition under the 10-day time limit specified in section 7-63, which pertains to election contests in primary elections, or under the 30-day time limit set out in section 23-20 of the Election Code, which pertains to election contests in general elections. The appellate court determined that the provisions of section 7-63 applied. Accordingly, the court dismissed as untimely the election contest petition which Orbach filed 28 days after the board of election commissioners declared Axelrod elected as the Democratic ward committeeman for Chicago's 46th Ward.

Moreover, in *Orbach*, the Chicago board of election commissioners was the only, and thus the final, canvassing board. *Orbach* was an election contest challenging the primary election of a candidate to the office of ward committeeman. The Chicago board of election commissioners was required under section 7-56(7) of the Election Code to canvass the returns of the primary election of ward committeemen and to send a tabulated statement of returns from such election to the county clerk. Unlike the primary election at issue here, however, the Election Code does not require the Cook County Canvassing Board to canvass the tabulated statement of returns for the office of ward committeeman which the \*41 Chicago board of election commissioners sends to the county clerk. See Ill.Rev.Stat.1989, ch. 46, pars. 7-56(5), 22-1.

The State Board of Elections likewise had no statutory duty to canvass the returns of the election at issue in *Orbach*. Section 7-56(6) specifies that "returns shall be canvassed"

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by the State Board of Elections only "[i]n the case of the nomination of candidates for offices, certified tabulated statement of returns for which are filed with the State Board of Elections." Section 7-56(5) specifically states that tabulated statements of returns of votes cast for the office of ward committeeman shall not be certified to the State Board of Elections. Thus, neither the County Canvassing Board nor the State Board of Elections was required by statute to canvass the returns at issue in *Orbach*. Because the board of election commissioners was the only canvassing board required by statute to canvass the election returns for ward committeemen, it was the board conducting "the final canvass of returns" within the meaning of section 7-63. Accordingly, the 10-day period for filing an election contest began after the board of election commissioners performed its canvass.

*Orbach* cannot be viewed as controlling authority in circumstances where the State Board of Elections is required by statute to canvass election returns. Here, sections 7-56(5) and 22-1 of the Election Code, construed together, require the Cook County Canvassing Board to canvass the primary election returns for the Republican candidate for the office of Representative to the General Assembly for the 55th Representative District. (Ill.Rev.Stat.1989, ch. 46, par. 7-56(5).) Under section 7-56(5) of the Election Code, the county clerk has a duty to file a certified copy of the tabulated statement of returns prepared by the County Canvassing Board for that office with the State Board of Elections. (Ill.Rev.Stat.1989, \*42 ch. 46, par. 7-56(5).) Section 7-56(6) of the Election Code (Ill.Rev.Stat.1989, ch. 46, par. 7-56(6)) imposes a duty upon the State Board of Elections to canvass any certified tabulated statement of returns which it receives from the county clerk.

Mulligan nevertheless argues that the Cook County Canvassing Board was the only board which canvassed the returns in question. She argues that the 55th Representative District lies entirely within Cook County and that the Cook County Canvassing Board was the only board which examined and counted the returns. She argues that the County Canvassing Board therefore conducted the final canvass of returns within the meaning of section 7-63. She argues that the State Board did not perform any canvassing function be-

cause it received a tabulated statement of returns from only one county canvassing board, and neither counted nor tallied any votes. She claims that the State Board's only \*\*594 \*\*\*224 function was to certify the result of the election.

As support for this argument, Mulligan cites section 7-58 of the Election Code (Ill.Rev.Stat.1989, ch. 46, par. 7-58), which requires each canvassing board, upon completion of its canvass of the returns, to make and transmit to the State Board of Elections a proclamation of the results of the primary. Mulligan argues that the County Canvassing Board must be the board conducting the final canvass of returns because it has authority to proclaim the results of the primary election. She argues that the State Board's only function is to certify the results of the election.

Analysis of section 7-60 of the Election Code demonstrates, however, that the proclamation of the State Board of Elections, rather than that of the County Canvassing Board, is determinative. Section 7-60 provides:

"Not less than 67 days before the date of the general election, the State Board of Elections shall certify to the \*43 county clerks the names of each of the candidates who have been nominated *as shown by the proclamation of the State Board of Elections as a canvassing board* \* \* \* and direct the election authority to place upon the official ballot for the general election the names of such candidates \* \* \*." (Emphasis added.) (Ill.Rev.Stat.1989, ch. 46, par. 7-60.)

The proclamation of the County Canvassing Board is determinative only for those offices for which tabulated statements of returns are not filed with the State Board of Elections (*e.g.*, precinct, township and ward committeemen). In such cases, the County Canvassing Board's proclamation is determinative because the State Board is not required by statute to canvass the election returns for such offices. See Ill.Rev.Stat.1989, ch. 46, pars. 7-56(5), 7-58, 7-60.

Mulligan also argues that the decision in [Young v. Washington \(1984\)](#), [127 Ill.App.3d 1094](#), [83 Ill.Dec. 259](#), [470 N.E.2d 14](#), supports her position that the State Board of Elections simply proclaims the result of the election. *Young* involved an election contest between candidates for the Democratic party nomination for the office of Representative in the General Assembly for the 24th Representative

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District. The 24th Representative District is wholly within the City of Chicago, in Cook County. Thus, in *Young*, the Chicago board of election commissioners was the board which initially canvassed the returns received from each precinct. Mulligan notes that the petitioner in *Young* filed the election contest petition seven days before the State Board issued its proclamation. In *Young*, however, both the majority and the dissenting opinions calculated the 10-day period specified in section 7-63 for filing an election contest petition as running from the date on which the State Board of Elections proclaimed the winner of the election. (*Young*, 127 Ill.App.3d at 1095, 1098, 83 Ill.Dec. 259, 470 N.E.2d 14.) Thus, the *Young* opinion actually supports Pullen's \*44 claim that the 10-day filing period specified in section 7-63 began after the State Board canvassed the returns.

Mulligan finally argues that this court should construe the phrase "canvassing board making the final canvass of returns" in section 7-63 as referring to the canvassing board which "examines and counts" the returns because such a construction would promote prompt resolution of primary election contests. It is true that adopting Mulligan's definition of "canvass" might expedite the contest procedure, by requiring the party contesting the election to file his or her petition earlier. An election contest proceeding, however, is instituted by one who claims to have been elected against one who has been declared elected, and therefore cannot proceed until it is known who has been declared elected. In the case of candidates for legislative offices, it is not until the canvass is made by the State Board of Elections that the result can be officially known. Moreover, to adopt Mulligan's definition of canvass would require us to ignore the clear language of sections 7-56(6) and 8-15 of the Election Code, which state that the State Board of Elections shall canvass the certified tabulated statements of returns which it receives from the County Canvassing Board.

**\*\*595 \*\*\*225** We cannot ignore the fact that the County Canvassing Board did not actually "count" the votes in the election here. After the polls closed, the election judges in each precinct entered the ballots into automatic tabulating equipment, which counted the ballots and recorded the votes for each candidate. The automatic tabulating equipment then generated a precinct return, which was certified by the

judges of election and sent to the county clerk as the official returns. (See Ill.Rev.Stat.1989, ch. 46, par. 24A-10.1.) Thus, the votes were "counted" in \*45 each precinct. The County Canvassing Board simply opened these precinct returns and tabulated the results.

We consider that Mulligan adopts too restricted a construction of the term "canvass." Webster's dictionary defines the term "canvass" to mean "to examine in detail: subject to scrutiny or investigation; *specif*: to examine (votes) officially for authenticity." (Webster's Third New International Dictionary 329 (1986).) Applying this definition of the term "canvass," it is clear that both the County Canvassing Board and the State Board of Elections canvassed the returns of the primary election at issue here. The County Canvassing Board examined the returns it received from each precinct and prepared a tabulated statement of returns stating the number of votes cast for Mulligan and Pullen individually and the total number of ballots voted for the Republican party in the primary. This tabulated statement of returns was then certified to the State Board of Elections. In the statutory electoral scheme, it is the function of the State Board then to examine or canvass this tabulated statement of returns before proclaiming the results of the election. Had the certified tabulated statement of return contained an obvious error, such as indicating more votes cast for the candidates than the total number of ballots voted, the State Board certainly would have investigated the matter before it proclaimed one candidate elected. Neither canvass is any more a canvass than the other. Under the clear language of the statute, the State Board of Elections is the canvassing board which makes the final canvass of the returns. There is nothing in the statute demanding a different construction, and this view of it renders the Election Code, as a whole, consistent and harmonious, while to hold otherwise must lead to uncertainty and confusion. Accordingly, we hold that the trial court properly denied Mulligan's motion to dismiss the election contest petition as untimely.

[4] \*46 We next consider whether the trial court should have counted certain contested ballots in determining which candidate was elected as the Republican nominee for Representative of the 55th Representative District. Although we will consider each of the seven categories of contested bal-

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lots separately, a brief discussion of the general principles applicable to all such challenges is appropriate. The Election Code is a comprehensive scheme which regulates the manner in which elections shall be carried out. Strict compliance with all applicable provisions in the Election Code is not necessary, however, to sustain a particular ballot. Rather, our courts draw a distinction between violations of "mandatory" provisions and violations of "directory" provisions. Failure to comply with a mandatory provision renders the affected ballots void, whereas technical violations of directory provisions do not affect the validity of the affected ballots. [Hester v. Kamykowski \(1958\), 13 Ill.2d 481, 150 N.E.2d 196.](#)

[5] There is no universal formula for distinguishing between mandatory and directory provisions. Rather, whether a particular statutory provision is mandatory or directory depends upon the intent of the legislature, which is ascertained by examining the nature and object of the statute and the consequences which would result from any given construction. ([Carr v. Board of Education \(1958\), 14 Ill.2d 40, 44, 150 N.E.2d 583.](#)) Of course, the language of the statute is often the most reliable evidence of the legislature's intent. Thus, where a statute, in prescribing the duties of the election officials, expressly states that failure to act in the manner set out in the statute will void the ballot, that statute will generally be given a mandatory construction.. **\*\*596 \*\*\*226** However, if the statute simply prescribes the performance of certain acts in a specific manner, and does not expressly state that compliance is essential to the validity of the ballot, then the statute generally will be given a directory construction. (**\*47**[Carr v. Board of Education \(1958\), 14 Ill.2d 40, 44, 150 N.E.2d 583; Hester v. Kamykowski \(1958\), 13 Ill.2d 481, 485, 150 N.E.2d 196; People ex rel. Cant v. Crossley \(1913\), 261 Ill. 78, 102, 103 N.E. 537;](#) see 2A A. Singer, Sutherland on Statutory Construction § 57.08, at 658 (Sands 4th ed. 1984).) Accordingly, as the court stated in [Craig v. Peterson \(1968\), 39 Ill.2d 191, 196, 233 N.E.2d 345:](#)

"[I]n construing statutory provisions regulating elections the courts generally have tended to hold directory those requirements as to which the legislature has not clearly indicated a contrary intention, particularly where such requirements do not contribute substantially to the integrity of the election process."

We do not mean to suggest, of course, that election officials may simply ignore directory provisions of the Election Code. All of the provisions of the Election Code are mandatory in the sense that election officials are obligated to comply with their terms. It does not follow, however, that every failure to comply should invalidate the ballot in question. Literal compliance with directory provisions will not be required if it appears that the spirit of the law has not been violated and the result of the election has been fairly ascertained. ([Hester v. Kamykowski \(1958\), 13 Ill.2d 481, 485, 150 N.E.2d 196; People ex rel. Woods v. Green \(1915\), 265 Ill. 39, 106 N.E. 504.](#)) Applying the foregoing principles, we consider the particular challenges which the parties raise here.

#### 1. Uninitialled Absentee Ballots

[6] We first consider whether the trial court erred in counting absentee ballots which did not contain the initials of an election judge. The parties stipulated at trial that 27 in-precinct ballots and 55 absentee ballots did not contain the initials of an election judge. The parties agreed at trial that the uninitialled in-precinct ballots would not be counted. They disagreed as to the admissibility of the uninitialled absentee ballots. Prior to the recount, **\*48** the appellee argued that the uninitialled absentee ballots should be considered, and the appellant argued that they should not. The trial court ruled in the appellee's favor. After the recount, the positions of the parties changed as to this issue, and the appellee asked the trial court to reconsider its ruling that the uninitialled absentee ballots should be counted. The trial court granted the motion to reconsider, and again ruled that the uninitialled absentee ballots should be counted.

Section 7-44 of the Election Code (Ill.Rev.Stat.1989, ch. 46, par. 7-44) provides that the election judge shall give a voter a primary ballot, on the back of which the primary judge shall endorse his initials. Sections 19-9 and 24A-10.1 of the Election Code extend this requirement to absentee ballots. Section 24A-10.1 specifies:

"Immediately after the closing of the polls, the absentee ballots delivered to the precinct judges of election by the election authority shall be examined to determine that such ballots comply with Sections 19-9 and 20-9 of this Act and are entitled to be deposited in the ballot box;

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those entitled to be deposited in the ballot box shall be initialed by the precinct judges of election and deposited in the ballot box." (Ill.Rev.Stat.1989, ch. 46, par. 24A-10.1.)

Section 7-51 of the Election Code specifies that "[n]o primary ballot, without the endorsement of the judge's initials thereon, shall be counted." (Ill.Rev.Stat.1989, ch. 46, par. 7-51.) Section 24A-10.1 also provides that the judges of election shall examine all ballot cards in the ballot box to determine whether they contain the initials of an election judge. If any ballot card or ballot card envelope is not initialed, it must be marked "Defective" on the back and not counted. Ill.Rev.Stat.1989, ch. 46, par. 24A-10.1.

\*49 Our courts have held that the statutory requirement that judges of election initial each ballot before placing it in the ballot box is mandatory, and that no ballot without \*\*597 \*\*\*227 such initials may be counted. (*Tuthill v. Rendelman* (1944), 387 Ill. 321, 330, 56 N.E.2d 375 (rejecting uninitialed in-precinct ballots); *Morandi v. Heiman* (1961), 23 Ill.2d 365, 178 N.E.2d 314 (rejecting uninitialed absentee ballots).) In *Craig v. Peterson* (1968), 39 Ill.2d 191, 233 N.E.2d 345, however, the court held the initialing requirement directory and allowed the counting of uninitialed absentee ballots. The trial court here, relying upon *Craig*, allowed the uninitialed absentee ballots to be counted.

In *Craig*, the plaintiff argued that the absentee ballots returned from 14 precincts should be invalidated because none of them contained the initials of an election judge. The defendant responded that the statutory requirement of initialing was directory, rather than mandatory, and that the ballots should be counted. The *Craig* court acknowledged that the application of the statutory initialing requirement is mandatory in the usual case, because it enables the election judges to identify those ballots which they have personally placed in the ballot box, and therefore is an effective safeguard against fraudulent practices such as "stuffing" a ballot box. The court found, however, that statutory requirements which deprive qualified voters of their right to have their vote counted, without fault on the part of the voters, are constitutionally suspect where such requirements do not contribute to the integrity of the election process. The court concluded that application of the initialing requirement to

absentee ballots at issue in *Craig* was unnecessary to ensure the integrity of the election and, therefore, construed the initialing requirement as directory in that case.

In *Craig*, all voters who voted in person at the polling place used voting machines. Therefore, the election \*50 judges did not initial in-precinct ballots. The only paper ballots used in the election were those cast by absentee voters. None of the absentee ballots were initialed. The court concluded that, under the circumstances, the initialing requirement did not contribute to the integrity of the election process. The court observed that the initialing requirement did not "assist in separating the illegally cast from the legally cast ballots for there were no other paper ballots \* \* \* and there is no claim that these absentee ballots were altered, tampered with or in any way improperly preserved--in fact it is stipulated that these are the identical ballots received by the absentee voters from the county clerk." *Craig*, 39 Ill.2d at 199, 233 N.E.2d 345.

The court concluded that mandatory application of the initialing requirement to the absentee ballots in such circumstances would disfranchise a substantial number of qualified voters who had done everything in their power to comply with the law, without actually contributing to the integrity of the election. In fact, application of the initialing requirement might enable corrupt election judges to deliberately refrain from initialing ballots of those absentee voters who they had reason to believe voted other than the way the judges desired. Although the court noted that this possibility always exists as to absentee ballots, courts permitted this risk in other elections only because there was no other means of separating legally from illegally cast ballots. In *Craig*, on the other hand, no such justification existed. Because the initialing requirement was not necessary to ensure the integrity of the election at issue, the court in *Craig* counted the uninitialed absentee ballots.

The *Craig* court stated that its decision was not inconsistent with the result in *Morandi v. Heiman* (1961), 23 Ill.2d 365, 178 N.E.2d 314, where uninitialed absentee ballots were not counted. The court noted that *Morandi* involved an all-paper-ballot election in which identical ballots were \*51 used by in-precinct and absentee voters. Thus, in *Morandi*, unlike *Craig*, there was no satisfactory method of separating

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the absentee ballots from the illegally cast in-precinct ballots. Although the respondent in *Morandi* attempted to show that the absentee ballots could be distinguished from the in-precinct ballots, because they had been folded differently than the in-precinct ballots, the court in *Morandi* concluded that attempting to distinguish " 'a validly cast \*\*598 \*\*\*228 ballot from an illegal one upon such fortuitous circumstance would be a dangerous rule.' " [Craig](#), 39 Ill.2d at 198, 233 N.E.2d 345, quoting [Morandi v. Heiman](#) (1961), 23 Ill.2d 365, 374, 178 N.E.2d 314.

Two appellate court decisions have considered the statutory requirement that ballots must be endorsed by an election judge in light of *Craig*. ([Snow v. Natzke](#) (1986), 140 Ill.App.3d 367, 94 Ill.Dec. 830, 488 N.E.2d 1077; [Goble v. Board of Education](#) (1980), 83 Ill.App.3d 284, 38 Ill.Dec. 919, 404 N.E.2d 343.) In *Goble*, the court applied *Craig* to an all-paper-ballot election and held that nine absentee ballots could be counted even though they were not endorsed by an election judge. The court noted that the parties had stipulated to the absence of fraud and that the sole irregularity complained of was the failure to initial the absentee ballots. The court concluded that the initialing requirement must be held directory in circumstances where the exclusion of the uninitialled ballots would disfranchise innocent voters without contributing to the integrity of the election process.

In [Snow v. Natzke](#) (1986), 140 Ill.App.3d 367, 94 Ill.Dec. 830, 488 N.E.2d 1077, the court refused to count ballots which did not bear the initials of an election judge. The court concluded that the rule in *Craig* did not apply unless the evidence positively demonstrated that the uninitialled ballots were cast by absentee voters rather than persons voting in person at the polling place.

As stated, the trial court here, relying upon *Craig*, concluded that the initialing provisions were directory \*52 and counted the uninitialled absentee ballots. In so holding, the trial court concluded that the uninitialled ballots were absentee ballots and that those ballots were validly cast. The appellee argues that *Craig* does not apply here. She argues that *Craig* is limited to machine elections in which the only paper ballots used are absentee ballots. She argues that this election was an all-paper-ballot election because both the in-precinct and the absentee ballots were paper punch card bal-

lots. The appellee also argues that *Craig* is not applicable here because the parties did not enter into a stipulation that the absentee ballots were authentic.

The appellant responds that *Craig* applies to any election in which the uninitialled absentee ballots can be readily identified and distinguished from uninitialled, and thus invalidly cast, in-precinct ballots. She argues that the expert trial testimony of Robert Logay, director of elections for the county clerk, established that the absentee ballots used in this election are readily identifiable because they contain handwritten precinct numbers. The in-precinct ballots, on the other hand, contain preprinted precinct numbers. The appellant also argues that the fact that the parties did not enter into a stipulation is irrelevant here, because neither party raised any allegation of fraud or questioned the authenticity of the disputed absentee ballots.

[7] We conclude that the trial court correctly allowed the uninitialled absentee ballots to be counted. Under *Craig*, uninitialled absentee ballots may be counted only if: (1) the absentee ballots can be identified and distinguished from in-precinct ballots; and (2) the initialing requirement does not contribute to the integrity of the election process.

In *Craig*, ballots cast by absentee voters were readily identifiable, because voters at the polling place used voting machines. Here too, ballots cast by absentee voters \*53 are readily identifiable and distinguishable from ballots cast by voters at the polling place. The testimony at trial established that all absentee ballots have handwritten precinct numbers, while in-precinct ballots have pre-printed precinct numbers. Because the uninitialled absentee ballots can be readily distinguished from uninitialled in-precinct ballots, the first prong of *Craig* is satisfied. Cf. [Morandi v. Heiman](#) (1961), 23 Ill.2d 365, 178 N.E.2d 314 (uninitialled absentee ballots could not be distinguished from the uninitialled in-precinct ballots).

The question of whether application of the initialing requirement to absentee ballots is necessary to maintain the integrity \*\*599 \*\*\*229 of the election process is a closer question. Applying the initialing requirement to *in-precinct* ballots is certainly necessary to preserve the integrity of the election, because the initials provide the only means by

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which the election officials can identify and separate the legally cast from the illegally cast in-precinct ballots. Thus, here, as in *Craig*, application of the initialing requirement to in-precinct ballots prevented fraudulent practices, such as stuffing the ballot box.

Because absentee ballots are not cast in the polling place, and are not opened until after the polls have closed, application of the initialing requirement to such ballots is not necessary to prevent voters from fraudulently stuffing the ballot box. Here, as in *Craig*, neither party questioned the legitimacy of the uninitialled absentee ballots or alleged any fraud or other irregularity. Accordingly, under the reasoning adopted in *Craig*, application of the initialing requirement is not necessary to preserve the integrity of the election process.

The appellee argues, however, that this case is distinguishable from *Craig* because the parties in *Craig* stipulated that the absentee ballots were the identical ballots that the absentee voters received from the county clerk. She claims that no such stipulation exists here. Accordingly, \*54 she argues that application of the initialing requirement safeguards the integrity of the election process because it guards against the possibility that some unauthorized person fraudulently replaced the genuine initialled absentee ballots with substitute uninitialled ballots sometime after the genuine ballots were deposited in the ballot box. Basically, the appellee argues that application of the initialing requirement is necessary to ward against the possibility that someone tampered with the absentee ballots after election night.

We must reject the appellee's attempt to distinguish *Craig* on this ground. The parties here entered into a stipulation that any and all ballots sought to be admitted into evidence at trial, including the uninitialled absentee ballots questioned here, had been properly preserved from election night to the time of their presentation in court, and that their preservation was in accordance with the provisions of the Election Code and other applicable statutory provisions. Because the appellee stipulated that the uninitialled absentee ballots were properly preserved, she is now precluded from arguing that application of the initialing requirement is necessary to ensure that there was no tampering with the absentee ballots before they were presented to the court. This stipulation,

like the stipulation in *Craig*, removed any concern that other ballots were substituted for the authentic absentee ballots after election night.

Because the uninitialled absentee ballots are readily identifiable and distinguishable from in-precinct ballots, and because application of the initialing requirement is not necessary to safeguard the integrity of the election process, we conclude that *Craig* applies. Accordingly, the trial court properly counted the uninitialled absentee ballots.

#### \*55 2. Ballots Lacking Precinct Numbers

[8] The appellant argues that 14 absentee ballots without precinct numbers are invalid and should not have been counted. These 14 ballots may be divided into two categories: (1) 10 ballots in which the sole irregularity complained of is the absence of a precinct number; and (2) four ballots which, in addition to not having a precinct number, also bear the title "Niles Township." Only the first category of ballots is addressed in this section. The second category of ballots is discussed in the next section, which considers the validity of ballots with the wrong precinct number.

Section 7-20 of the Election Code states that "[o]n the back or outside of the primary ballot of each precinct, so as to appear when folded, shall be printed the words 'Primary Ballot,' followed by designation of said precinct, the date of the primary and a facsimile of the signature of the election authority who furnished the ballots." Ill.Rev.Stat.1989, ch. 46, par. 7-20.

There has not been as yet a construction of section 7-20, but a number of decisions have interpreted a similar provision in the \*\*600 \*\*\*230 Election Code which sets out the form, contents and manner of printing of ballots used in general elections. (Ill.Rev.Stat.1989, ch. 46, par. 16-3.) Section 16-3 specifies that "there shall be printed on the back of each ballot card \* \* \* the words 'Official Ballot,' followed by the number of the precinct or other precinct identification, \* \* \* the date of the election and a facsimile of the signature of the election authority who has caused the ballots to be printed."

At first, our courts gave section 16-3 a mandatory construction and held that ballots which did not strictly comply with

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all of the printing requirements set out in that section were invalid. See, e.g., [People ex rel. Mattingly v. Snedeker \(1918\)](#), 282 Ill. 425, 118 N.E. 782 (election void because \*56 the ballots used did not contain the words "Official Ballot," followed by the designation of the polling place for which the ballot was prepared, the date of the election and the facsimile signature of the officer who caused the ballots to be printed); [People ex rel. Vance v. Bushu \(1919\)](#), 288 Ill. 277, 123 N.E. 517 (election voided because ballots did not contain the facsimile signature of the town clerk on the back thereof); [People ex rel. Childress v. Illinois Central R.R. Co. \(1921\)](#), 298 Ill. 516, 131 N.E. 624 (ballots which did not designate the polling place were invalid).

[9] In [Hester v. Kamykowski \(1958\)](#), 13 Ill.2d 481, 150 N.E.2d 196, however, the court overruled decisions which held all such requirements mandatory, and held that failure to strictly comply with statutory requirements as to the form of the ballot will not necessarily render a ballot void. The court conceded that printing errors which interfere with the voters' ability to freely exercise their choice (e.g., ballots which do not provide for write-in candidates) or which destroy the secrecy of the ballot (e.g., translucent envelopes) will invalidate the affected ballots. The court concluded, however, that unintentional errors in printing will not void the ballot where they do not affect the merits of the election. Applying these principles to the facts before it, the *Hester* court stated:

"In the instant case the form of ballot failed to disclose on the back or outside the words 'Official Ballot' and the date of the election, nor did it anywhere designate the polling place for the particular ballot although there were four polling places in the election. \* \* \* We are of the opinion that under the present circumstances these irregularities, standing alone, would not, of themselves, justify throwing out the entire number of ballots. [Citation.] Expressions of this court to the contrary \* \* \* insofar as they construe the requirements as mandatory regardless of the circumstances and effects in the particular case, represent an unduly strict application and can no longer be accepted as correctly stating the rule. \*57 By enforcing with too great technical exactness the provisions concerning the form of ballots the very object of those provisions in securing a fair election may be defeated." ([Hester](#), 13 Ill.2d at

[487-88](#), 150 N.E.2d 196.)

Under *Hester*, technical irregularities, including the absence of a precinct designation on the ballot, do not justify voiding the affected ballot.

[10] The appellant argues that *Hester* should not be controlling because the court did not consider section 17-16 of the Election Code, which states:

"No ballot without the official endorsement shall be deposited in the ballot box, and none but ballots provided in accordance with the provisions of this Act shall be counted." (Ill.Rev.Stat.1989, ch. 46, par. 17-16.)

The appellant argues that the second clause in section 17-16 makes the printing requirements set out in section 16-3 mandatory, in that it specifically prohibits election judges from counting ballots which do not strictly comply with the provisions of the Election Code.

Section 17-16, however, applies only to general elections and precludes the counting of ballots defective as described which may be used in such elections. Here, we are considering ballots used in a primary election. Section 7-51 of the Election Code, which regulates primary elections, \*\*601 \*\*\*231 simply states that no primary ballots without the endorsement of a judge's initials thereon shall be counted. That section, unlike section 17-16, does not have a general provision that only ballots provided in accordance with the provisions of the act shall be counted.

[11] Moreover, the appellant's claim that the second clause of section 17-16 was intended to include a prohibition of the counting of ballots which do not contain a precinct number is unconvincing. The second clause of section 17-16, stating that "none but ballots provided in accordance with the provisions of this Act shall be counted," does not void every ballot with printing irregularities. \*58 Rather, that clause was designed to require the use of only official ballots provided by the election authorities and to invalidate unofficial ballots which might be supplied by candidates, political parties or indeed prepared by the voters themselves for a personal touch.

The appellant also relies upon [Pinkston v. Holland \(1971\)](#), 133 Ill.App.2d 865, 272 N.E.2d 247, for the proposition that ballots which do not bear a precinct designation are invalid.

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In *Pinkston*, the court voided an election for village officers because the ballots lacked a printed facsimile of the signature of the clerk who caused the ballot to be printed, as required by section 16-3 of the Election Code. Instead, the clerk had manually signed her name on the ballots on the evening before the election. The court concluded that the printed facsimile requirement specified in section 16-3 was mandatory in nature.

The question here was not involved in *Pinkston*. Moreover, the court in *Pinkston* did not attempt to distinguish this court's *Hester* decision, which construed the printing requirements in section 16-3 as directory. Instead, the court relied upon a series of cases which were impliedly overruled in *Hester*.

Under this court's holding in *Hester* the absence of a precinct identification on certain ballots, standing alone, did not invalidate those ballots. Section 7-20 must be regarded as directory only.

### 3. Ballots with the Wrong Precinct Designation

[12] The appellant next argues that the trial court should not have counted five ballots because they bore the wrong precinct number. Three of these ballots were absentee ballots, with the wrong precinct number manually written on the ballot, and two ballots were in-precinct ballots, which had the wrong precinct number printed thereon. The appellant also argues that four ballots without precinct numbers should not have been counted because\*59 those ballots bear the title "Niles Township." The appellant notes that no part of Niles township is within the 55th Representative District. We address each of these claims separately.

The appellant filed a motion in the trial court to have these ballots excluded from the recount, but the trial court denied the motion, relying upon the decision in *Hester v. Kamykowski* (1958), 13 Ill.2d 481, 150 N.E.2d 196. The appellant contends that the trial court's reliance on *Hester* was misplaced. She argues that *Hester* did not consider whether ballots cast in the wrong precinct should be counted. Appellant also argues that, under *Hester* ballots which do not have a precinct number are invalid when those ballots also have other irregularities.

The appellee argues that the record contains no evidence of illegal voting or proof that these ballots were cast in the wrong precinct. She argues that these ballots involve a ministerial error on the part of an election judge.

Section 7-43 of the Election Code, which defines the qualifications of voters at primary elections, specifies that every person who is a United States citizen of 18 or more years of age, and who has resided in the State for 6 months and in the precinct for 30 days before the primary, shall be entitled to vote at the primary. (Ill.Rev.Stat.1989, ch. 46, par. 7-43.) Nothing in the Election Code specifically states that a ballot cast in the wrong precinct is invalid.

The appellant argues, however, that in *Boland v. City of LaSalle* (1938), 370 Ill. 387, 19 N.E.2d 177, and \*\*602\*\*\*232 *Thornton v. Gardner* (1964), 30 Ill.2d 234, 195 N.E.2d 723, our court held that ballots cast in the wrong election jurisdiction should not be counted in the election results. In *Boland*, a resident of the City of LaSalle's 7th Ward cast her ballot in the 6th Ward. The court refused to count her vote, concluding that the vote "was clearly illegal because cast in the wrong ward, \*60 [and] it cannot now be counted either for or against the third proposition." (*Boland*, 370 Ill. at 398, 19 N.E.2d 177.) In *Thornton v. Gardner* (1964), 30 Ill.2d 234, 235, 195 N.E.2d 723, the court stated that the votes of seven persons who voted at the wrong polling place were determined to be illegal votes. Because there was no evidence as to how these seven voted, the court held that it was appropriate to deduct the votes on a *pro rata* basis. See also *Tuthill v. Rendelman* (1944), 387 Ill. 321, 346, 56 N.E.2d 375 (where undisputed evidence established that the voter did not live in the precinct in which she sought to vote, the trial court did not err in refusing to count that vote).

The appellant argues that *Boland* and *Thornton* are controlling here, and that ballots which bear the wrong precinct designation may not be counted. Although we agree that, under *Boland* and *Thornton*, ballots cast in the wrong precinct are invalid, the facts in this case are distinguishable. The evidence in *Boland* and *Thornton* established with certainty that one or more voters voted at the wrong polling place. Here, on the other hand, there is no evidence that any voter cast a ballot in the wrong precinct. The evidence es-

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tablished only that certain ballots bore the wrong precinct number.

We also disagree with the appellee's contention that the court's decision in *Hester v. Kamykowski* (1958), 13 Ill.2d 481, 150 N.E.2d 196, is controlling. In *Hester*, the court held that the absence of a precinct designation, *standing alone*, is not sufficient to invalidate a ballot. The nine ballots disputed here are not simply missing a precinct number. Rather, five of those ballots have the wrong precinct number either written or printed thereon, and four ballots, in addition to not having a precinct number, bear a township designation outside the 55th Representative District.

Thus, the two categories of ballots here fall somewhere in between the ballots held valid in *Hester* and the \*61 ballots invalidated in *Boland* and *Thornton*. Accordingly, we must consider the policy considerations underlying each of those decisions in determining whether the trial court properly counted the ballots questioned here. In *Boland* and *Thornton*, the evidence established that voters improperly went to the wrong polling place to cast their ballots. The error was therefore attributable to the fault of the voter, and the voters, basically, disfranchised themselves. In *Hester*, on the other hand, the court repeatedly stated that ignorance, inadvertence or mistake on the part of the election officials should not be permitted to disfranchise an election district or to defeat the will of the electorate. (*Hester*, 13 Ill.2d at 487-88, 150 N.E.2d 196.) Accordingly, the court held that irregularities in the form of the ballot, which occur because of the honest mistake of election officials, will not, by themselves, invalidate the election. Other decisions have likewise expressed a reluctance to construe statutory requirements so as to deprive fully qualified voters of their right to have their votes counted, simply because of a mistake on the part of election officials. *Craig v. Peterson* (1968), 39 Ill.2d 191, 196, 233 N.E.2d 345; *Boland v. City of LaSalle* (1938), 370 Ill. 387, 391, 19 N.E.2d 177.

At the same time, courts have not hesitated to invalidate the ballots of voters who were not qualified to vote in the election in question (*Tuthill v. Rendelman* (1944), 387 Ill. 321, 346, 56 N.E.2d 375; *Boland v. City of LaSalle* (1938), 370 Ill. 387, 19 N.E.2d 177; *Thornton v. Gardner* (1964), 30 Ill.2d 234, 195 N.E.2d 723), or who knowingly violated

election laws (*Boland v. City of LaSalle* (1938), 370 Ill. 387, 19 N.E.2d 177 (invalidating ballot on which voter wrote obscenity)).

Applying the foregoing observations to the ballots questioned here, we conclude that the trial court properly counted the five ballots with the wrong precinct number.. \*\*603 \*\*\*233 There is no allegation or evidence that these ballots were fraudulently cast. The appellant does not \*62 claim that these ballots were cast by voters who resided outside the 55th Representative District or who were not qualified to vote in the election at issue. She argues that the ballots should not be counted because they were cast in one precinct but counted in the wrong precinct. We cannot agree with the appellant's claim that the five ballots which bear the wrong precinct number should not be counted.

We may reasonably assume, absent evidence to the contrary, that the five ballots questioned here were properly cast in the precinct where the voter resided, because a voter may receive a ballot only after applying for a ballot and satisfying an election judge that he or she is qualified to vote and resides in the precinct in question. The statements by appellant's counsel at trial offered a plausible explanation as to why a ballot properly cast in one precinct would be found in the ballot box of another precinct. Appellant's counsel explained that in some instances, voters from several precincts cast ballots at one polling place. After the voter receives and marks a ballot which bears the number of the precinct in which the voter resides, the voter must hand that ballot to an election judge, who deposits it into the ballot box of the appropriate precinct. The evidence suggests that ballots which bore the number of one precinct within the 55th Representative District were found in the ballot box of another precinct within the 55th Representative District, because the election judges inadvertently deposited those ballots into the wrong ballot box. Although these ballots were counted in the wrong precinct, they were cast by voters who resided in the 55th Representative District and who were entitled to vote for one of the candidates involved in this contest. Any error was attributable to the election officials and not the voters. (Cf. *Boland v. City of LaSalle* (1938), 370 Ill. 387, 19 N.E.2d 177.) We conclude that otherwise qualified voters should not be deprived \*63 of their right to have their

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votes counted simply because of error on the part of the election officials.

[13] We reach a different conclusion, however, with respect to those ballots which not only do not have a precinct number, but which also bear the township designation "Niles Township." The appellant contends, and the appellee does not object, that no part of Niles township is within the 55th Representative District. Thus, the evidence suggests that the ballots which bear the title "Niles Township" were cast by voters who resided outside the 55th Representative District. These Niles township ballots are distinguishable from the ballots with the wrong precinct number, because the former ballots were cast by voters who did not reside within the 55th Representative District, while the latter ballots were cast by voters who resided within the district. The voters who cast the Niles township ballots had no right to cast a vote for one of the candidates in this election contest. Although this court will not deprive an "otherwise qualified voter" of the right to have his vote counted, simply because of a mistake on the part of the election officials (*Craig v. Peterson* (1968), 39 Ill.2d 191, 196, 233 N.E.2d 345; *Bo-land v. City of LaSalle* (1938), 370 Ill. 387, 391, 19 N.E.2d 177), the voters here were not qualified to vote for the office in question. Consequently, their votes may not be counted. The record shows that an equal number of these Niles township ballots were cast for each candidate. Accordingly, deducting these votes from each candidate's vote tally has no effect on the election results.

#### 4. Ballot Applications Lacking the Voter's Signature

[14] In her cross-appeal, the appellee argues that 41 applications for ballots were not signed by voters who nonetheless received ballots and voted. The trial court allowed these votes to be counted, finding that the provision in the Election Code requiring voters to sign \*64 an application for ballot was directory and that, absent proof of fraud or other illegality, ballots cast in violation of that provision should not be invalidated. The appellee argues that the trial court improperly construed the statutory provision requiring voters to sign an \*\*604 \*\*\*234 application for ballot as directory. She argues that signature verification is mandatory because it relates directly to the integrity of the election process. She argues that the trial court should have proportion-

ally reduced the vote totals received for each candidate by the number of votes cast by voters who failed to sign their application forms. The appellant responds that the statutory requirement for signing ballot applications is directory. She argues that violation of a directory provision of the Election Code will invalidate the affected ballot only if fraud or other illegality is demonstrated. The appellant claims that the trial court properly counted the ballots with unsigned applications, because the appellee did not allege or offer evidence of fraud.

Section 7-44 of the Election Code specifies that any person desiring to vote at a primary shall state his name, residence and party affiliation to the primary judges, one of whom shall then announce the same. The voter shall then sign the "Certificate of Registered Voter" prescribed in article 5. If the voter is not challenged, the primary judge must give him one ballot of the political party with which the voter declares himself affiliated. If the voter is challenged and is not personally known to the election judges to be qualified to vote, he may not receive a primary ballot until he completes an affidavit stating that he is qualified to vote. Section 5-29 of the Election Code (Ill.Rev.Stat.1989, ch. 46, par. 5-29), which describes the "Certificate of Registered Voter" referred to in section 7-44, specifies that, "[u]pon application to vote, \* \* \* each registered elector shall sign his name or make his mark \* \* \* on a certificate," \*65 certifying that the voter is registered in the precinct and is qualified to vote. The judges of election must then compare the signature upon the certificate with the signature on the registration record card as a means of identifying the voter. The statute further provides that, if the elector is unable to sign his name, a judge of election shall check the data on the registration card to determine whether the elector is entitled to vote. Ill.Rev.Stat.1989, ch. 46, par. 5-29.

In determining whether a statute is mandatory or directory, our courts have generally regarded the language of the statute as the best indicator of legislative intent. Thus, where a statute imposes duties upon election officials and by express language provides that the omission to perform the same shall render the election void, courts are bound to construe those provisions as mandatory. But if, as in most cases, the statute simply provides that certain acts or things shall be

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done within a particular time or in a particular manner, and does not declare that their performance is essential to the validity of the election, then they will be regarded as directory. (*Carr v. Board of Education* (1958), 14 Ill.2d 40, 150 N.E.2d 583; *Gulino v. Cerny* (1958), 13 Ill.2d 244, 148 N.E.2d 724; *Hester v. Kamykowski* (1958), 13 Ill.2d 481, 487, 150 N.E.2d 196; *People ex rel. Cant v. Crossley* (1913), 261 Ill. 78, 102, 103 N.E. 537, quoting McCrary on Elections § 225.) Technical compliance with each and every provision of the Election Code is not required to sustain a ballot.

Section 5-29 does not expressly declare that the observance of its provisions shall be mandatory or that failure to sign an application for a ballot will invalidate that ballot. It merely directs that the voter shall sign the affidavit. A similar statutory provision was given a directory construction in *Carr v. Board of Education* (1958), 14 Ill.2d 40, 150 N.E.2d 583. The petitioner in *Carr* sought a declaratory judgment that three elections to increase school tax \*66 rates were void because voters in those elections failed to execute affidavits as required by section 1-4 of the School Code (Ill.Rev.Stat.1957, ch. 122, par. 1-4). Section 1-4 of the School Code, like section 5-29 of the Election Code, required persons desiring to vote to sign an affidavit stating their name and address, that they resided within the particular district and that they were qualified voters. The court concluded that the statute was designed to aid election officials in determining the qualifications of voters. Because the statute did not specifically invalidate the votes of persons who failed to execute an affidavit,, \*\*605 \*\*\*235 the court concluded that its requirements should be considered directory.

[15] Here, as in *Carr v. Board of Education* (1958), 14 Ill.2d 40, 150 N.E.2d 583, there is no allegation that any unqualified voters voted in the election or that failure to comply with section 5-29 hindered the rights of any person to challenge the qualifications of any voter. Ballots duly received by the judges of an election and deposited in the ballot box are presumed to be legal until the contrary is shown. Here, the disputed ballots were so received and deposited and there was no evidence to rebut the presumption that these ballots were cast by qualified voters. In such circum-

stances, we conclude, as the court did in *Carr*, that voters should not be disfranchised because of any failure to strictly comply with the statute requiring signed certificates. The general purpose of all election laws is to obtain fair and honest elections, and "this end is paramount in importance to the formal steps prescribed as a means to its achievement." *Carr v. Board of Education* (1958), 14 Ill.2d 40, 44, 150 N.E.2d 583.

The signature requirement set out in section 5-29 is simply one method by which election judges can verify the identity of a voter who presents himself at the polling place. In this respect, section 5-29 is distinguishable from the statutory provision which requires absentee \*67 voters to sign an application for an absentee ballot. Because an absentee voter never appears at the polling place in person, the signature requirement is the only means by which election judges can verify the identity of the absentee voter. See *Talbott v. Thompson* (1932), 350 Ill. 86, 182 N.E. 784.

[16] Furthermore, even if we agreed with the appellee that section 5-29 should be given a mandatory construction, we would not find that the section was violated here. Section 5-29 specifically provides that, if a voter is unable to sign his name, a judge of election shall check the data on the registration card to determine whether the elector is entitled to vote. (Ill.Rev.Stat.1989, ch. 46, par. 5-29.) Judges of election are presumed to perform the duties required of them by the statute. (*Tuthill v. Rendelman* (1944), 387 Ill. 321, 332, 56 N.E.2d 375.) Thus, in the absence of evidence to the contrary, we must presume that the election judges gave ballots to electors who did not sign a ballot application only after the election judges checked the data on the registration card and satisfied themselves that the electors were entitled to vote. Accordingly, the trial court did not err in refusing to reduce the totals received by each candidate in each precinct proportionally to the number of unsigned applications found in that precinct.

#### 5. Numbered Ballots

Appellee argues that the trial court should not have counted 77 ballots which were numbered. She argues that the evidence at trial established that judges of election in two precincts marked certain ballots with a number which corresponded to the number appearing on the voter's application

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for a ballot. She argues that, by numbering the ballots, the election judges destroyed the secrecy of the ballot, and that these ballots should not have been counted.

\*68 Our constitution states that "[t]he General Assembly by law shall \* \* \* insure secrecy of voting and the integrity of the election process \* \* \*." (Ill. Const.1970, art. III, § 4.) Several provisions of the Election Code were obviously enacted by the legislature for the purpose of ensuring the secrecy of the ballot. (See, e.g., Ill.Rev.Stat.1989, ch. 46, par. 24A-5 (voting booths "shall be placed so that the entrance to each booth faces a wall in such a manner that no judge of election or pollwatcher is able to observe a voter casting a ballot".) Nothing in article 7 of the Election Code, which sets out the rules governing primary elections, or in article 24A of the Election Code, which defines the procedures used in jurisdictions with electronic voting equipment, specifically prohibits election judges from numbering ballots.

[17] Appellee argues, however, that section 17-11 of the Election Code, which \*\*606 \*\*\*236 regulates the manner of voting in general elections, states:

"Before leaving the voting booth the voter shall fold his ballot in such manner as to conceal the marks thereon. He shall then vote forthwith in the manner herein provided, except that the number corresponding to the number of the voter on the poll books shall not be endorsed on the back of his ballot." Ill.Rev.Stat.1989, ch. 46, par. 17-11.

The appellee argues that section 17-11 specifically prohibits election judges from numbering ballots in a primary election. We disagree for two reasons. First, section 17-11 describes in detail how the voter shall mark a ballot and therefore should be construed as prohibiting voters, rather than election judges, from marking a number on the back of the ballot. Other sections of the Election Code which define the duties of election judges in general elections do not prohibit such judges from numbering ballots. (See, e.g., Ill.Rev.Stat.1989, ch. 46, pars. 17-9, 17-10.) Second, section 17-11 does not apply \*69 to primary elections. Rather, sections 7-46 and 7-47 of the Election Code define the manner in which ballots shall be voted, folded and delivered in primary elections. While these sections are similar in many respects to section 17-11, they do not specify that no num-

ber shall be endorsed on the back of a primary ballot.

The appellee nevertheless argues that numbered ballots may not be counted because they violate the secrecy of the ballot. As support for this argument, the appellee relies upon a body of case law which holds that ballots with distinguishing marks which violate the secrecy of the ballot are invalid. See, e.g., *Griffin v. Rausa* (1954), 2 Ill.2d 421, 118 N.E.2d 249; *Hester v. Kamykowski* (1958), 13 Ill.2d 481, 150 N.E.2d 196.

[18][19][20] Our courts have consistently held that any deliberate marking of a ballot by a voter, not made to indicate his choice for a candidate, and which is effective as a mark by which his ballot may be distinguished, is a distinguishing mark which invalidates the ballot. (*In re Contest of Election for Governor* (1983), 93 Ill.2d 463, 485, 67 Ill.Dec. 131, 444 N.E.2d 170; *Griffin v. Rausa* (1954), 2 Ill.2d 421, 424, 118 N.E.2d 249; *Barlick v. Kunz* (1941), 375 Ill. 318, 321, 31 N.E.2d 283; *Tuthill v. Rendelman* (1944), 387 Ill. 321, 347, 56 N.E.2d 375.) Not every marking which is sufficient to distinguish one ballot from another will invalidate a ballot. The question of whether a particular mark upon a ballot is a distinguishing mark is largely a question of fact. (*Barlick v. Kunz* (1940), 375 Ill. 318, 325, 31 N.E.2d 283.) Generally, courts have held that two elements must be satisfied before a mark will be regarded as a distinguishing mark. First, the mark must be one which has been placed on the ballot by the voter himself. Marks placed on a ballot by election officials without participation of the voter do not constitute distinguishing marks. (*In re Contest of Election for Governor* (1983), 93 Ill.2d 463, 485, 67 Ill.Dec. 131, 444 N.E.2d 170; *Barlick v. Kunz* (1940), 375 Ill. 318, 325, 31 N.E.2d 283; \*70 *Boland v. City of LaSalle* (1938), 370 Ill. 387, 391, 19 N.E.2d 177.) A voter will not be disfranchised simply because some unauthorized person, regardless of his innocent intention, has deliberately placed marks on a ballot. *Barlick v. Kunz* (1941), 375 Ill. 318, 325-26, 31 N.E.2d 283.

[21] Second, the mark must be made with the deliberate intention of violating the secrecy of the ballot. (*In re Contest of Election for Governor* (1983), 93 Ill.2d 463, 485, 67 Ill.Dec. 131, 444 N.E.2d 170; *Griffin v. Rausa* (1954), 2 Ill.2d 421, 424, 118 N.E.2d 249; *Barlick v. Kunz* (1941),

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[375 Ill. 318, 325-26, 31 N.E.2d 283](#).) If it appears that marks were placed upon a ballot as the result of an honest effort by the voter to indicate his choice of a candidate, and not as an attempt to signify the identity of the voter, the ballot should not be invalidated. [Griffin v. Rausa \(1954\), 2 Ill.2d 421, 424, 118 N.E.2d 249](#); [Barlick v. Kunz \(1941\), 375 Ill. 318, 325-26, 31 N.E.2d 283](#).

[22][23] Applying the foregoing observations to the ballots questioned here, we conclude, as did the trial court, that the \*\*607 \*\*\*237 numbers on the ballots are not distinguishing marks which invalidate the ballots. Neither of the elements described above is satisfied here. The numbers on the ballots were placed on the ballots by the election judges, rather than the voters. As a general rule, ignorance, inadvertence, mistake, or even intentional wrong on the part of election officials will not be permitted to disfranchise voters. ([Sibley v. Staiger \(1932\), 347 Ill. 288, 179 N.E. 877](#).) Although an exception to this rule is recognized where election officials fail to comply with a mandatory provision of the Election Code, no mandatory provision of the Election Code was violated here.

In fact, to hold these numbered ballots invalid would allow corrupt election judges to deliberately disfranchise voters by numbering the ballots of those voters who they suspected would vote differently than the judges desired. The appellee concedes that the possibility of fraud exists. She argues, however, that voters could return the numbered \*71 ballots to the election judges and request new, unmarked ballots. As stated, however, nothing in the Election Code specifically prohibits election judges from numbering primary ballots. We will not obligate voters, at the risk of disfranchisement, to monitor the election officials to ensure that they do nothing to jeopardize the secrecy of the ballot, particularly where nothing in the Election Code prohibits the election officials from acting in the manner questioned.

The numbers also do not qualify as distinguishing marks because they were not made with the intention of violating the secrecy of the ballots or of identifying the voters. On the contrary, the election judges testified at trial that they only numbered the ballots to make it easier to count the ballots when the polls closed. It is true that this court has always endeavored to protect the secrecy of the ballot. (See, e.g.,

[Hester v. Kamykowski \(1958\), 13 Ill.2d 481, 150 N.E.2d 196](#) (where court voided an election based, in part, upon the fact that the ballots were printed upon transparent paper, in violation of section 16-3 of the Election Code).) Here, however, there is no evidence in the record which suggests that the numbered ballots were actually traced to particular voters or that the secrecy of the ballots was violated at any time during or after the voting process. In such circumstances, we must reject the appellee's claim that the numbered ballots are invalid because they violated the secrecy of the ballots.

#### 6. Allegedly Lost Ballot

The appellee asserts that the trial court erred in deducting one ballot for her which was lost before the recount. The appellee states that the parties stipulated to the chain of custody of the ballots in all precincts except Maine township precinct 23. In this precinct, 160 ballots were counted on election night, but only 159 ballots were \*72 found at the recount. The appellee argues that, because the appellant filed the petition for election contest, she had the burden of proving that the ballots counted on election night were properly preserved until the day of the recount. The appellee argues that, because the parties' stipulations expressly excluded any foundation concerning the authenticity of the ballots in precinct 23, the appellant was required to establish that ballots in that precinct were properly preserved before the recount results could be received into evidence. The appellant responds that she was not required to establish a foundation for admission of the recount results in precinct 23, because the appellee stipulated to the vote count change in that precinct. Petitioner further argues that the appellee waived this issue by failing to object in the trial court.

[24][25][26] The returns of the election officials are *prima facie* evidence of the result of the election. The ballots, however, are the original evidence of the votes cast. In an election contest, the court may accept the ballots cast at the election as better evidence of the result than the election returns if those ballots have been properly preserved. ([Armbrust v. Starkey \(1954\), 3 Ill.2d 131, 133, 119 N.E.2d 910](#); [MacWherter v. Turner \(1964\), 52 Ill.App.2d 270, 273, 201 N.E.2d 325](#).) The contestant, as the moving party, bears the burden of proving \*\*608 \*\*\*238 that the ballots have been

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kept intact. ([MacWherter, 52 Ill.App.2d at 273, 201 N.E.2d 325.](#)) If the evidence discloses that the ballots were exposed to the reach of unauthorized persons, and the returns are not likewise discredited, the ballots will not be regarded as better evidence of the result of the election. If the evidence shows that there was no reasonable opportunity for tampering with the ballots, however, they are the best evidence of the result of the election. [MacWherter, 52 Ill.App.2d at 273, 201 N.E.2d 325.](#)

[\[27\]\[28\]\[29\]\[30\]](#) \*73 The question of whether the ballots have been properly preserved is a question of fact to be determined from the evidence. The contestant may satisfy her burden of proof by introducing evidence that the election officials preserved the ballots according to the statutory requirements. Even where the statutory provisions are not complied with, however, the contestant may nevertheless prevail, since the preservation requirements are directory only. ([Armbrust v. Starkey \(1954\), 3 Ill.2d 131, 119 N.E.2d 910.](#)) Once the trial court receives the ballots into evidence for consideration, the rules regarding ballot preservation cease, and the sole question before the court becomes whether those ballots are legal or illegal. [Wood v. Hartman \(1942\), 381 Ill. 474, 480, 45 N.E.2d 864; Lisk v. Benjamin \(1982\), 105 Ill.App.3d 51, 60 Ill.Dec. 916, 433 N.E.2d 1154.](#)

[\[31\]](#) The parties here stipulated that all ballots sought to be admitted into evidence at trial had been preserved from election night to their presentation in court and that the foundation for admitting the ballots into evidence had been established. One of the parties wrote in longhand at the end of this stipulation, however, the caveat "except as to Maine 23." In that precinct, 160 votes were counted on election night. Pursuant to the court order, the ballots in all precincts were recounted. The ballots in Maine township precinct 23 were counted three times, twice by computer and once by hand. The first computer recount showed that a total of 159 Republican ballots were cast, while a second computer recount showed a total of 160 ballots. A final recount, conducted by hand, showed a total of 159 Republican ballots.

The appellant concedes that the appellee did not stipulate to the preservation of ballots in Maine township precinct 23. She argues however, that it was not necessary to establish a

foundation for introduction of those ballots, or to demonstrate that the ballots were properly preserved, because Mulligan stipulated to a vote count \*74 change in all precincts, including Maine township precinct 23. She argues that the trial court properly gave effect to this stipulation and accepted the vote tallies on recount as correct.

Mulligan argues that the trial court erred in accepting the recount total. She argues that the parties entered into the stipulation regarding the vote count change only to reflect what was found at the recount. She argues that the parties did not intend for this stipulation to have any legal effect. Basically, the appellee is arguing that the recount results in Maine township precinct 23 were not properly admitted into evidence, because the appellant failed to establish a proper foundation for that evidence by showing that the ballots which were recounted were properly preserved.

The record shows, however, that the evidence of the recount results in all of the precincts was received into evidence, when the parties stipulated that the recount resulted in a vote change, with Pullen gaining 1 vote and Mulligan losing 30 votes. The appellee cannot on appeal complain of evidence which she has stipulated into the record. ([People v. Hawkins \(1963\), 27 Ill.2d 339, 189 N.E.2d 252; People v. Stribling \(1982\), 104 Ill.App.3d 969, 60 Ill.Dec. 729, 433 N.E.2d 967.](#)) The appellee did not object at trial to the recount results on the ground that these results reflected a change in Maine township precinct 23, and that such a change could not be considered without evidence that the ballots were preserved. The appellee also did not object when the trial court entered an order on July 16, 1990, in which it "accepted the recapitulation of the vote tallies upon the recount, showing a net gain of one vote for Pullen and a loss of thirty votes for Mulligan,, \*\*609 \*\*\*239 as correct." In view of the stipulations in the record, and the appellee's failure to object when the court gave those stipulations legal effect, we must reject the appellee's claim that the trial \*75 court erred in not relying upon the election night results as to Maine township precinct 23.

#### 7. Partially Punctured Ballots

The appellant argues that the trial court erred in refusing to visually inspect approximately 30 partially punctured ballots. The appellant claims that visual inspection of these bal-

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lots shows that the voters clearly indicated their intent to vote for a particular candidate. She claims that even though the voters' intent was clear, the votes were not counted because the ballots could not be read by the electronic tabulating equipment. The appellant explains that voters cast their votes by placing a punch card ballot in a special device. While the card is in the device, the voter uses an instrument called a stylus to dislodge a perforated, square chad beside a number which corresponds to a number given to a particular candidate whom the voter has chosen. Later an electronic tabulating machine counts the votes cast for each candidate by passing light through the holes the stylus has made. As light passes through the hole, the machine records each vote.

In some instances, the chad did not completely detach from the ballot, but the voter instead punctured a round hole in the chad, partially dislodged the chad or made a strong indentation in the chad. The testimony at trial suggested that such perforations and indentations may occur if a voter punches the ballot while it is outside the device, punches the ballot which is not properly attached to the four corners of the device, or, because of feebleness, does not apply the stylus to the ballot with sufficient force to dislodge the chad. If sufficient quantities of light cannot pass through these perforations or indentations, the electronic tabulating equipment treats the ballot as blank.

\*76 The appellant claims that, although the electronic tabulating equipment did not count the ballots, visual inspection of the ballots shows that the voters punctured the ballots to a sufficient degree that the ballots clearly reflect the voters' intent to vote for either the appellant or appellee. She argues that the trial court should have visually inspected the ballots to determine whether the voters' intent could be ascertained, and then should have manually counted those ballots which clearly indicated the voters' intent, even though those ballots did not register on the electronic tabulating equipment. She argues that the trial court erred as a matter of law in concluding that visual inspection of the disputed ballots was improper and that only those votes which registered upon the electronic tabulating equipment would be counted.

[32] We first consider whether the trial court erred in refusing to visually inspect the disputed ballots. The trial court

denied the appellant's motion to inspect the ballots, holding that a voter must completely dislodge the chad from the ballot before that vote may be counted. As authority for its conclusion, the trial court relied upon a series of cases holding that the only appropriate way for a voter to mark a paper ballot is to make a cross (x) in the appropriate space on the ballot.

We agree with the appellant that the court's analysis was flawed. The Election Code expressly states that voters must mark their paper ballots by making a cross (x) in the space next to the candidate of their choice. (Ill.Rev.Stat.1989, ch. 46, par. 17-11.) Our courts have given this statutory provision a mandatory construction and have held that a vote will not be counted unless two lines intersect in a cross in the appropriate place on the ballot, even if the voter's intent is clear. [Scribner v. Sachs \(1960\), 18 Ill.2d 400, 164 N.E.2d 481](#) (refusing to count ballots marked with a check mark or the word "yes"); \*77 [Tuthill v. Rendelman \(1944\), 387 Ill. 321, 345, 56 N.E.2d 375](#); [Barlick v. Kunz \(1941\), 375 Ill. 318, 325, 31 N.E.2d 283](#).

Nothing in our Election Code, however, requires voters to completely dislodge the chad from the ballot before their vote will be counted. Article 24A simply authorizes the use of voting systems "in which the \*\*610 \*\*\*240 voter records his votes by means of marking or punching a ballot or one or more ballot cards." (Ill.Rev.Stat.1989, ch. 46, par. 24A-1.) The ballot cards used in the election at issue here are defined as ballots which are "voted by the process of punching." (Ill.Rev.Stat.1989, ch. 46, par. 24A-2.) Ballot cards are inserted into a "marking device," defined as an apparatus in which "ballots \* \* \* are inserted and used in connection with a punch apparatus for the piercing of ballots by the voter, or any approved device for marking a paper ballot with ink or other substance which will enable the ballot to be tabulated by means of automatic tabulating equipment or by an electronic scanning process." (Ill.Rev.Stat.1989, ch. 46, par. 24A-2.) Although these definitional provisions suggest that voters must punch their ballots to cast their votes, they do not require voters to completely dislodge the chad before their votes may be counted.

Although the legislature certainly has the power to provide a mandatory standard for marking punch card ballots, as it did

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for the marking of paper ballots, no such standard has been set out in the Election Code. We would be usurping the power of the legislature if we were to infer such a standard in the Election Code and then conclude that the legislature intended such standard to be given a mandatory construction.

The appellee argues that the questioned ballots may not be counted even if the Election Code does not specifically require voters to completely dislodge the chad from the ballot. She argues that section 24A-15.1 of the Election Code expressly states that punch card ballots \*78 must be recounted on automatic tabulating equipment. That section provides:

"The automatic tabulating equipment shall be tested prior to the discovery recount or election contest as provided in Section 24A-9, and then the official ballots or ballot cards shall be recounted on the automatic tabulating equipment \* \* \*.

Any person who has filed a petition for discovery recount may request that a redundant count be conducted in those precincts in which the discovery recount is being conducted." (Ill.Rev.Stat.1989, ch. 46, par. 24A-15.1.)

A redundant count is "a verification of the original computer count by another count using compatible equipment or by hand as part of a discovery recount." Ill.Rev.Stat.1989, ch. 46, par. 24A-2.

The appellee argues that, under section 24A-15.1 punch card ballots must be recounted on automatic tabulating equipment. She argues that ballots which cannot be counted on the automatic tabulating equipment are invalid. Respondent, in essence, urges this court to construe section 24A-15.1 as mandatory in nature. As stated, whether a statutory provision is mandatory or simply directory is a question of legislative intent.

[33][34] Where a statute directs that an act shall be done in a particular manner and states that failure to perform the act in the manner stated will render the affected ballot void, this court must give the statute a mandatory construction. Where the effect of failure to comply with a particular statutory requirement is not specified, however, courts must consider the nature and object of the statutory provision and the consequences which would result from construing it one way or another. [Hester v. Kamykowski \(1958\), 13 Ill.2d 481, 150](#)

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Here, section 24A-15.1 simply directs that ballot cards shall be recounted on the automatic tabulating equipment. It does not state that those ballots which \*79 cannot be read by the automatic tabulating equipment shall not be counted. Nor does the Election Code specifically prohibit the counting of punch card ballots by hand. In fact, section 24A-2 of the Code specifically authorizes a candidate to verify the results of a discovery recount by counting the ballots by hand. (See Ill.Rev.Stat.1989, ch. 46, par. 24A-2.) Although section 24A-2 does not expressly apply to court-ordered recounts in election contests, the trial court here specifically authorized a hand count of ballots in any precinct where the automatic tabulating equipment generated a result \*\*611 \*\*\*241 different from the results on election night or in the discovery count. The trial record shows and the appellee concedes that ballots in some precincts were manually counted during the recount process pursuant to this order and that evidence of these hand counts was introduced at trial. In fact, the stipulation that the tabulating equipment was functioning properly was based, in part, on such hand recounts. These facts suggest that a hand count is both a permissible and a necessary part of the recount process.

The fact that section 24A-15.1 does not expressly provide for a hand count of ballots which are not read by the automatic tabulating equipment does not necessarily indicate that the legislature intended to prohibit such a result. The purpose of our election laws is to obtain a correct expression of the intent of the voters. Our courts have repeatedly held that, where the intention of the voter can be ascertained with reasonable certainty from his ballot, that intention will be given effect even though the ballot is not strictly in conformity with the law. ([Gulino v. Cerny \(1958\), 13 Ill.2d 244, 248, 148 N.E.2d 724](#); [Griffin v. Rausa \(1954\), 2 Ill.2d 421, 424, 118 N.E.2d 249.](#)) Permitting a hand count of ballots which clearly reflect the voters' intent would not abrogate the general statutory scheme regarding punch card ballots or undermine the fairness or integrity \*80 of the voting process. The legislature authorized the use of electronic tabulating equipment to expedite the tabulating process and to eliminate the possibility of human error in the counting process, not to create a technical obstruction which defeats the

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rights of qualified voters. This court should not, under the appearance of enforcing the election laws, defeat the very object which those laws are intended to achieve. To invalidate a ballot which clearly reflects the voter's intent, simply because a machine cannot read it, would subordinate substance to form and promote the means at the expense of the end. [Hester v. Kamykowski \(1958\), 13 Ill.2d 481, 150 N.E.2d 196](#); [People ex rel. Agnew v. Graham \(1915\), 267 Ill. 426, 108 N.E. 699](#).

The voters here did everything which the Election Code requires when they punched the appropriate chad with the stylus. These voters should not be disfranchised where their intent may be ascertained with reasonable certainty, simply because the chad they punched did not completely dislodge from the ballot. Such a failure may be attributable to the fault of the election authorities, for failing to provide properly perforated paper, or it may be the result of the voter's disability or inadvertence. Whatever the reason, where the intention of the voter can be fairly and satisfactorily ascertained, that intention should be given effect. We conclude that section 24A-15.1 is directory, and that ballots which cannot be counted on the automatic tabulating equipment may be manually counted where the voter's intent can be determined with reasonable certainty from visual inspection of the ballot.

Even if we gave a mandatory construction to section 24A-15.1, however, the ballots questioned here nevertheless may be counted. The legislature anticipated that the automatic tabulating equipment would not be able to count certain valid ballots. Accordingly, it enacted section 24A-14 of the Election Code (Ill.Rev.Stat.1989, ch. 46, par. 24A-14), which states:

**\*81** "If any ballot is damaged or defective so that it cannot properly be counted by the automatic tabulating equipment, a true duplicate copy shall be made of the damaged ballot in the presence of witnesses and substituted for the damaged ballot. Likewise, a duplicate ballot shall be made of a defective ballot which shall not include the invalid votes. All duplicate ballots shall be clearly labeled 'duplicate', shall bear a serial number which shall be registered on the damaged or defective ballot, and shall be counted in lieu of the damaged or defective ballot."

(Ill.Rev.Stat.1989, ch. 46, par. 24A-14.)

Section 24A-14 clearly permits visual inspection and duplication of defective ballots to ensure that the voters' intent may be given effect. The appellee argues that section 24A-14 does not apply here, because partially punctured ballots may not be regarded as "defective" ballots. She claims **\*\*612 \*\*\*242** that only those ballots which are rejected by the automatic tabulating equipment qualify as "defective" ballots. She argues that the ballots here were not so rejected by the equipment; they simply were not counted by such equipment. We are not persuaded by the appellee's argument that section 24A-14 applies only to ballots which are rejected by the automatic tabulating equipment.

There is no evidence in the record which supports the appellee's claim that the automatic tabulating equipment rejects certain ballots. In any event, section 24A-14 specifically refers to ballots which "cannot properly be counted by the automatic tabulating equipment," and not to ballots which are rejected by such equipment. Although the Election Code does not define the term "defective ballots," we conclude that ballots are "defective," within the meaning of section 24A-14, when votes on those ballots are not counted by the automatic tabulating equipment, even though visual inspection of the ballots clearly reflects the voters' intent to cast a **\*82** vote for one candidate or another. As stated, voters may do everything that the Election Code requires to mark their ballots, and yet still not cast votes which can be read by the automatic tabulating equipment. The defects may be attributable to improperly perforated paper or to the voters' inability to exert sufficient pressure on the ballots to completely dislodge the chads. Whatever the cause of the defects, section 24A-14 specifically authorizes hand duplication of such ballots. Visual inspection of partially punctured ballots is necessary and appropriate in an election contest to determine whether those ballots are defective. The court may then duplicate those ballots which are defective, so that they may be counted on the automatic tabulating equipment. Ill.Rev.Stat.1989, ch. 46, par. 24A-14.

The result we reach here is consistent with decisions of courts in other jurisdictions, which have permitted visual inspection and manual counting of punch card ballots that could not be read by electronic tabulating equipment. Al-

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though these decisions did not construe the provisions of our Election Code and thus have limited authoritative value here, they are relevant insofar as they demonstrate that courts have struggled to give effect to the intention of voters where that intention can be ascertained with reasonable certainty. [Fischer v. Stout \(Alaska 1987\), 741 P.2d 217](#) (punch card ballots which were marked entirely with pen rather than punched could be counted, even though punch card machine was available at the time of the election, because ballots provided clear evidence of the voters' intent); [Willis v. Thomas \(Alaska 1979\), 600 P.2d 1079](#) (where voter both circled and punched boxes next to candidates' names to indicate his intent, circling of boxes alone not a sufficient indication of voter intent); [Hickel v. Thomas \(Alaska 1978\), 588 P.2d 273](#) (punch card ballots marked with pen or pencil instead of punched held valid); [\\*83 Escalante v. City of Hermosa Beach \(1987\), 195 Cal.App.3d 1009, 241 Cal.Rptr. 199](#) (held valid punch card ballots marked in pen rather than a punched-out chad, a ballot punched "no" with transparent tape on reverse side holding "yes" chad in place, and ballots with non-vote-signifying chads punched in addition to vote-signifying chads); [Fair v. Hernandez \(1981\), 116 Cal.App.3d 868, 879-80, 172 Cal.Rptr. 379](#) (where voter fails to punch out number which corresponds to a candidate and instead punches out a number which is not assigned to any candidate ballot cannot be counted; but where voter punches out a number which is not assigned to any candidate, and also punches a number which corresponds to a candidate, the ballot must be counted); [Wright v. Gettinger \(Ind.1981\), 428 N.E.2d 1212, 1225](#) (ballots with chads which were partially attached but were hanging underneath the ballot were valid, because the "hanging chads" indicated voters' intent); [McCavitt v. Registrars of Voters \(1982\), 385 Mass. 833, 434 N.E.2d 620](#) (standard for hand count of punch card ballots is not limited to a determination of whether light flows through the chad; if intent of voters can be ascertained, it should be given effect); but *cf.* [Rary v. Guess \(1973\), 129 Ga.App. 102, 198 S.E.2d 879](#) (where voter fails to properly use the vote recorder by punching out **\*\*613 \*\*\*243** the chad with the instrument provided, voter has disfranchised himself with regard to that office); [LeRay v. Mullican \(La.App.1984\), 456 So.2d 1038](#) (ballot marked with pencil rather than punched was void, because penciled checkmark was a distinguishing mark).

We also note that the House of Representatives Committee on Elections counted a punch card ballot in a general election contest between Ray Christensen and Gerald Weller, even though the automatic tabulating equipment could not count the ballot, because the chad was not completely dislodged. (Transcript of Proceedings of the House Committee on Elections 28-36 (March 27, **\*84** 1987).) We do not, of course, regard the Committee's decision as persuasive evidence of the legislature's intent. Statements made by individual legislators after a statute is enacted do not accurately reflect the intent of the legislature when the statute was debated and enacted. ([Morel v. Coronet Insurance Co. \(1987\), 117 Ill.2d 18, 24-25, 109 Ill.Dec. 157, 509 N.E.2d 996.](#)) We simply note that the Committee's decision on one punch card ballot was consistent with the decision we reach here.

#### Conclusion

In sum, we uphold the trial court's determinations that: (1) uninitialised absentee ballots may be counted; (2) ballots without precinct numbers may be counted (insofar as the trial court's determination relates to ballots for which the sole irregularity complained of is the absence of a precinct number); (3) ballots which bear the wrong precinct designation may be counted; (4) ballots which were numbered by an election judge to correspond to a voter's application number may be counted; (5) ballots cast by voters who failed to sign their application form may be counted; and (6) the results of the recount, rather than the results on election night, govern in all precincts, including Maine township precinct 23.

We conclude, however, that the trial court improperly denied the appellant's motion to have the ballots on which votes could not be counted by the automatic tabulating equipment visually inspected. We also hold that the trial court improperly counted four ballots which bore the designation "Niles Township," in addition to not bearing a precinct number, since Niles township is outside the 55th Representative District. Because an equal number of these invalid "Niles Township" ballots was counted for each candidate, the trial court's determination that each candidate received 7,387 votes must be adjusted to reflect a loss of two votes for each candidate. **\*85** Adjustment of the vote tallies results in a total of 7,385 votes for each candidate, but does not change the trial court's finding and judgment that the elec-

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tion resulted in a tie.

Having decided all of the issues raised by the parties, including the contention that partially punctured ballots should have been inspected and counted where proper, we determined that each candidate had an equal number of votes. We ordered the cause remanded to the trial court. This court directed the trial court to visually inspect each of the ballots not counted by the automatic tabulating equipment and to determine whether the voter's intent to cast a vote for either the appellant or the appellee could be ascertained. The trial court was further ordered to file a report of its findings with this court so we could review the trial court's determination.

The trial court's written order was filed with this court on September 18, 1990. According to the order, the trial court visually inspected a total of 27 ballots and determined that seven ballots showed the voters' intent to vote for Pullen and one ballot showed the voter's intent to vote for Mulligan. The voter's intent could not be ascertained from visual inspection of the remaining 19 ballots. Objections to the trial court's determinations as to particular ballots were filed by the appellee and the appellant. (The appellee objects in part to the trial court's judging one of these 19 ballots an over-vote. It will not be necessary to address this, as any decision as to it would be without consequence to the election result.)

This court has reviewed the disputed ballots and the trial court's finding as to each **\*\*614 \*\*\*244** ballot in light of these objections. The objection of the appellee that to be counted the chad should be fully punched out or that at least there should be a hanging chad on the back side of the ballot would set too rigid a standard for determining **\*86** whether the voter intended to vote for the particular candidate. Many voters could be disfranchised without their fault if, for example, ballots with only perforations on the chad could not be regarded as indicating the voter's intent to vote. From our examination of the ballots, we consider that the procedures used by the trial court were not improper to ascertain whether the voter intended to vote for the appellant or the appellee or whether this could not be determined. The appellee's objection that the only workable way to ascertain the intent of the voter from a punch card ballot is to find that the chad has been removed, so that the machine can count it, is leg-

ally unconvincing. This is shown by our discussion above under "Partially Punctured Ballots." We need not consider the objections of the appellant in light of the disposition we make of this appeal.

The trial court determined that seven ballots reflect the voter's intent to vote for Pullen, one ballot reflects the voter's intent to vote for Mulligan and the remaining 19 ballots should be disregarded, because the voter's intent cannot reasonably be ascertained. Accordingly, the vote tallies for each candidate must be adjusted to reflect a gain of 7 votes for Pullen and a gain of 1 vote for Mulligan.

A summary of the legal votes is as follows. The total number of votes cast for Pullen as determined by the trial court was 7,387. Two votes must be subtracted from this total, to reflect the invalid "Niles Township" ballots counted for Pullen. Seven votes must be added to the tally, to include the seven ballots which reflect the voter's intent to vote for Pullen, but which were not counted because they did not register on the automatic tabulating equipment. Thus, a net total of 7,392 votes were cast for Pullen.

Mulligan's vote total, as determined by the trial court, was also 7,387. Two votes must be deducted from **\*87** this total to reflect the invalid "Niles Township" ballots counted for Mulligan. One vote must be added to the total to include the ballot which reflected the voter's intent to vote for Mulligan, but which was not counted because the ballot did not register on the automatic tabulating equipment. Thus, a net total of 7,386 votes were cast for Mulligan. Accordingly, the appellant, Penny Pullen, was elected by a majority of six votes, as shown below. The judgment of the circuit court of Cook County is affirmed in part and reversed in part.

	Pullen
Mulligan	
-	
-	
-	
-	
-	
-----	
Trial Court's Vote Tally:	7,387
7,387	

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"Niles Township" ballots:	- 2	
- 2		
Visually Inspected ballots:	+ 7	
+ 1		
-----	-----	-
-----		
	7,392	
7,386		

*Judgment affirmed in part and reversed in part.*

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Supreme Court of Mississippi.  
 D.P. RIZZO  
 v.  
 Lee C. BIZZELL.  
 No. 58863.

July 13, 1988.  
 Rehearing Denied Sept. 21, 1988.

Action was brought contesting Democratic primary with runoff election of county supervisor. Special tribunal upheld election results and appeal was taken. The Supreme Court, Dan M. Lee, P.J., held that campaign violations did not warrant holding of special election as will of electorate could be ascertained.

Affirmed.

#### West Headnotes

#### [\[1\] Elections](#) 154(8)

[144k154\(8\) Most Cited Cases](#)

Among members of special tribunal formed to hear election contests, special judge is controlling judge of both facts and law, though county election commissioners sit as advisors to determination of facts. [Code 1972, § 23-15-931](#).

#### [\[2\] Elections](#) 154(6)

[144k154\(6\) Most Cited Cases](#)

Supreme Court would defer to findings of special judge in primary election challenge and not make additional or supplemental findings notwithstanding fact that majority of county commissioners dissented from findings. [Code 1972, § 23-15-933](#).

#### [\[3\] Elections](#) 158

[144k158 Most Cited Cases](#)

Violation of statute by campaigning within 150 feet of polling place was technical, not material, and did not warrant holding another primary election at particular precinct. [Code 1972, § 23-15-895](#).

#### [\[4\] Elections](#) 158

[144k158 Most Cited Cases](#)

Violation of rule prohibiting campaigning within 150 feet of

polling place, and other possible criminal violations of election laws prohibiting disturbing election and intimidating electors to prevent voting did not warrant special primary election for particular precinct as even if results were thrown out, it was still possible to ascertain will of electorate. [Code 1972, §§ 23-15-895, 97-13-21, 97-13-39](#).  
 \*121 Martin A. Kilpatrick, Greenville, for appellant.

Roy D. Campbell, III, Campbell, DeLong, Hagwood, Wade & Stuart, Greenville, for appellee.

Before DAN M. LEE, P.J., and ROBERTSON and ZUCCARO, JJ.

DAN M. LEE, Presiding Justice, for the Court:

This appeal is taken from an adverse judgment against plaintiff below, D.P. Rizzo, in his suit contesting the August 25, 1987, Democratic Primary runoff election for the post of Bolivar County Supervisor, District 2. Rizzo lost the runoff to Lee C. Bizzell and filed this action which was heard before a special tribunal made up of the special judge and five election commissioners of Bolivar County, Mississippi. Based on a bill of exceptions, Rizzo prosecutes this appeal specifically alleging that the special judge made erroneous findings of fact and conclusions of law concerning several alleged irregularities.

#### I.

On August 25, 1987, Appellant D.P. Rizzo (hereinafter "Rizzo") and Appellee Lee C. Bizzell (hereinafter "Bizzell") were runoff opponents in the second Democratic primary election for District 2 Supervisor of Bolivar County, Mississippi. Bizzell received 1,494 votes and Rizzo 1,316, a difference of 178 votes. On September 14, 1987, Rizzo filed a petition to contest the election before the Bolivar County Democratic Executive Committee, contesting the second primary election and praying that it cause new elections to be held in both the central Cleveland precinct and the east central Cleveland precinct (wherein there were 1,290 and 977 registered voters, respectively). The petition charged numerous instances of irregularities, violations of statutes \*122 and fraudulent acts occurred at these two precincts.

The executive committee denied Rizzo's petition on

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September 23, 1987, and on October 23, 1987, Rizzo filed a complaint in the Circuit Court of the Second Judicial District of Bolivar County, Mississippi, praying that upon judicial review of the action of the executive committee, new elections be ordered in each of the involved polling places. On or about November 6, 1987, Bizzell filed an answer with defenses to the complaint including a motion to dismiss. On December 9, 1987, the specially-appointed judge entered an order setting this matter for trial on January 19, 1988. A special tribunal comprised of the special judge and the five Bolivar County election commissioners heard the trial on January 19 and 20, 1988. Bizzell entered into the office of supervisor on January 1, 1988, some three weeks prior to the trial.

At the trial's conclusion, the special judge made oral findings of fact and conclusions of law, and granted the election commissioners a period of time thereafter within which to file separate findings to be made a part of the special judge's ruling. Though he found a substantial number of the allegations to have been sustained by the evidence, the special judge held that the will of the voters could be ascertained without special elections at the involved precincts, and Bizzell was declared the winner of the second Democratic primary election. On January 26, 1988, the election commissioners filed in the trial court their separate finding of fact wherein four of the five election commissioners (Stringer, Washington, Denson and Vowell) disagreed with the special judge and concluded that a new election should be held at the east central Cleveland precinct, and three of the five election commissioners (Stringer, Washington and Denson) concluded that a new election should be held at the central Cleveland precinct.

On February 2, 1988, Rizzo filed his notice of appeal and on February 4, 1988, he filed in this Court his bill of exceptions and bond for costs as required by statute in election contests. Rizzo submits that the judgment of the special judge resulted from material errors in the findings of fact and conclusions of law, and that new elections for the office of Bolivar County, Mississippi, District 2 supervisor should be ordered at both the central Cleveland and east central Cleveland precincts.

In this Court, Rizzo submitted a bill of exceptions rather

than seeking to submit a transcript as allowed under [Miss.Code Ann. § 23-15-933 \(Supp.1987\)](#). Bizzell submitted two affidavits alleging Rizzo's bill of exceptions summarizing the testimony was incorrect or incomplete in several particulars, and Bizzell filed appellee's corrections/additional to the bill of exceptions.

As noted above, Rizzo contested the voting at only two precincts: 1) the east central Cleveland precinct, and 2) the central Cleveland precinct.

#### A. Central Cleveland Precinct.

The only allegation of irregularity at the central Cleveland precinct involved Virginia Dickerson, Bizzell's sister-in-law. There seems to be no dispute that for several hours Ms. Dickerson handed out campaign literature within 150 feet of the polling place. The special judge so found.

At the central Cleveland precinct, however, the polls were sandwiched between another polling place and a street so that no one could observe the 150-foot limit. Thus, by agreement, all campaign workers stood across the street from the polls. Ms. Dickerson apparently violated this agreement by crossing the street and campaigning close to the polls for approximately six hours, until instructed to retire to the position across the street by an election official.

Rizzo admitted that he told the Democratic executive committee that he could not say he lost votes on account of any violation at the central Cleveland precinct. Rizzo admitted his workers also distributed literature within 150 feet of the polls according to the agreement.

#### B. East Central Cleveland Precinct.

##### 1) Poll watcher (Mr.) Beverly Perkins

Though Rizzo alleged some 17 separate violations, central to his claim for a new \*123 election in the east central Cleveland precinct was the conduct of Beverly Perkins. Bizzell paid Perkins as a supporter and campaigner, and Bizzell assigned Perkins as a poll watcher at the precinct. Perkins, in turn, assigned other Bizzell poll watchers at the precinct.

Police arrested Perkins sometime during the morning at the

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polling place after Democratic executive committee subcommittee on elections chairman Willie Earl Griffin swore out a warrant for disturbing the peace. Perkins later was released and returned to the east central Cleveland precinct and continued his poll watching.

Griffin testified, and the special judge found, that Perkins violated the restriction on campaigning within 150 feet of the polling place, although the only pieces of literature Perkins might have had were brochures for a former gubernatorial candidate eliminated in the first primary.

Several Rizzo supporters testified that Perkins told them the election had "already been wrapped up." These and other Rizzo supporters testified that Perkins harassed and discouraged voters.

#### 2) Election Managers Howard Hughes and Margaret Little

Perkins' conduct was not the sole irregularity alleged to have occurred at the east central Cleveland precinct. Two poll workers, Manager/Bailiff Howard Hughes and manager Margaret Little, violated ballot secrecy provisions according to Rizzo's witnesses.

Two different people heard Hughes tell persons they could not have assistance despite their having requested it (BE 6), though this may have been because they were not blind, disabled or illiterate.

Bizzell introduced testimony from several of his poll watchers and campaigners which contradicted Rizzo's witnesses. Bizzell's witnesses basically testified that they did not see Hughes or Mrs. Little looking in voting booths and minimized Perkins' wrongdoing.

#### 3) Candidate Lee C. Bizzell

The evidence indisputably showed that Bizzell gave money to election manager Mrs. Little, but he later retrieved it. Rizzo, Orlando Blanks and presumably others saw Bizzell enter the east central Cleveland precinct at one point during the day and give \$20 to Margaret Little. Bizzell made no attempt to conceal this gift and he and Mrs. Little testified it was only for refreshments for the poll workers. Blanks (the Mabus poll watcher), overheard that the \$20 was for re-

freshments and objected to it. Bizzell stated he got the money back from Mrs. Little through another person.

#### 4) Democratic Executive Committee Member Charles Williams

Charles Williams, a former Rizzo supporter who supported Bizzell, was a member of the Democratic executive committee elections subcommittee. Subcommittee members recommended poll workers to the full committee for their particular precincts, thus Williams apparently recommended Hughes and Little for the east central Cleveland precinct. Williams and Rizzo had a falling out when then Supervisor Rizzo asked for Williams' resignation from a county agency position to which Rizzo had originally appointed him. The special judge found that Williams should not have participated in the executive committee review of the original election contest because of this conflict of interest. The special judge found that Williams' conduct did not effect the outcome of the election contest, however.

#### C. Findings.

The special judge found evidence to support several allegations, but determined ultimately that none of the improprieties required ordering a new election. The will of the voters could be ascertained, and there was no conduct of a fraudulent nature.

Specifically, the special judge found:

1) Beverly Perkins violated the 150-foot rule and Perkins' conduct constituted "rather serious technical violations" which should have led to his removal by the party employing him. The evidence was abundant \*124 that Perkins corralled voters in the street, but evidence was insufficient to establish that he accompanied them into voting booths. Perkins constantly harassed and annoyed people and otherwise made himself obnoxious.

2) There was insufficient evidence that polling officials entered voting booths on more than one occasion. The special judge found the evidence conflicting and he stated there seemed to be "some confusion among the witnesses as to who was an official and who was a campaigner."

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3) The proof was "unclear and perhaps insufficient" to establish that on more than one occasion polling officials refused to permit a voter to have the person of their choice assist them in voting.

4) Specifically, as to eligible voter Ernest Jones, it was not clear whether Jones made known his wish to have a particular person assist him, and thus any violation of his right to assistance was not willful or deliberate.

5) Bizzell admitted handing money to an election official, which constituted a technical violation and an absence of good judgment, but the transfer was not intended to affect the outcome of the election.

6) Charles Williams and another Democratic executive committeeman, Larry Carter, may have had an interest in the election such that they should have recused themselves from the committee deliberations on Rizzo's petition, but that action was not being reviewed by the court.

7) Ms. Dickerson did indeed violate the 150-foot rule at the central Cleveland polling place.

8) No fraudulent conduct occurred at either box.

In contrast, the election commissioners filed findings January 25, 1988, in which they concluded that Perkins willfully violated voting laws in an attempt to further Bizzell's candidacy, and that polls managers acquiesced in these violations. The commissioners' tribunal also found, unanimously, that two of the election managers at east central Cleveland precinct violated the secrecy of the ballot by pulling the voting machine curtains or otherwise observing voters without their consent. They also found that a substantial number of blind, disabled or illiterate voters were denied assistance by a person of their own choosing. A majority of the five commissioners on the tribunal found that a new election should be held in the east central Cleveland precinct. A majority likewise found Ms. Dickerson's violations of voting laws at the central Cleveland precinct to be wilful and intentional.

The commissioner casting the deciding vote on all split commission findings was David W. Washington. On voir dire before the special judge, Washington acknowledged he supported Rizzo and had previously helped him organize

campaign workers. Washington stated that he had gone to the east central Cleveland precinct and seen wrongdoings, which he reported to counsel for the election commission. The special judge said that had the final decision rested with the election commission, then Washington would have been disqualified. Since the special judge had the final decision, Washington was not disqualified.

Following this judgment Rizzo perfected this appeal and it comes to this Court upon expedited review pursuant to [Miss.Code Ann. § 23-15-933 \(Supp.1987\)](#).

## II.

To What Extent May this Court Make Its Findings of Fact? Appellant Rizzo makes much of the fact that members of the Bolivar County Election Commission dissented and filed separate findings of fact from those made by the special judge. He argues that this Court is not bound by the facts below, and indeed does not have to give the normal deference given the findings of fact by a trial court since there were dissenters.

[Miss.Code Ann. § 23-15-933 \(Supp.1987\)](#) provides:

Within three (3) days after judgment rendered, unless a longer time not exceeding four (4) additional days be granted by the trial judge, the contestant or contestee, or both, may file an appeal to \*125 the Supreme Court upon giving a cost bond in the sum of Three Hundred Dollars (\$300.00), together with a bill of exceptions which shall state with appropriate fullness the point or points of law at issue with a sufficient synopsis of the facts to fully disclose the bearing and relevancy of the said points of law, the said bill of exceptions to be signed by the trial judge, or in case of his absence or refusal, or disability, by two (2) disinterested attorneys, as is provided by law in other cases of bills of exception. *If the findings of fact have been concurred in by all the commissioners in attendance, provided as many as three (3) of the commissioners are and have been in attendance, the facts shall not be subject to review on appeal, and the bill of exceptions shall not set up the evidence upon which the facts have been determined. But if not so many as three (3) of the commissioners are and have been in attendance or if one or more of the commissioners dissent, a transcript of the testimony may be filed with the bill of exceptions, or within such*

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*short time thereafter as the Supreme Court may allow, and the Supreme Court, upon a review thereof, may take such finding upon the facts as the evidence requires; giving only such consideration as the court may think warranted to the presumption of correctness of the conclusions of the trial judge.* The appeal shall be immediately docketed in the Supreme Court and referred to the court en banc upon briefs without oral argument, unless the court shall call for oral argument, and shall be decided at the earliest possible date, as a preference case over all others, and such judgment shall be entered and certified as the trial tribunal should have entered and certified, with the same effect as had such judgment been entered by the trial tribunal and no appeal had been taken therefrom.

[emphasis added] However, the Legislature evidently favored the findings of the special judge over those of the commissioners. [Miss.Code Ann. § 23-15- 931 \(Supp.1987\)](#) provides:

When the day for the hearing has been set, the circuit clerk shall issue subpoenas for witnesses as in other litigated cases, and he shall also issue a summons to each of the five (5) election commissioners of the county, unless they waive summons, requiring them to attend said hearing, *throughout which hearing the said commissioners shall sit with the judge or chancellor as advisors or assistants in the trial and determination of the facts,* and as assistants in counts, calculations and inspections, and in seeing to it that ballots, papers, documents, books and the like are diligently secured against misplacement, alteration, concealment or loss both in the sessions and during recesses or adjournments; *the judge or chancellor being, however, the controlling judge both of the facts and the law, and to have all the power in every respect of a chancellor in term time;* and the tribunal shall be attended by the sheriff, and clerk, each with sufficient deputies, and by a court reporter. The special tribunal so constituted shall fully hear the contest or complaint de novo, and the original contestant before the party executive committee shall have the burden of proof and the burden of going forward with the evidence in the hearing before the special tribunal. The special tribunal, after the contest or complaint shall have been fully heard anew, shall make a finding dictated to the reporter covering all controversial

material issues of fact, together with any dissents of any commissioner, and thereupon, the trial judge shall enter the judgment which the county executive committee should have entered, of which the election commissioners shall take judicial notice, or if the matter be one within the jurisdiction of the State Executive Committee, the judgment shall be certified and promptly forwarded to the Secretary of the State Executive Committee, and in the absence of an appeal, it shall be the duty of the State Executive Committee forthwith to reassemble and revise any decision theretofore made by it so as to conform to the judicial judgment aforesaid; provided that when the contest is \*126 upon a complaint filed with the State Executive Committee and the petition to the court avers that the wrong or irregularity is one which occurred wholly within the proceedings of the state committee, the petition to the court shall be filed in the circuit or chancery court of Hinds County and, after notice served, shall be promptly heard by the circuit judge or chancellor of that county, without the attendance of commissioners.

[emphasis added]

[1] Among the members of the tribunal, then, the special judge is the "controlling judge" of both the facts and the law, though the commissioners sit as advisors to the determination of facts. Neither statute contemplates what occurs when a majority of the commissioners dissent, but [§ 23-15-931](#) seems to suggest that the special judge is the true trier of facts.

[2] Under [§ 23-15-933](#), this Court may make its own findings based on the evidence, giving only such presumption to the correctness of the special judge's findings as warranted. Rizzo suggests that, upon independent review of the facts as developed below, we should, in effect, adopt the findings of the dissenting election commissioners. This we decline to do.

The proof at the hearing was conflicting. The special judge was in a position to judge the credibility of the witnesses before him. We work from a cold record, and with the additional limitation that the record is only a bill of exceptions, not a transcript.

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The reasons for deferring to the special judge in this instance are obvious. The Legislature seemingly took notice of the fact that an objective fact finder, one removed from the political turmoil surrounding the election, is necessary in election contests. Here we have the additional factor that one of the election commissioners dissenting to the special judge's findings had a direct interest in the outcome and should have been removed from the tribunal. Finally, the commissioners also took the opportunity in their findings to chastise the democratic executive committee for its management of the primary election. Thus, it appears the election commissioners had an additional axe to grind in this case.

Under these circumstances, we cannot say the findings of the special judge were erroneous. Despite the well intentioned efforts of appellant's counsel, we do not make additional or supplemental findings along the lines of the findings suggested by the dissenting members of the Bolivar County Election Commissioners.

We adopt the findings of the special judge.

### III.

#### A. Central Cleveland Precinct.

[3] The special judge found that the evidence "is sufficient to generally support" the allegation that Ms. Dickerson improperly campaigned within 150 feet of the polling place, although she did move back across the street behind the agreed line after being told to do so by an election official.

Finding no fraud or intentional misconduct, the special judge found he could ascertain the will of the voters.

At issue is the prohibition against campaigning found in [Miss.Code Ann. § 23-15-895](#) (Cum.Supp.1987). That section provides:

It shall be unlawful for any candidate for an elective office or any representative of such candidate to post or distribute cards, posters or other campaign literature within one hundred fifty (150) feet of any entrance of the building wherein any election is being held. It shall be unlawful for any candidate or a representative named by him in writing, to appear at any polling place while armed or uniformed, nor shall he display any badge or credentials ex-

cept as may be issued by the manager of the polling place.

[Miss.Code Ann. § 23-15-593](#) (Cum.Supp.1987) pertains to irregularities involving violations of the 150-foot provision. Since it is supplemental to and not inconsistent with our statutes governing use of voting machines, the fact that Miss.Code \*127 [§ 23-15-593](#) purports to concern ballot box irregularities does not restrict its application to this case. See [Miss.Code Ann. § 23-15-449](#) and -451 (Cum.Supp.1987). [Miss.Code Ann. § 23-15-593](#) provides:

When the ballot box is opened and examined by the county executive committee in the case of a primary election, or county election commissioners in the case of other elections, and it is found that there have been failures in material particulars to comply with the requirements of [Section 23-15-591](#) and [Section 23-15-895](#) to such an extent that it is impossible to arrive at the will of the voters at such precinct, the entire box may be thrown out unless it be made to appear with reasonable certainty that the irregularities were not deliberately permitted or engaged in by the managers at that box, or by one (1) of them responsible for the wrong or wrongs, for the purpose of electing or defeating a certain candidate or candidates by manipulating the election or the returns thereof at that box in such manner as to have it thrown out; in which latter case the county executive committee, or the county election commission, as appropriate, shall conduct such hearing and make such determination in respect to said box as may appear lawfully just, subject to a judicial review of said matter as elsewhere provided by this chapter. Or the executive committee, or the election commission, or the court upon review, may order another election to be held at that box appointing new managers to hold the same.

The intent of the statute appears to be that violations of the 150-foot rule will not necessarily require throwing out a precinct box. Where the violations involve "failures in material particulars ... to such an extent that it is impossible to arrive at the will of the voters at such precinct," the entire box may be thrown out; however, if it appears "with reasonable certainty" that the violations were not condoned by any of the election precinct managers for the purpose of electing or defeating a certain candidate, then a hearing should be held and the commission or executive committee should

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make such determination as is just. The statute does not rule out an order either by the election body or by the court upon review, holding another election at that precinct with new managers.

At the central Cleveland precinct no one, including Rizzo's supporters, could comply with the 150-foot rule. The testimony was that Ms. Dickerson did not attempt to intimidate or harass anyone, and she did move back across the street and remained there after being instructed to do so by a polling official. There was no evidence that Ms. Dickerson's actions were engaged in or permitted by the election officials, or that Bizzell authorized or knew of Ms. Dickerson's violations.

The special judge thus found that the violation was technical, not "material," and the will of the voters at that precinct could be ascertained. We find no error here.

#### B. East Central Precinct.

[4] Most important here were the findings of the special judge relating to the will of the electorate. The proof without dispute shows a pattern of conduct by Beverly Perkins disruptive of the electoral process.

In addition to violating the 150-foot rule, the evidence of Perkins' conduct suggests possible criminal violations of election laws prohibiting disturbing an election, [Miss.Code Ann. § 97-13-21 \(1972\)](#), and intimidating electors to prevent voting, [Miss.Code Ann. § 97-13-39 \(1972\)](#).

In his findings, the special judge did not make clear whether he considered Perkins' conduct so severe that the results of the voting in the East Central Cleveland Precinct should have been thrown out. We certainly have no hesitation in expressing displeasure with the election process described in this record. We might agree that discarding the east central Cleveland precinct votes is appropriate, but this does not automatically mean a new election must follow. The special judge did find that even if the results were thrown out, it was still possible to ascertain the will of the electorate.

Assuming the special judge found that Rizzo's contest was successful, necessitating \*128 the results from this precinct being thrown out, we must turn to the test announced in

[Noxubee County Democratic Committee v. Russell](#), 443 So.2d 1191, 1197-98 (Miss.1983):

When an election has been successfully contested, this Court has employed different tests over the years to aid its determination of what form of relief is in order. By various routes, we have attempted to discern whether the entire election should be thrown out or only the tainted votes. We have employed a two pronged test which though it has been stated in different ways, essentially provides that special elections will be required only when (1) enough illegal votes were cast for the contestee to change the result of the election, or (2) so many votes are disqualified that the will of the voters is impossible to discern. [Walker v. Smith](#), 213 Miss. 255, 56 So.2d 84, suggestion of error, 213 Miss. 263, 264, 57 So.2d 166, 167 (1952); [Pyron v. Joiner](#), 381 So.2d 627 (Miss.1980).

Here, as the disqualification of the illegal votes does not change the result of the election, we need only consider whether the irregularities were substantial enough to warrant a special election. In *Walker*, we clarified the manner in which we make this determination, finding that the question

depends upon the facts and circumstances in each particular case, including the nature of the procedural requirements violated, the scope of the violations, and the ratio of illegal votes to the total votes cast. [213 Miss. at 264, 57 So.2d 166](#).

As this rule has been applied in our case law, the nature of the procedural violation is important because if the irregularities are due to fraud or willful violations of the election procedure, this Court will not hesitate to order a new election, even though the percentage of illegal votes is small. [See, e.g., Harris v. Stewart](#), 187 Miss. 489, 193 So. 339 (1940); [Hayes v. Abney](#), 186 Miss. 208, 188 So. 533 (1939).

The scope of the violations and the ratio of illegal votes are significant, because even in the absence of fraud, the disenfranchisement of a significant number of voters will cast enough doubt on the results of an election to warrant voiding it. As a rule, if more than thirty percent of total votes have been disqualified, a special election will be required. [See, e.g., Wallace v. Leggett](#), 248 Miss. 121, 158 So.2d 746 (1963); [Ulmer v. Currie](#), 245 Miss. 285, 147 So.2d 286 (1962); [Sinclair v. Fortenberry](#), 213 Miss. 219,

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[56 So.2d 697 \(1952\)](#); [May v. Layton, 213 Miss. 129, 55 So.2d 460 \(1951\)](#).

On the other hand, when the percentage of illegal votes is smaller, even though the winning margin is less than the number of illegal votes, a special election may not be required. [Pyron v. Joiner, 381 So.2d 627 \(Miss.1980\)](#) (disqualification of 3.9 percent of the votes did not warrant special election.) [Walker v. Smith, 213 Miss. 255, 56 So.2d 84](#), suggestion of error [57 So.2d 166 \(1952\)](#) (disqualification of six percent of the total vote did not warrant a special primary election.)

Applying the *Russell* test to the facts of this case, it is apparent that a new election is unnecessary. First, it is clear that by discarding the illegal votes the outcome is unchanged, for without any votes from the precinct Bizzell won the election. There was no fraud practiced and the ratio of illegal votes to total votes, discarding all 355 votes at the east central Cleveland precinct, is 355 to 2817, or slightly more than 12%. The nature of the violations, while serious, cannot totally control the disposition of this case, for we must balance the public interest with that of the successful contestant.

When deciding whether a special election is warranted, we recognize competing interests which must be weighed and balanced. While the voters are not parties to this contest, *their interests are paramount. Special elections are a great expense for the county and its taxpayers.* Beyond that, the turnout for a special election is never as great as when there are a number of candidates on the slate. By contrast, we feel that the *rights of the individual \*129 candidates cannot be allowed to overshadow the public good.*

[Russell, 443 So.2d at 1197](#) [emphasis added].

Rizzo argues that a special election for just the east central Cleveland precinct is warranted. While it may be a permissible alternative under [Miss.Code Ann. § 23-15-593](#) (Cum.Supp.1987), given the circumstances, we cannot agree. In addition to the factors noted above, we cannot ignore the fact that Rizzo carried the precinct convincingly despite the violations. Even the somewhat less expensive alternative of a special election confined to the east central

Cleveland precinct cannot, on balance, be rationalized here.

Since Bizzell received a total of 178 more votes than Rizzo, Rizzo would have to acquire a net increase of 178 votes at the east central Cleveland precinct to effect the outcome. The total number of votes at the precinct was 355; Rizzo received 243 votes to 112 for Bizzell. Rizzo out-pollled Bizzell by this same two-to-one margin at this precinct in the first primary, as well as in the runoff. Thus, unless Bizzell's supporters would totally abstain from voting, Rizzo would likely need an increase in turnout of roughly 50% at a special election just to have a chance to obtain the needed 178 additional votes. There was virtually no evidence implying that qualified electors would turn out in any greater numbers, nor was there any real evidence that voters were denied or prevented from voting by Perkins. Thus, little evidence suggested turnout might improve at all, much less by a large percentage.

Under the circumstances of this case, the special judge correctly determined that the will of the voters could be ascertained and a new election was unnecessary.

The decision of the special judge declaring Bizzell the winner of the second Democratic primary for the position of supervisor, District 2, in Bolivar County, Mississippi, is hereby affirmed.

AFFIRMED.

ROY NOBLE LEE, C.J., HAWKINS, P.J., and PRATHER, ROBERTSON, SULLIVAN, ANDERSON, GRIFFIN and ZUCCARO, JJ., concur.

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C

Superior Court of Massachusetts.

William STAPLETON and others [FN1]

[FN1]. Bernice Sullivan and Mary Hutton, as registered voters of the City of Lawrence, petitioners in a recall action and citizens over the age of sixty-five claiming rights under [G.L.c. 231, § 59F](#) and as representatives of a class of 4,250 registered voters of the City of Lawrence.

v.

Charles F. NYHAN and others [FN2]

[FN2]. Maria Tavares and John Tapia, as individuals and as appointed Members of the Lawrence Board of Registrars of Voters; James McGravey as City Clerk and Member of the Lawrence Board of Registrars of Voters; Carol Hajjar McGravey as City Solicitor and Member of the Hearing Panel pursuant to [G.L.c. 55B, § 7](#); and Mary Claire Langille Kennedy, individually and as Mayor of the City of Lawrence.

**No. CA942586D.**

Feb. 3, 1995.

Memorandum of Decision and Order  
FREMONT-SMITH, Judge.

\*1 This action arises out of a decision by the Board of Registrars of Voters of the City of Lawrence refusing to certify a petition to recall the Mayor, based on the Board's finding after an evidentiary hearing, that the petition for recall contained an insufficient number of valid signatures. The proponents of the recall then brought this action alleging that the Board's decision should be set aside as unsupported by any substantial evidence, as based on an error of law, or as arbitrary or capricious. See [M.G.L.c. 30A § 14\(7\)](#).

After reviewing the administrative record and considering the briefs and oral arguments of all parties and the amicus curiae brief of the Secretary of State, the Court renders the following findings, rulings and judgment:

On November 2, 1993, Mayor Mary Claire Kennedy was elected over her opponent by only fifteen votes. Her op-

ponent filed suit in 1994 for a *de novo* review of the recount. After trial, judgment entered upholding the recount, and that case is now on appeal.

On September 28, 1994, a group of Lawrence voters filed the recall petition with the City Clerk which is the subject of this action.

The legal procedure for a recall election in Lawrence is complicated and convoluted. The Lawrence City Charter, § 9.7, provides that, at any time not less than twelve months before the expiration of an official's term of office, one hundred or more voters may file with the city clerk an affidavit containing the name of the official whose recall is sought and a statement of the grounds for the recall petition. The petitioners then have thirty additional days in which to collect signatures (on petition blanks demanding the recall) of at least fifteen percent of the total number of persons registered to vote at the preceding city election and to return and file the petition in the office of the city clerk. [FN3]

[FN3]. The parties are in agreement that, based upon the total vote in the mayoral general election, 3,275 certified signatures were required for a recall election.

Within twenty-four hours of such filing, the clerk must submit the petition to the Board of Registrars of Voters (the "Board") "who shall forthwith certify" on the petition the number of signatures that are valid voters' names. The procedure for this initial certification is set out in [G.L.c. 43, § 38](#):

Within five days after the filing of said petition the registrars of voters shall ascertain by what number of registered voters the petition is signed, and what percentage that number is of the total number of registered voters, and shall attach thereto their certificate showing the result of such examination.

See also [G.L.c. 53, §§ 7 and 22A](#).

If the Board certifies that the petition has a sufficient number of valid signatures, the City Clerk is to "forthwith" submit the certified petition to the City Council. When such certificate has been so transmitted, said petition shall be

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deemed to be valid unless written objections are made thereto by a registered voter of the city within forty-eight hours after such certification by filing such objections with the city council ... and a copy thereof with the registrars of voters ... Section seven of chapter fifty-five B shall apply to such objections, and the board of registration of voters shall transmit a copy of its decision to the city council ... [G.L.c. 43, § 38](#). Subsection (c) of the Lawrence City Charter provides:

\*2 Upon its receipt of the certified petition, the city council shall forthwith give written notice of said petition and certificate to the person whose recall is sought. If said officer does not resign his office within five days following delivery of said notice, the city council shall order an election to be held not less than thirty-five nor more than sixty days after the date of the registrars [sic] certificate of the sufficiency of the petition.

Article IX of the Bylaws and Rules and Regulations governing the Board of Registrars of Voters provides that "[o]bjections to certifications by the Board shall be made within two (2) working days of the issuance of the ... certificate and are subject to the provisions of Section 9 of the City Charter, [G.L.c. 55B, § 7](#) and 950 CMR 59.00." [G.L.c. 55B, § 7](#), provides in relevant part that:

[o]bjections to certificates of nomination, nomination papers, or withdrawals for city offices, or to petitions for local ballot questions shall be filed with the City Clerk within two working days of the last day fixed for filing such nomination papers, withdrawals or petitions, or on the day on which certification of the names on a petition must be completed, whichever is later, except where city charters provide otherwise

Such Boards shall render a decision on any matter referred to them ... not later than four days after the last day fixed for filing objections to such certificates ... But such decision need not be rendered until fourteen days after the last day fixed for filing objections to a petition, if the timing of such decision will not thereby prevent the question from qualifying for the ballot not later than thirty days before any previously scheduled election at which the question could appear.

Article X of the Board's Bylaws provides that hearings of the Board are governed by the regulations of the State Ballot Law Commission (SBLC) "the Commission," [950 C.M.R.](#)

[59.01-59.03](#), as amended. [950 CMR 59.03](#) provides that the Standard Adjudicatory Rules of Practice and Procedure, 801 CMR 1.01, apply to all SBLC proceedings, with certain modifications. One such requirement makes it incumbent upon the objector to signatures (here, the Mayor) to provide a list of the challenged signatures, by page and line, and the reason each such signature is objected to, no later than three days before the hearing. [801 CMR 1.01\(8\)](#), as amended by [950 CMR 59.03\(18\)](#). Another provision concerns the rules of evidence to be used at hearings before the Commission: Evidence may be admitted and given probative effect only if it is the kind of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs. Weight to be given evidence presented will be within the discretion of the Agency or Presiding Officer. *Based on its experience that in general it is not the kind of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs, the Commission will not admit in evidence affidavits bearing directly on an ultimate fact in dispute, such as a voter's affidavit that the voter did or did not sign a nomination paper or petition, except upon motion for good cause shown.* [801 CMR 1.01\(10\)\(g\)\(2\)](#) as amended by [950 CMR 59.03\(20A\)](#) (emphasis added).

\*3 Under the above legal framework, a duly-elected official in Lawrence, once notified of the certification of a recall petition, must either immediately resign or else stand for reelection within sixty days, unless that official, within just 48 hours, files detailed, line-by-line objections to the validity of signatures on the petition, and has provided notice of the basis for each such objection at least three days before commencement of a Board of Registrar's hearing, which hearing must then be completed within 14 days of the notice of filing of the petition.

In attempted conformity to these procedures, after the September 28, 1994 petition was filed, the Board of Registrars initially certified 4,250 [\[FN4\]](#) voters' signatures, which exceeded (by 975) the number of signatures (15% of voters at the general election, 3,275) needed to proceed with the recall. On October 13, the City Council voted to notify the Mayor of the Board's certification of the petition and, within the allotted 48 hours, the Mayor filed objections to the Board's preliminary certification. [\[FN5\]](#)

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[FN4](#). The Board, at the onset, voted to remove from the recall petition thirty-five additional signatures based on the signers' affidavits to the effect that they had been misled into signing the petition. The propriety of allowing the withdrawal of these signatures is questionable. In [McBride v. City of Chelsea, 18 Mass.App.Ct. 1113 \(1984\)](#) (summary disposition) the Court noted that such "withdrawals after filing may (a) create confusion and unfairness by leaving circulators unsure whether they have obtained enough signatures, (b) permit opponents to pressure signers to withdraw after their names have become a matter of public record, and (c) generally render the initiative system cumbersome to administer and possibly unworkable." Memorandum and Order, entered October 2, 1984, at 11. The legality of this initial reduction in the number of signatures has no significance, however, in view of the Board's later determination that at least 1,772 signatures were invalid.

[FN5](#). The Mayor's letter of objection, dated October 14, 1994, objected that "1,772 signatures are of questionable validity" and advised that she "had retained a recognized and acknowledged handwriting expert," Barbara Harding. It stated that, based upon Harding's analysis of 3,434 signatures, Harding had concluded that 1,772 are "probable forgeries."

On October 20, this Court (Richard Welch, J.) issued a preliminary injunction staying the effectiveness of the Board's certification until the earlier of the date the Board ruled on the validity of the plaintiff's objections, or October 28 (*i.e.*, within the requisite fourteen days provided for completion of a Board hearing following the filing of objections by the Mayor, under [M.G.L.c. 55B, § 7](#)). Beginning immediately after Justice Welch's order, on Saturday, October 22, 1994, and continuing up to and including the last permissible day, October 27, 1994, the Board conducted an evidentiary hearing into the objections filed by the Mayor. During the proceedings, which comprised over twenty-two hours of hearing, the Board heard from approximately fifty-eight witnesses and received sixty-four exhibits. The nature of the testimony consisted of expert opinion, citizens who reaf-

firmed their questioned signatures, citizens who testified that their signatures were forged or obtained by fraud, and citizens who testified they had been misled regarding the purpose of the petition. At the hearing, the Board proceeded upon the legal assumption that the Mayor had the burden of proving, by a preponderance of the evidence, that a sufficient number of signatures on the petition (in this case, 976) were either forged or otherwise not certifiable.

At the hearing's conclusion on October 27, the Board voted 3-2 to de-certify the recall petition, having concluded that there were insufficient valid signatures.

The parties agree that the scope of review is pursuant to [M.G.L.c. 30A, § 14](#). The Court may affirm, remand, set aside or modify the Board's decision if it determines the decision is unsupported by substantial evidence, was based upon an erroneous interpretation of the law, or was arbitrary or capricious. [M.G.L.c. 30A § 14\(7\)](#). [\[FN6\]](#) The Board's decision will be upheld if supported by substantial evidence. [Almeida Bus Lines, Inc. v. Department of Public Utilities, 348 Mass. 331, 341 \(1965\)](#). In reviewing the Board's decision, this Court is required to give "due weight to the experience, technical competence and specialized knowledge of the agency, as well as to the discretionary authority conferred to it." [Katz v. Massachusetts Commission Against Discrimination, 365 Mass. 357 \(1974\)](#). To the extent that the agency makes a determination of fact, the agency's finding must be permitted to stand unless it is unsupported by substantial evidence in the entire record. See [Kahn v. Brookline Rent Control Board, 394 Mass. 709 \(1985\)](#); [Griffin's Package Store, Inc. v. Alcoholic Beverages Control Commission, 12 Mass.App.Ct. 768 \(1981\)](#).

[FN6](#). If a Court believes that a Board's grounds for its decision are unclear or its decision was based upon an erroneous legal standard, the Court can remand the case to the Board for further proceedings. [Dane v. Board of Registrars of Voters of Concord, 374 Mass. 152, 173 \(1978\)](#). As jurisdiction was also invoked under Mass.G.L.c. 56 § 59, this Court could also have ordered a *de novo* trial in the Superior Court. [McCarthy v. Secretary of the Commonwealth, 371 Mass. 667, 676-77 \(1977\)](#).

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\*4 Since the agency has been entrusted with the function of applying its administrative expertise to the determination of complex social, economic, and technical issues, the role of the judiciary in reviewing administrative agency actions is not to substitute its own view of the rightness of correctness of the agency's decision for that of the agency. Traditional judicial review requires that the judiciary sustain and support the administrative agency's decision regardless of whether or not the reviewing Court believes it would have reached the same decision if it had been given initial decisional responsibility for the decision. See, *Schwartz, Administrative Law*, § 10.8 2d ed. (1984); *Cella, Admin. Law and Practice*, § 1641 (1986).

The plaintiffs contend that their legal rights were violated by the Board in the following principal ways: (1) They contend that the Board did not provide the plaintiffs with adequate notice of the list of signatures which were being challenged by the Mayor; (2) the Board erroneously relied upon an affidavit of handwriting expert Barbara Harding; and (3) the Board improperly employed a "contamination theory" analysis to justify exclusion of the petition.

While the regulations do require that the names the objector seeks to challenge and the basis for each challenge be provided to the respondent three days before the start of the hearing (see [801 CMR 1.01\(8\)](#), as amended by [950 CMR 59.03\(18\)](#)) and while it is true that the signatures challenged by the Mayor were contained on three lists, of which only the first was provided to the plaintiffs before the start of the hearing, the Board delayed receiving evidence as to the petition sheets in question until plaintiffs' counsel had been provided three days to review them. As the purpose of the notice requirement of [801 CMR 1.01\(8\)](#) is to provide the proponents adequate time to study them and to develop a position as to their validity, they were not harmed by this departure from the rules. While a technical violation of the regulation, this procedure deprived neither party of due process by denying a reasonable opportunity, under the circumstances, to present or adequately oppose the evidence. [\[FN7\]](#)

[FN7](#). As noted above, the Mayor had been required to file line-by-line objections to the petition, which contained thousands of signatures, within only forty-eight hours, whereas the plaintiffs were af-

forded seventy-two hours to respond.

At the hearing, the Board received the testimony of a handwriting expert, Barbara Harding ("Harding"), who testified that she compared the signatures on the petition with the corresponding signatures on each voter's registration card, and concluded that 1,772 signatures on the petition were of questionable authenticity. Harding also described for the Board the method she used to determine, in each instance, the authenticity of signatures, thereby providing the Board members, as well as the petitioners, a basis for making their own comparisons. [\[FN8\]](#)

[FN8](#). Plaintiffs question the sufficiency of Harding's methodology, noting that she had spent only a few seconds examining each signature on the petition. But no rebuttal testimony was offered to indicate it would take a handwriting expert more than a few seconds to compare each signature on the petition with the corresponding signature on the registration card to be able to reach a conclusion as to its validity. Harding's credibility was a matter for the Board to decide, and they decided to credit her testimony.

Plaintiffs also sought to discredit Harding by themselves introducing, at the hearing, exhibit no. 23, an October 12, 1994, letter from Harding to the Mayor, wherein she had stated that she questioned the authenticity of 1,772 signatures. Under cross-examination, she testified that she wished to confirm her opinion by further examining the signatures, by comparing the original documents rather than xerox copies. The Mayor then offered, later in the hearing, an affidavit from Harding which confirmed, after a comparison of the original documents rather than just of copies, her earlier opinion (first stated in her October 12th letter) that at least 1,772 signatures were invalid. While the applicable regulations do provide that affidavits are not to be used except for "good cause," the time constraints placed upon the Board could well be found to justify the acceptance of her affidavit, in view of plaintiffs' earlier opportunity to cross-examine her on her substantially similar letter, which had already been introduced, at plaintiffs' request, at the hearing. In any event, the acceptance of the affidavit was, at worst, harmless error. As the plaintiffs themselves had introduced

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evidence of Harding's opinion letter with respect to the invalidity of the 1,772 signatures, and had been provided an opportunity to cross-examine her thereon, plaintiffs were not prejudiced by the Board's consideration of this confirmatory affidavit, regardless of whether there was "good cause" for its submission.

\*5 Plaintiffs further claim that the Board erred when it relied on the so-called "contamination theory" to reject the entire recall petition. In addition to Harding's testimony regarding the questionable 1,772 signatures, however, there was testimony regarding the use of forged signatures of deceased voters, the placement of voters' signatures on the petition without prior permission, the misleading of voters as to the purpose of the petition, the obtaining of signatures on forms on which the purpose of the petition did not appear, the misleading of newly-registered voters to believe that signing the petition was part of the registration process, and the curious fact that five hundred of the seven hundred newly-registered voters signed the petition. [FN9] In addition, there was evidence that the names of fictitious or non-existent persons were listed, wrong addresses for voters were used, and the names of some voters were misspelled on the petition. Whether or not all of this comprised sufficient evidence for the Board to conclude, as some members apparently did, that there was pervasive fraud sufficient to invalidate the entire petition, see, e.g. *Hebert v. Ballot Law Commission*, 10 Mass.App.Ct. 275 (1980), there was substantial evidence upon which the Board majority could reasonably conclude, as it did, that there were insufficient valid signatures to require a recall election; i.e. that at least 976 of the signatures were invalid.

[FN9] There was testimony that persons who were being newly registered during the petition drive were also asked to sign a recall petition sheet without being apprised of its purpose.

As noted above, under the standard of review of the Board's decision under *M.G.L.c. 30A, § 14(7)*, a Court is to be highly deferential to an administrative Board on questions of fact and reasonable inferences which may be drawn therefrom. See *Flint v. Commissioner of Public Welfare*, 412 Mass. 416 (1992). The Court's role is merely to insure that the Board reasonably complied with the legal require-

ments of fair procedure and of the Lawrence City Charter and other applicable laws. See *Chicopee Co-op Bank v. Board of Bank Incorporation*, 347 Mass. 744 (1964). The Court finds that the Board, under the circumstances and in the limited time it had available, dealt as fairly as it could with the difficult and emotion-provoking issues thrust upon it, and that the Board's decision not to certify the mayoral recall petition was supported by substantial evidence, was not contrary to law, and was not arbitrary or capricious. [FN10]

[FN10] Under the time constraints imposed by the statute and the Court, the Board obviously could not fully litigate the matter by calling each of the 1,772 challenged signatures to testify--a process which would have required weeks of testimony and cost over \$50,000 in service fees alone.

Finally, plaintiffs have challenged the impartiality of one or more of the Board members and sought their disqualification. The record, however, contains no concrete, substantial evidence of any conflict of interest sufficient to have required their disqualification. In sum, the Board presumed that the Mayor had the burden of proof to rebut the presumption of regularity created by the Board's initial certification. *Four Thousand, Five Hundred Sixty-eight Registered Voters of Worcester v. City Clerk of Worcester*, 392 Mass. 424 (1984) The Mayor here satisfied that burden. [FN11]

[FN11] In *McCarthy v. Secretary of the Commonwealth*, 371 Mass. 667 (1977), the Supreme Judicial Court held that the severe time constraints on an independent candidate for filing original nomination papers and the principal objective of the election laws to ensure that the public will may be expressed through the electoral process, by permitting access by a candidate to the ballot, require that the burden of proof to challenge signatures on an original nomination petition be placed on the objector to the signatures. In a petition for a recall election, however, the shoe is on the other foot. The public's will has been expressed, through a general election, and in a manner which can be expected to be more reliably reflected than by the results of a special "recall" election, where the electoral turn-out may be

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small. In a recall petition, moreover, the unreasonable time constraints for access to the ballot, which the SJC was concerned about in *McCarthy*, are not placed upon the petitioner, but rather upon the duly-elected official, who must object and provide the grounds for objection to each challenged signature *within forty-eight hours* and prove the invalidity of each signature at a hearing which must be completed within an *additional fourteen days*. In these circumstances, one may doubt whether the appellate courts of the Commonwealth would impose the same burden of proof on a duly-elected official to establish the invalidity of recall signatures as has been placed upon those objecting to signatures on an original nomination petition. Rather, the appellate courts might well conclude that the "expression of the public will" by way of a general election and the right of access by a candidate to the ballot should be safeguarded by requiring those seeking a recall election to prove the validity of challenged signatures. In any event, the Board did apply the *McCarthy* standard and found, on substantial evidence, that the requisite number of signatures were shown to be invalid.

#### ORDER

\*6 Accordingly, the Court enters judgment for the defendants, and plaintiffs' complaint is dismissed with prejudice.

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**(Cite as: 110 Ohio St.3d 471, 854 N.E.2d 472)**



Supreme Court of Ohio.  
 TAFT, Appellee,  
 v.  
 CUYAHOGA COUNTY BOARD OF ELECTIONS  
 et al., Appellees; Bain, Appellant.  
**No. 2006-0477.**

Submitted Aug. 8, 2006.  
 Decided Aug. 16, 2006.

**Background:** Following a tie in official canvass of votes for office of city council, candidate who had been declared winner by coin flip filed election-contest petition challenging first recount of votes, which resulted in determination that candidate's opponent had won the election by one vote. The Court of Common Pleas, Cuyahoga County, ordered a supervised recount and entered judgment holding that election resulted in a tie vote and ordering county election board to determine by lot which candidate was to be declared elected. Based on prior coin flip, the first candidate was again declared winner. Opponent appealed.

**Holdings:** The Supreme Court held that:

- (1) candidate's cash bond substantially complied with statutory requirements;
- (2) candidate was not required to establish election irregularity in order to obtain recount;
- (3) recount of only one precinct did not violate voters' equal protection rights;
- (4) candidate was not equitably estopped from challenging recount procedure;
- (5) trial court was required to hold evidentiary hearing on issue of challenged ballot; and
- (6) board was required to determine winner by lot after any finding by trial court that election resulted in a tie.

Reversed and remanded.

West Headnotes

**[1] Elections** **308**

**144k308 Most Cited Cases**

Cash bond filed by candidate with his election-contest petition substantially complied with statutory requirements for bond filed by contestor, although statute specified that surety bond was to be filed with petition; clerk of court approved form and amount of bond, bond obligated candidate to pay costs incurred by him if he lost the contest, and opponent did not allege or demonstrate prejudice caused by bond posted by the contestor. *R.C. § 3515.09.*

**[2] Elections** **269**

**144k269 Most Cited Cases**

In general, the procedure prescribed by statute to bring an election contest within the jurisdiction of a judge must be strictly followed.

**[3] Elections** **308**

**144k308 Most Cited Cases**

If a contestor fails to comply with the statutory bond requirement for election contests, the court is without jurisdiction to hear or determine the controversy. *R.C. § 3515.09.*

**[4] Elections** **299(3)**

**144k299(3) Most Cited Cases**

Candidate was not required to establish, by clear and convincing evidence, presence of an election irregularity in order to obtain a recount, as a part of election contest; whether election contest involved a recount of ballots was in trial court's discretion, and court had sufficient evidence to order limited recount, given that candidate's verified petition and county election board's investigative report demonstrated that precinct being recounted was where the alleged election irregularity occurred. *R.C. § 3515.09.*

**[5] Elections** **295(1)**

**144k295(1) Most Cited Cases**

In order to prevail in his election contest, candidate had to establish by clear and convincing evidence that one or more election irregularities occurred and

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that the irregularity or irregularities affected enough votes to change or make uncertain the election result.

**[6] Elections** 🔑299(1)

[144k299\(1\) Most Cited Cases](#)

Statute giving trial court discretion to determine if election contest involves a recount of ballots is a tool that, in the proper, limited circumstances, can be used by a contestor to advance his or her claim by verifying the presence of irregularities and their impact on the election. [R.C. § 3515.13](#).

**[7] Constitutional Law** 🔑3652

[92k3652 Most Cited Cases](#)

(Formerly 92k225.2(6))

**[7] Elections** 🔑299(2)

[144k299\(2\) Most Cited Cases](#)

Trial court did not violate voters' constitutional right to equal protection when it ordered a recount of only one precinct in city council election contest; there was no allegation or evidence of different standards being applied by election officials to accept or reject contested ballots, and there was no evidence that any other precincts had experienced the same counting problem as the precinct that was subject of the recount. [U.S.C.A. Const.Amend. 14](#).

**[8] Estoppel** 🔑92(1)

[156k92\(1\) Most Cited Cases](#)

Candidate was not equitably estopped from challenging recount procedure that resulted in a finding that his opponent for city council seat won election by one vote on the basis of his original acquiescence in that procedure; candidate claimed that board improperly counted single ballot that contained a chad hanging by one corner, such irregularity was not plain on face of the unpunched ballots, and candidate was not aware of the potential defect until after the count election board's administrative review and investigative report.

**[9] Elections** 🔑300

[144k300 Most Cited Cases](#)

**[9] Judgment** 🔑181(15.1)

[228k181\(15.1\) Most Cited Cases](#)

Genuine issue of material fact regarding whether ballot containing hanging chad should have been counted for candidate contesting results of election for city council precluded summary judgment in favor of contestor in election contest, and thus trial court was required to hold evidentiary hearing on issue of the challenged ballot.

**[10] Elections** 🔑290.1

[144k290.1 Most Cited Cases](#)

The election-contest statutes envision the opportunity to submit testimony. [R.C. §§ 3515.11, 3515.12](#).

**[11] Elections** 🔑290.1

[144k290.1 Most Cited Cases](#)

Contestees in election contests have the right to present evidence in rebuttal.

**[12] Elections** 🔑299(4)

[144k299\(4\) Most Cited Cases](#)

County election board was required to determine by lot the winner of election for city council seat after the trial court determined that election had resulted in a tie, rather than relying on coin flip made before first recount of the votes, under statute setting forth the procedures to be followed upon judgment of the court in an election contest. [R.C. § 3515.14](#).

**\*\*473** [Kenneth J. Fisher Co., L.P.A., and Kenneth J. Fisher](#), Cleveland, for appellee Taft.

[Buckley King, L.P.A., and Richard M. Bain](#), Cleveland; [McCarthy, Lebit, Crystal & Liffman Co., L.P.A., and Robert T. Glickman](#), Cleveland, for appellant.

[William D. Mason](#), Cuyahoga County Prosecuting Attorney, and [Reno J. Oradini Jr.](#), Assistant Prosecuting Attorney, for appellees Cuyahoga County Board of Elections and members.

PER CURIAM.

**\*471** {¶ 1} This is an appeal from a judgment declaring a tie vote in an election contest and certifying the ruling to a board of elections. Because the

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common pleas **\*\*474** court erred by failing to conduct an evidentiary hearing, we reverse the judgment and remand the cause to the common pleas court for further proceedings.

#### November 8, 2005 Election

{¶ 2} On November 8, 2005, an election was held for four at-large council seats in the city of Pepper Pike, Ohio. Six candidates ran for the four council seats. On November 30, 2005, appellee Cuyahoga County Board of Elections certified that appellee Frederick I. Taft, an incumbent council member, and appellant, Richard M. Bain, who are both attorneys, had each received 1,124 votes, which resulted in a tie for the fourth council seat. Pursuant to [R.C. 3505.33](#), [FN1] the chairman of the board of elections flipped a coin to break the tie and declared Taft the winner.

**FN1.** {¶ a} [R.C. 3505.33](#) provides:

{¶ b} "When the board of elections has completed the canvass of the election returns from the precincts in its county, in which electors were entitled to vote at any general or special election, it shall determine and declare the results of the elections determined by the electors of such county or of a district or subdivision within such county. If more than the number of candidates to be elected to an office received the largest and an equal number of votes, such tie shall be resolved by lot by the chairman of the board in the presence of a majority of the members of the board."

#### **\*472** First Recount

{¶ 3} On December 8, 2005, the board of elections conducted an automatic recount of the council race in all precincts of Pepper Pike pursuant to [R.C. 3515.011](#). [R.C. 3515.011](#) requires an automatic recount by the appropriate board of elections if the margin between the votes for the declared winning candidate and those for the defeated candidate in a municipal election is less than one-half of one percent of the total vote. The board counted all precincts by automatic tabulation equipment, and, in

addition, hand-counted the ballots from Precinct H. The hand count and the machine count for Precinct H matched the official canvass results. The recount resulted in Taft's vote total being reduced by one vote and Bain defeating Taft by that single vote. Both Taft and Bain were present to witness the recount. After comparing the original official and recount results, the board found that Taft's vote total had decreased by one in Precinct D.

{¶ 4} On December 12, 2005, the board of elections certified Bain as the winner of the election based upon the recount of the November 8, 2005 election.

#### Administrative Investigation

{¶ 5} On December 16, 2005, the board of elections investigated the election by examining all of the ballots cast in Precinct D. Taft and Bain were both present during the ballot examination. The board determined that one of the ballots contained a chad hanging by one corner. See [R.C. 3506.16\(A\)\(1\)](#) (" 'Chad' means the small piece of paper or cardboard produced from a punch card ballot when a voter pierces a hole in a perforated, designated position on the ballot with a marking device to record a voter's candidate, question, or issue choice"). Pursuant to the county prosecutor's advice, however, the board decided that it could not change the certified election result.

#### Election Contest and Second Recount

{¶ 6} On December 21, 2005, Taft filed an election-contest petition in the Cuyahoga County Court of Common Pleas challenging the board's December 12 recount certification of Bain as the winner of the fourth Pepper Pike Council seat. Taft requested that the court order a hand recount of Precinct D in Pepper Pike with all chads hanging by two or fewer corners removed, and further requested that if he **\*\*475** received the additional vote in the court-supervised recount, he be declared the winner of the election for the Pepper Pike Council seat, with a four-year term commencing January 1, 2006. Taft claimed that an election irregularity had occurred when the board of elections failed to remove the

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hanging chad from the questioned ballot from Precinct D and thereby failed to correctly count the votes for that precinct, which resulted in Taft losing the election to Bain by one vote. Taft attached the board's December 19 investigation report to his \*473 verified election-contest petition, and named Bain, the elections board, its director, its chairman, and its board members as contestees.

{¶ 7} On January 10, 2006, the board and its director, chairman, and members answered the petition and filed a motion to dismiss it. Bain submitted an answer and a motion to dismiss the petition for failure to post an adequate bond. The common pleas court denied Bain's dismissal motion.

{¶ 8} Bain also filed a motion for summary judgment, attaching an affidavit and several exhibits. In his affidavit, Bain specified that when he first observed the ballot in question during the board's administrative review of Precinct D, the chad was not attached by fewer than three corners of the ballot, but that the board's handling of the ballot during its investigation altered its condition.

{¶ 9} On February 23, 2006, the common pleas court ordered the board of elections to deliver the ballots from the November 8, 2005 election under seal for a March 1, 2006 recount in the courtroom to be supervised by two master commissioners--one from each political party--appointed by the court. At the March 1, 2006 recount, the master commissioners determined that the pertinent ballot from Precinct D contained a hanging chad detached at three of its four corners and that the ballot should be counted for Taft, resulting in a 1,124 to 1,124 tie between Taft and Bain. When Bain requested an evidentiary hearing, the common pleas court rejected his request and emphasized that it was "not going to have any evidence presented."

{¶ 10} On March 2, 2006, the common pleas court entered a judgment in which it held, "Pursuant to the hand count of Precinct D of the Village of Pepper Pike, Ohio and the report of the Master Commissioners, the court finds that the election resulted

in a tie vote and this ruling is thereby certified to the Cuyahoga County Board of Elections to publicly determine by lot which one of the persons should be declared elected." Instead of conducting a new coin flip, the board of elections relied on its chairman's previous coin flip and declared Taft the winner. We denied Bain's emergency motion for an immediate stay of the common pleas court's March 2, 2006 judgment. *Taft v. Cuyahoga Cty. Bd. of Elections*, 108 Ohio St.3d 1500, 2006-Ohio-1275, 844 N.E.2d 354; see, also, R.C. 3515.15 ("The person against whom judgment is rendered in a contest of election may appeal on questions of law, within twenty days, to the supreme court; *but such appeal shall not supersede the execution of the judgment of the court* " [emphasis added] ).

{¶ 11} This cause is now before us upon Bain's appeal as of right from the common pleas court's judgment.

{¶ 12} Bain asserts that the common pleas court erred in several particulars in the election contest. These claims are next discussed.

**\*474 R.C. 3515.09: Adequate Bond**

[1] {¶ 13} Bain asserts that the common pleas court lacked jurisdiction over Taft's election contest because Taft failed to file an adequate bond. R.C. 3515.09 provides that an election-contest petition \*\*476 "shall be accompanied by a bond with surety to be approved by the clerk of the appropriate court in a sum sufficient, as determined by him, to pay all the costs of the contest."

{¶ 14} Taft contacted the Clerk of the Cuyahoga County Court of Common Pleas to determine the bond that he would be required to post to contest the election pursuant to R.C. 3515.09. After a review of past practice, the chief deputy clerk determined that a \$100 bond was adequate and in full compliance with the statutory requirements. Taft then completed the following bond form and filed it with his election-contest petition in accordance with instructions from the clerk's office:

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{¶ 15} "We bind ourselves to the said Defendant Cuyahoga County Board of Elections in the sum of \$100.00 Dollars, that the said Plaintiff Frederick I. Taft shall pay the costs incurred by Frederick Taft by reason of losing this action if it be finally decided that the said action ought not to have been granted."

{¶ 16} Bain claims that because R.C. 3515.09 must be strictly construed, Taft's bond did not comply with the statutory requirement because the bond was a cash bond instead of a surety bond, the bond did not obligate Taft to pay all the costs of the contest, and the bond specified that Taft bound himself only to the board of elections.

[2][3] {¶ 17} Bain is correct that, in general, "[t]he procedure prescribed by statute to bring an election contest within the jurisdiction of a judge must be strictly followed." *McCall v. E. Local School Dist. Bd. of Edn.* (1959), 169 Ohio St. 50, 8 O.O.2d 11, 157 N.E.2d 351, paragraph one of the syllabus; see, also, *Maschari v. Tone*, 103 Ohio St.3d 411, 2004-Ohio-5342, 816 N.E.2d 579, ¶ 10, quoting *Hitt v. Tressler* (1983), 4 Ohio St.3d 174, 175, 4 OBR 453, 447 N.E.2d 1299 ("Because 'election contests are special in nature, the procedure prescribed by statute, to invoke a court's jurisdiction to hear such an action, must be strictly followed' "). If the contestor fails to comply with the bond requirement of R.C. 3515.09, "the court is without jurisdiction to hear or determine the controversy." *In re Contest of Special Election in Village of N. Baltimore* (1940), 136 Ohio St. 279, 16 O.O. 406, 25 N.E.2d 458, paragraph two of the syllabus.

{¶ 18} Nevertheless, we have adopted and applied a substantial-compliance standard for the statutory bond requirement. See, e.g., *McClintock v. Sweitzer* (1941), 138 Ohio St. 324, 325, 20 O.O. 383, 34 N.E.2d 781 ("We hold that there was a substantial compliance with [the statutory bond requirement for election contests], and that no error prejudicial to appellee resulted"); see, also, \*475 *Williams v. O'Neill* (1944), 142 Ohio St. 467, 475-476, 27 O.O. 400, 52 N.E.2d 858 (Hart, J., dissenting)

(substantial compliance, when no prejudice is shown, is sufficient to satisfy bond requirement of election-contest statute); *Hitt*, 4 Ohio St.3d at 175, 4 OBR 453, 447 N.E.2d 1299 ("We disagree with the result reached by the *Williams v. O'Neill* majority and adopt the reasoning set forth in Judge Hart's dissent").

{¶ 19} In applying this test here, Taft's bond, which was approved in form and amount by the clerk of the common pleas court, substantially complied with R.C. 3515.09. The fact that the bond was in cash did not render it defective. See *Monnette v. Malone* (1979), 60 Ohio St.2d 5, 5-6, 14 O.O.3d 2, 395 N.E.2d 493 (\$500 cash accepted by clerk's office as bond for court costs complied with R.C. 3515.09). In addition, although the language used by Taft could have been clearer, the bond obligates him to pay "the costs incurred" by him if he loses. Costs incurred by Taft if he \*\*477 loses could reasonably be construed to mean that Taft will pay all costs of the contest ordered by the court if he loses. See, e.g., *Hannah v. Roche* (1941), 138 Ohio St. 449, 454, 20 O.O. 575, 35 N.E.2d 838 (bond stating that "if the said contestors shall pay all the costs of the contest if same be adjudged against them, then this obligation to be void" satisfied statutory bond requirement for election contest because language could be construed to mean that bond was for the payment of all costs of the contest if the contestors lose); see, also, *Williams*, 142 Ohio St. at 475-476, 27 O.O. 400, 52 N.E.2d 858 (Hart, J., dissenting), noting that in *McClintock*, 138 Ohio St. 324, 20 O.O. 383, 34 N.E.2d 781, the court approved a bond in an election contest in which the bond was conditioned "to pay the costs which may be taxed against the plaintiff in such action." Nor would the mere fact that Taft's bond specifies that he bound himself only to the board of elections alter this conclusion, since Taft is willing to pay all costs of the contest, and the clerk approved his cash bond as complying with R.C. 3515.09. There is no allegation or evidence of prejudice to Bain because of the bond posted by Taft and approved by the clerk.

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{¶ 20} In this regard, Bain's reliance on *N. Baltimore*, 136 Ohio St. 279, 16 O.O. 406, 25 N.E.2d 458, is misplaced because in that case, there was no evidence that the clerk ever approved the initial submission of cash in lieu of a bond, and subsequent bonds filed by the contestor did not accompany the original petition, as required by statute.

{¶ 21} Based on the foregoing, the common pleas court did not err in denying Bain's motion to dismiss the election-contest petition based upon a failure to comply with the bond requirement of R.C. 3515.09. The court reasonably concluded that Taft had substantially complied with R.C. 3515.09 and that Bain had suffered no prejudice.

#### Recount Order--Evidentiary Standard

[4] {¶ 22} Bain next asserts that the court of common pleas erred in ordering a recount of Precinct D as part of the election contest because the court first had to \*476 determine that there was clear and convincing evidence of an election irregularity.

[5] {¶ 23} To be sure, in order to prevail in his election contest, Taft had to establish by clear and convincing evidence that one or more election irregularities occurred and that the irregularity or irregularities affected enough votes to change or make uncertain the election result. *Harmon v. Baldwin*, 107 Ohio St.3d 232, 2005-Ohio-6264, 837 N.E.2d 1196, ¶ 27.

{¶ 24} But we have never held that either or both of these requirements is a prerequisite to obtaining a recount in an election contest pursuant to R.C. 3515.13, which provides, "If any contest of election involves a recount of the ballots in any precincts, the court shall immediately order the ballots of the precincts in which the recount is demanded to be sent to the court in such manner as the court designates, and such court may appoint two master commissioners of opposite political parties to supervise the making of the recount." The statute contains no condition for a recount and instead leaves it within the court's discretion to determine if the election contest involves a recount of ballots.

[6] {¶ 25} Consequently, R.C. 3515.13 is simply a tool that--in the proper, limited circumstances--can be used by a contestor to advance his or her claim by verifying the presence of irregularities and their impact on the election. See *In re Election of Nov. 6, 1990 for Office of Atty. Gen. of Ohio* (1991), 58 Ohio St.3d 103, 116, 569 N.E.2d 447 ("contestor could have verified \*\*478 his charges [of irregularities] by asking for a court-supervised recount under R.C. 3515.13 as part of this election contest"); *Harmon*, 107 Ohio St.3d 232, 2005-Ohio-6264, 837 N.E.2d 1196, ¶ 34 ("Nor did Harmon attempt to invoke the recount procedure in R.C. 3515.13" to prove his election-contest claim).

{¶ 26} Finally, the court had sufficient evidence before it to order the limited recount of Precinct D under R.C. 3515.13. According to Taft's verified petition and the board's investigative report attached to the petition, Precinct D is where the alleged election irregularity occurred.

{¶ 27} Therefore, the common pleas court did not err in granting Taft's request for a court-supervised recount of Precinct D in accordance with R.C. 3515.13.

#### Recount Order: Equal Protection

[7] {¶ 28} Bain further claims that the common pleas court erred in ordering a recount of only one precinct in Pepper Pike because the order violated the voters' constitutional right of equal protection. Bain cites *Bush v. Gore* (2000), 531 U.S. 98, 121 S.Ct. 525, 148 L.Ed.2d 388, in support of his proposition.

{¶ 29} Bain is mistaken. In *Bush*, the United States Supreme Court simply held that court-ordered manual recounts for the 2000 presidential election \*477 violated the voters' right to equal protection because "standards for accepting or rejecting contested ballots might vary not only from county to county but indeed within a single county from one recount team to another." *Id.* at 106, 121 S.Ct. 525, 148 L.Ed.2d 388.

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{¶ 30} Conversely, in this case, there is no allegation or evidence of different standards being applied by election officials to accept or reject contested ballots. Instead, it appears that election officials applied the same statutory standard. See, e.g., [R.C. 3515.04](#) ("If a county used punch card ballots and if a chad is attached to a punch card ballot by three or four corners, the voter shall be deemed by the board not to have recorded a candidate, question, or issue choice at the particular position on the ballot, and a vote shall not be counted at that particular position on the ballot in the recount").

{¶ 31} The court did not need to order a recount of all of the precincts in Pepper Pike. The election contest was specifically limited to one precinct, and there was no evidence that any other precincts had experienced the same counting problem as Precinct D's. Therefore, the common pleas court did not, through arbitrary and disparate treatment, "value one person's vote over that of another." [Bush](#), 531 U.S. at 104-105, 121 S.Ct. 525, 148 L.Ed.2d 388.

#### Equitable Estoppel

[8] {¶ 32} Bain contends that the common pleas court erred in holding that the election ended in a tie vote, because Taft was estopped from challenging the initial recount procedure that had resulted in the board's certification of Bain as the victor by virtue of Taft's original acquiescence in that procedure.

{¶ 33} "In cases in which we have found equitable estoppel in an election contest, irregularities were plain on the face of the ballot, and the contestors were aware of the alleged defects prior to the election." [In re Contested Election of Nov. 2, 1993](#) (1995), 72 Ohio St.3d 411, 413, 650 N.E.2d 859.

{¶ 34} Taft is not estopped from instituting his election contest. His claimed election irregularity--the board's improper counting of a single ballot from Precinct D during its initial recount--was not plain on the face of the unpunched ballots, and Taft was not aware of the potential defect until after the board's December 16, 2005 administrative review

and December 19, 2005 investigative report. In addition, this is \*\*479 not a case where he should have been aware of the single ballot in question before the board's investigation. Cf. [Maschari](#), 103 Ohio St.3d 411, 2004-Ohio-5342, 816 N.E.2d 579, ¶ 34-36 (contestor estopped from contesting election based on board's no-challenge policy for cross-over voters because she should have been aware of the policy and had actively solicited cross-over voters).

#### \*478 Denial of Right to Evidentiary Hearing

[9] {¶ 35} During the March 1, 2006 supervised recount, the common pleas court specified that it was not conducting an evidentiary hearing and denied Bain's request for a hearing at which he could cross-examine witnesses.

{¶ 36} [R.C. 3515.11](#) provides that "[t]he proceedings at the trial of the contest of an election shall be similar to those in judicial proceedings, in so far as practicable." Judicial proceedings manifestly permit the opportunity to present evidence.

[10][11] {¶ 37} Election-contest cases are no different. "[T]he election-contest statutes envision the opportunity to submit testimony." See [Crane v. Perry Cty. Bd. of Elections](#), 107 Ohio St.3d 287, 2005-Ohio-6509, 839 N.E.2d 14, ¶ 31, citing [R.C. 3515.12](#); [In re Election on the Issue of Zoning the Southeasterly Section of Swanton Twp.](#) (1982), 2 Ohio St.3d 37, 39, 2 OBR 581, 442 N.E.2d 758, fn. 1 ("There is no question that contestors-appellants had the ability to call as witnesses any voter ineligible to vote on the zoning issue who might have done so [under [R.C. 3515.12](#)]"). "Contestees in election contests have the right to present evidence in rebuttal." [Crane](#), 107 Ohio St.3d 287, 2005-Ohio-6509, 839 N.E.2d 14, ¶ 29.

{¶ 38} The common pleas court appears to have based its decision solely on the parties' pleadings and the court-supervised recount. In effect, the court granted summary judgment in favor of Taft. The court's judgment, however, was improper because Taft never filed a motion for summary judgment.

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ment, and there remains a genuine issue of material fact. See, e.g., *Marshall v. Aaron* (1984), 15 Ohio St.3d 48, 15 OBR 145, 472 N.E.2d 335, syllabus ("Civ.R. 56 does not authorize courts to enter summary judgment in favor of a non-moving party"); *State ex rel. J.J. Detweiler Ents., Inc. v. Warner*, 103 Ohio St.3d 99, 2004-Ohio-4659, 814 N.E.2d 482, ¶ 13-16 (exception to general rule prohibiting summary judgment in favor of a nonmoving party does not apply when genuine issues of material fact exist). In Bain's affidavit attached to his summary-judgment motion, he states that during the board's December 16, 2005 administrative review of the disputed ballot, he observed that the chad was attached by at least three corners to the ballot and that the flexing of the ballot by election officials altered its condition. This evidence is sufficient to raise a genuine issue of material fact about whether the ballot should properly be counted for Taft.

{¶ 39} Therefore, the common pleas court erred in failing to conduct an evidentiary hearing in the election contest.

#### Board Determination

[12] {¶ 40} R.C. 3515.14 specifies that "[i]f the court decides that the election resulted in a tie vote, such decision shall be certified to the board of elections \*479 having jurisdiction and said board shall publicly determine by lot which of such persons shall be declared elected."

{¶ 41} The plain language of this provision sets forth the following chronological sequence: (1) the court determines that the election results in a tie vote, (2) the court then certifies its decision to the board of elections, and (3) the board then publicly determines by lot which of the persons shall be declared elected. R.C. 3515.14 thus contemplates that the board's determination by lot be made *after* the \*\*480 court's election-contest decision that the election resulted in a tie vote, and not *before* the election contest. Instead, the board erroneously relied on its chairman's previous coin flip, which was made pursuant to R.C. 3505.33 before the election contest, and was subsequently invalidated by the

board's certification of Bain as the victor after the automatic recount required by R.C. 3515.011. In addition, because the election-contest result differed from the final, precontest decision of the board, the board of elections was not free to use its chairman's previous coin flip. Cf. *Orewiler v. Fisher* (1938), 133 Ohio St. 608, 11 O.O. 315, 15 N.E.2d 132 (where original declaration of tie vote and determination of winner by lot was not changed by either the recount or the election contest, the board of elections could rely on the original, pre-contest lot determination). Therefore, the board erred in relying on its previous coin flip to determine the winner. If, following remand, the court of common pleas conducts an evidentiary hearing and concludes that a tie vote occurred, the board must then conduct a new determination by lot.

#### Conclusion

{¶ 42} The common pleas court erred in determining the election contest without first conducting an evidentiary hearing. Based on the foregoing, we reverse the judgment of the common pleas court and remand the cause for further proceedings consistent with this opinion.

Judgment reversed and cause remanded.

MOYER, C.J., RESNICK, PFEIFER, LUNDBERG STRATTON, O'CONNOR, O'DONNELL and LANZINGER, JJ., concur.

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 (Cite as: 223 Ga. 36, 153 S.E.2d 437)

**C**

Supreme Court of Georgia.  
 Horace E. TATE  
 v.  
 Robert S. MORLEY.  
 No. 23817.

Jan. 5, 1967.  
 Rehearing Denied Jan. 19, 1967.

Plaintiff, alleging himself to be a citizen, voter and taxpayer of city brought quo warranto proceedings in the Superior Court of Fulton County, Sam Phillips McKenzie, J., to remove defendant from membership on board of education of city. The Court overruled a general demurrer to the petition and after a hearing rendered a judgment ousting defendant from his office, and appeal was taken. The Supreme Court, Candler, P.J., held that after member of board of education had been elected in a properly conducted municipal election, his election could not be challenged on ground that his nomination was contrary to rules and regulations promulgated by city executive committee for holding primary elections.

Reversed.

West Headnotes

**[1] Elections**  **151**

[144k151 Most Cited Cases](#)

Objections to irregularities in nomination of a candidate should be taken prior to election and it is too late to object after nominee's name has been placed on the ballot and he has been elected to office.

**[2] Elections**  **151**

[144k151 Most Cited Cases](#)

Candidate's election cannot be impeached on ground that statutory requirements regarding nominations were not complied with in his case or that his nomination was procured by unlawful means.

**[3] Elections**  **266.5**

[144k266.5 Most Cited Cases](#)

(Formerly 144k2661/2)

Election in which voters have fully, fairly, and honestly expressed their will is not invalid because the certificate of

nomination of a successful candidate is defective through an omission of some detail.

**[4] Elections**  **151**

[144k151 Most Cited Cases](#)

Objections relating to nomination must be timely made, otherwise they must be regarded as waived.

**[5] Elections**  **151**

[144k151 Most Cited Cases](#)

It is too late to make objections relating to nomination after nominee's name has been placed on the ballot and he has been elected to office.

**[6] Schools**  **53(1)**

[345k53\(1\) Most Cited Cases](#)

After member of board of education had been elected in a properly conducted municipal election, his election could not be challenged on ground that his nomination was contrary to rules and regulations promulgated by city executive committee for holding primary elections. Laws 1933, p. 226.

**\*\*438 \*39** William H. Alexander, Howard Moore, Jr., Atlanta, for appellant.

William H. Major, Edenfield, Heyman & Sizemore, Atlanta, for appellee.

Syllabus Opinion by the Court

**\*36** CANDLER, Presiding Justice.

Robert S. Morley, alleging himself to be a citizen, voter and taxpayer of the City of Atlanta brought quo warranto proceedings in the Superior Court of Fulton County against Dr. Horace E. Tate. His petition seeks to remove Dr. Tate from membership on the board **\*37** of education of the City of Atlanta representing the 7th Ward. It does not question his eligibility to hold such office. It alleges that he was elected to such office by the voters of the City of Atlanta in a general election which the city regularly held on the first Wednesday in December, 1965, for city officers, including the office Dr. Tate is holding. Petitioner predicates his right to the relief sought solely on the ground that the Atlanta City Executive Committee, a political organization or association created by Ga.L. 1933, p. 226, and charged with the duty of

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conducting primary elections for the selection of candidates for City of Atlanta public offices, including members of its board of education, permitted respondent to qualify as a candidate in the city's primary election of September 8, 1965, without paying an entrance fee and after the time for qualifying under its rules and regulations had passed, all of which was done by such executive committee pursuant to a ruling which Judge Durwood T. Pye made on August 17, 1965, in the case of *Muskett v. Allen*-a ruling which this court reversed on January 11, 1966. See [Allen v. Muskett](#), 221 Ga. 665, 146 S.E.2d 782. The court \*\*439 overruled a general demurrer to the petition and after a hearing rendered a judgment ousting respondent from his office. From those judgments the respondent gave notice of appeal to this court. Held:

[\[1\]\[2\]\[3\]\[4\]\[5\]\[6\]](#) 1. We think the petition was subject to general demurrer. It shows that Dr. Tate was elected to the office he holds in a general election which the city held at the proper time and place for the purpose of electing city officers, including a member of its board of education from the 7th Ward, and the petition makes no attack on the qualification of Dr. Tate to hold the office for which he was elected nor on the manner in which the general election at which he was elected was conducted. It is firmly established that objections to irregularities in the nomination of a candidate should be taken prior to election and it is too late to object after the nominee's name has been placed on the ballot and he has been elected to office; his election cannot be impeached on the ground that statutory requirements regarding nominations were not complied with in his case or that his nomination was procured by unlawful means. [29 C.J.S. Elections s 141, p. 408](#); 25 Am.Jur.2d 834, s 143. [Hooper v. Almand](#), 196 Ga. 52, 25 S.E.2d 778. In [Adair v. McElreath](#), 167 Ga. 294, 316, 145 S.E. 841, it \*38 was unanimously said: 'Furthermore, we are of the opinion that the following statement of the law upon this subject is correct: 'All provisions of the election law are mandatory if enforcement is sought before election in a direct proceeding for that purpose; but after election all should be held directory only, in support of the result, unless of a character to effect an obstruction to the free and intelligent casting of the vote, or to the ascertainment of the result, unless the provisions affect an essential element in the election, or unless it is expressly

declared by the statute that the particular act is essential to the validity of an election or that its omission renders it void. Voters finding a ticket or the names of candidates on the official ballot, are not required to determine whether they are entitled to a place thereon, but may safely rely on the action of the officers of the law, and on the presumption that they have performed their duty. And so an election in which the voters have fully, fairly, and honestly expressed their will is not invalid because the certificate of nomination of a successful candidate is defective through an omission of some detail.' 9 R.C.L. 172, 173, s 161. 'Objections relating to nomination must be timely made; otherwise they may be regarded as waived. It is too late to make them after the nominee's name has been placed on the ballot and he has been elected to office; his election can not be impeached on the ground that statutory requirements regarding nomination were not complied with in his case, or that his nomination was procured by unlawful means.' 20 C.J. 132, s 152.' The petition in this case questions only the validity of the respondent's nomination and applying the rule announced above, we hold it fails to state a cause of action for the relief sought. But even if it could be said in the circumstances of this case that Dr. Tate's nomination was contrary to the rules and regulations promulgated by the Atlanta City Executive Committee for holding primary elections, yet, where it affirmatively appears, as here, that he did in general election which the city held for the purpose of electing a person to fill the office here involved, receive a majority of the votes which the electors cast for a person to fill such office, this court would not hold that he should be ousted from the office to which he was so elected.

\*39 2. Since the petition fails to state a cause of action for the relief sought, all subsequent proceedings taken in the case are nugatory.

Judgment reversed.

All the Justices concur.

Note: The opinion in this case was prepared by Presiding Justice T. S. CANDLER \*\*440 before his retirement on December 31, 1966 and is presented to the court by Justice UNDERCOFLER with a recommendation that it be adopted.

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## H

Supreme Court of Iowa.  
Raymond TAYLOR, Keith Comley, and Vivian  
Edgerton, Appellants,  
v.  
CENTRAL CITY COMMUNITY SCHOOL DIS-  
TRICT, Appellee.  
**No. 05-1047.**

June 1, 2007.

**Background:** Voters brought action against school district seeking to reverse court decision which found that four disputed ballots in school funding special election should not be counted, which resulted in passage of funding measure. The District Court, Linn County, [Douglas S. Russell, J.](#), upheld the decision, and voters appealed.

**Holdings:** The Supreme Court, [Cady, J.](#), held that:  
(1) trial court had jurisdiction over the petition, and  
(2) ballots on which voters failed to enter any mark of any kind in the target were invalid.  
Affirmed.

### West Headnotes

#### [1] Elections 305(6)

[144k305\(6\) Most Cited Cases](#)

The standard of review in an appeal from a district court decision in an election contest is de novo.

#### [2] Elections 275

[144k275 Most Cited Cases](#)

District court had jurisdiction over voters' petition against school district that sought to reverse the decision of the election contest court regarding a school funding measure, as voters did not commence an independent action to dispute the election results but rather invoked the jurisdiction of the district court for the purpose of appealing the decision of the contest court; petition indicated voters were pursuing the matter as an appeal "pursuant to" statute providing for an appeal of contest court decisions, and in doing so asked the court to reverse

the decision of the contest court. [I.C.A. § 62.20.](#)

#### [3] Elections 269

[144k269 Most Cited Cases](#)

The right to contest an election is only conferred by statute, and contestants must strictly comply with the provisions of the statute in order to confer jurisdiction.

#### [4] Elections 180(4)

[144k180\(4\) Most Cited Cases](#)

Four disputed ballots in school funding election, on which voters failed to enter any mark of any kind in the target opposite the word "Yes" or "No" as to funding measure, were neither marked as required by the statute or as directed by the instructions on the ballot and thus were invalid and could not be counted, even though it was possible that voters intended to vote "No" on each ballot, particularly on three ballots where the voters filled in the letter "o" in the word "No" and left the oval target immediately to the left of the word "No" blank. [I.C.A. §§ 49.46, 49.92, 277.3.](#)

#### [5] Elections 186(4)

[144k186\(4\) Most Cited Cases](#)

Generally, a vote is counted in an election if the voter affixed any mark to the ballot that fairly indicates an intent to vote for a particular candidate or measure; however, this rule does not apply if the voter violates a mandatory provision of the election law in casting the ballot.

#### [6] Elections 180(1)

[144k180\(1\) Most Cited Cases](#)

The intent of a voter to vote for or against a public measure is the prevailing issue only if the voter has followed the legal requirements in marking the ballot.

#### [7] Elections 180(4)

[144k180\(4\) Most Cited Cases](#)

To be counted, a voting mark must be substantially within the target. [I.C.A. § 49.46.](#)

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**[8] Elections**  **186(4)**

[144k186\(4\) Most Cited Cases](#)

While the primary test of validity is whether the voter's intent is sufficiently shown, this intent cannot be derived from ballots that are marked inconsistently with the voting instructions provided on the ballot and the marking requirements of the statute. [I.C.A. § 49.46](#).

**[9] Elections**  **269**

[144k269 Most Cited Cases](#)

The goal in an election contest is to give effect to the venerable democratic right to vote; it is not to disenfranchise the voter.

\*[656 Wallace L. Taylor](#) of Cedar Rapids, for appellants.

[Ivan T. Webber](#) of Ahlers & Cooney, P.C., Des Moines, for appellee.

[CADY](#), Justice.

In this case we must primarily decide whether four contested ballots in a special election should be counted. The contest court and district court determined the ballots should not be counted. We affirm.

**I. Background Facts and Proceedings.**

The Central City Community School District proposed to refurbish its school building and construct a vocational education building. The plan required the issuance of general obligation bonds and a tax levy to pay for the improvements. On July 13, 2004, a special election was held to put the issue before the voters. Measure A asked the voters to authorize the board of directors of the school district to contract for indebtedness and issue general

**First Ballot**

YES



**Second Ballot**

YES

NO

**Third Ballot**

YES

NO

**Fourth Ballot**

YES

NO

\*[657](#) The recount board rejected the first ballot after finding the voter's intent was unclear, and counted the remaining three disputed ballots as

obligation bonds for the improvements in an amount not to exceed \$4,605,000. Measure B asked the voters to authorize the school board to levy a tax to pay for the bonds.

The official paper ballot asked the voters to mark their vote for each measure by filling in an oval target located to the immediate left of the words "Yes" and "No." The ballot's notice to voters, or instructions, specifically read:

(Notice to Voters: For an affirmative vote on any question upon this ballot, mark the word "YES" like this . For a negative vote, make a similar mark in the box marked "NO")

After a voter marked the paper ballot, it was mechanically scanned and counted.

An affirmative vote of sixty percent was needed for each measure to pass. [See Iowa Code § 75.1 \(2003\)](#). [\[FN1\]](#) Measure A passed by an uncontested margin. Measure B passed with 545 "Yes" votes and 362 "No" votes. The margin in favor of the measure was 60.09%.

[FN1](#). All citations or references to the Iowa Code refer to the 2003 edition in effect at the time of the election in this case, unless otherwise noted.

The opponents of the measures requested a recount, and a recount board was appointed pursuant to [Iowa Code section 50.48](#). The recount board determined the voting machine failed to properly read four Measure B votes. These four ballots were marked as follows:

"No" votes. This determination resulted in only 59.89% of "Yes" votes. The Linn County Board of Supervisors then certified this result on July 28,

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2004. As a result, Measure B failed to pass.

On August 13, 2004, twenty-eight eligible voters in the district filed a notice of intent to contest the election and a request to convene a contest court pursuant to [Iowa Code sections 57.1\(b\)](#) and [62.5](#). The contest court was subsequently convened pursuant to [Iowa Code section 57.7](#). [FN2] It determined by a 2-1 vote that the four disputed ballots should not be counted. As a result, the original count was reinstated and Measure B passed.

**FN2.** [Section 57.7](#) requires the contest court to consist of three members. One member must be "designated by the petitioners who are contesting the election," and another must be "designated by the county commissioner of elections to represent the interests adverse to those of petitioners." [Iowa Code § 57.7](#). Finally, a third member is "chosen jointly by the designees of the petitioners and of the commissioner." *Id.*

On September 16, 2004, three members of the opposition group (hereinafter referred to as Taylor) filed a petition in district court. The action was brought against the school district and asked the district court to reverse the decision of the contest court.

The school district filed a motion to dismiss. It claimed Taylor had no right to petition the district court for relief, and could only challenge the contest court decision by filing an appeal to the district court. In absence of the filing of a notice of appeal, the school district claimed the district court had no jurisdiction to grant relief.

The district court overruled the motion and eventually considered the merits of the petition. It found the intent of the voters who cast the four disputed ballots could not be shown, and the voters failed to properly mark the ballots within the voting target. Consequently, the district court held the contest court correctly decided that the four ballots should be rejected. As a result, Measure B passed. Taylor

has now appealed the district court's decision.

## II. Standard of Review.

[1] Our standard of review in an appeal from a district court decision in an election contest is de novo. [Devine v. Wonderlich](#), 268 N.W.2d 620, 623 (Iowa 1978) ("Appeal lies from the contest court to district court which hears the appeal in equity and determines anew all questions in the case. Hence our review is also de novo." (Citation omitted.)).

## III. Jurisdiction.

[2][3] The right to contest an election is only conferred by statute, and contestants must strictly comply with the provisions of the statute in order to confer jurisdiction. [Bauman v. Maple Valley Cmty. Sch. Dist.](#), 649 N.W.2d 9, 13 (Iowa 2002) ("When a statute prescribes a procedure for review, that procedure must be strictly followed to confer jurisdiction."). Thus, contestants are limited to the scheme provided by the legislature. This procedure includes proceedings before the contest court, as well as appeals to district court. *See de Koning v. Mellema*, 534 N.W.2d 391, 394 (Iowa 1995) ("The rule is quite generally recognized that to initiate special proceedings, such as election contest proceedings, the statutory provisions necessary to confer jurisdiction must be strictly complied with by the contestants.").

\*658 There are numerous statutory procedures that must be followed to convene a contest court in a disputed election. *See id.* at 394-95 (describing the procedure outlined in Iowa Code chapters 57 and 62). These procedures are largely unique to the election process, and they are generally not supplemented by our rules of civil procedure applicable to courts. [Bauman](#), 649 N.W.2d at 15-16 (declining to apply the Iowa rules of civil procedure to election contests). Yet, when it comes to the judicial review process following a decision by a contest court, [Iowa Code section 62.20](#) is the only statutory provision that provides for an appeal of contest court decisions regarding public measure elections.

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Iowa Code § 62.20. Moreover, section 62.20 is noticeably generic, and untenanted by directions beyond the procedures for a bond to stay execution of the contest court judgment. *See id.* The statute simply permits a "party against whom judgment [was] rendered [to] appeal within twenty days to the district court." *Id.* The district court is then required to "hear the appeal in equity and determine anew all questions arising in the case." *Id.*

The school district takes the position that the appeal is a carefully regulated process that must be strictly followed to confer jurisdiction on the district court. It offers the detailed procedures under our court rules applicable to appeals to supplement the vagueness under the statute, beginning with the fundamental requirement of the filing of a notice of appeal with the court that rendered the judgment. *See Iowa R.App. P. 6.6* ("An appeal ... is taken and perfected by filing a notice with the clerk of the court where the order, judgment, or decree was entered ...."). While this approach offers some appeal, it does not find support from the language of the statute. In the same way as we strive to uphold those legislative requirements written into the statute through strict compliance, we must not defeat the legislative process by imposing requirements where none exist. *See, e.g., Eysink v. Bd. of Supervisors*, 229 Iowa 1240, 1244, 296 N.W. 376, 378 (1941) ("This court has no power to write into the statute words which are not there."). For that reason, we have refused to supplement the statutory requirements governing election contests with the procedural requirements applicable to courts of law. *See Bauman*, 649 N.W.2d at 15-16 (refusing to apply the Iowa rules of civil procedure to election contests, except where the rules have been expressly endorsed). Moreover, the issue we confront is only whether the district court acquired jurisdiction to decide the controversy based on the procedure employed by Taylor. [FN3]

FN3. The school district offers many practical reasons for supplementing section 62.20 with our rules of appellate proced-

ure, including the benefit of filing a formal notice of appeal. We do not reject the appeal procedure suggested by the school district as a possible method to appeal a contest court decision. Instead, we hold the procedure used by Taylor in this case was sufficient to perfect an appeal and confer jurisdiction on the district court.

It is clear that Taylor invoked the jurisdiction of the district court for the purpose of appealing the decision of the contest court. Taylor did not commence an independent action to dispute the results of the election. Instead, he properly commenced the action through a contest court, and his petition in district court indicated he was pursuing the matter as an appeal "pursuant to" section 62.20, and in doing so he asked the court to reverse the decision of the contest court. Under the circumstances, we find the filing of this petition was sufficient to meet the statutory requirements for making an appeal.

#### \*659 IV. Disputed Ballots.

[4] A comprehensive set of rules and procedures govern elections in Iowa. *See generally* Iowa Code chs. 39-63A (2007); *see also* Iowa Code ch. 277 (2007) (providing the procedure for school elections). These provisions not only apply to general elections, but also to school elections. Iowa Code section 277.2 allows a school board to call a special election to vote on issues such as the one involved in this case. *See Bauman*, 649 N.W.2d at 12 ("Special elections may be called irregularly to decide primarily financial and school property issues." (citing Iowa Code § 277.2 (2001))). Additionally, chapter 277 directs that "[t]he provisions of chapters 39 to 53 shall apply to the conduct of all school elections." Iowa Code § 277.3.

Chapter 49 specifically addresses the form of ballots to be used in public measure elections. Iowa Code section 49.45 requires the ballots to ask the question, "Shall the following public measure be adopted?" *Id.* § 49.45. The specific public measure must then be identified, followed by two boxes or

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targets that allow the voter to answer the question by marking the box or target identified "Yes" or by marking the box or target identified "No." *Id.* The public measure ballots must additionally include a notice as follows:

[Notice to voters. To vote to approve any question on this ballot, make a cross mark or check in the target before the word "Yes." To vote against a question make a similar mark in the target preceding the word "No."]

*Id.* § 49.47. Section 49.47 also instructs officials to adapt the notice to voters "to describe the proper mark where it is appropriate." *Id.*

There is no claim that the form or content of the ballot in this case did not conform to our statutory requirements. *See, e.g., Harney v. Clear Creek Cmty. Sch. Dist.*, 261 Iowa 315, 321, 154 N.W.2d 88, 92 (1967) (requiring ballot to be in substantial compliance with requirements in statute); *Headington v. N. Winneshiek Cmty. Sch. Dist.*, 254 Iowa 430, 438-39, 117 N.W.2d 831, 836- 37 (1962) (same). Instead, the question is whether the voting mark on the disputed ballots complied with the requirements of our statutes. Section 49.46 requires the voter to "designate a vote by making the appropriate mark in the voting target." Iowa Code § 49.46 (emphasis added). The statutes indicate an appropriate mark may be that which is indicated in the notice or instructions, or a check mark or an "X." *See id.* §§ 49.46, 49.92. Thus, the voters in this case were required to mark their ballots by placing an "X," checking, or filling in the oval target next to the word "Yes" or "No."

While specific sections indicate how a public measure election ballot is to be marked, there is no specific section that deals with counting or rejecting voting marks on public measure ballots. There is a general section that deals with counting ballots in an election, but this section primarily refers to elections involving candidates, rather than public measures. *See id.* § 49.98 (entitled "Counting ballots"). The school district argues section 49.98 prohibits the four ballots from being counted in this case.

Under section 49.98 at the time of this election, [FN4] a ballot was required to "be rejected \*660 if marked in any manner other than authorized in sections 49.92 to 49.97." *Id.*; *see Beck v. Cousins*, 252 Iowa 194, 197, 106 N.W.2d 584, 586 (1960) ("In the interpretation of a disputed ballot the primary consideration is to arrive at the intent of the voter. This is subject to the conditions that the ballot must not be marked contrary to statutory provisions, and must not have on it any distinguishing marks or writings."). Section 49.92 governs voting marks. While it was clearly drafted by our legislature with elections involving political candidates in mind, it is consistent with the requirements of a voting mark for public measures. *Compare Iowa Code § 49.46* (describing the voting marks required for public measure elections), *with id.* § 49.92 (describing voting marks for candidate elections). The statute contemplates that a ballot will include voting instructions to "describe the appropriate mark to be used by the voter," and that the "mark shall be consistent with the requirements of the voting system in use in the precinct." *Id.* § 49.92. Additionally, it states the voting mark used on paper ballots may be a cross or check "which shall be placed in the voting targets opposite the names of the candidates." *Id.* Finally, the statute provides that marks made by instruments other than a black lead pencil are generally permitted. *Id.*

**FN4.** New legislation went into effect shortly after the results of the election in this case. *See* 2004 Iowa Acts ch. 1083, § 37 (codified at Iowa Code § 49.98 (2005)) (removing the phrase "[a]ny ballot shall be rejected if it is marked in any other manner than authorized in sections 49.92 to 49.97"). We express no opinion how this legislative change may affect the result in this case or future cases.

It is clear the provision in section 49.98 governing the rejection of a ballot marked in an unauthorized manner also applies to public measure ballots that are marked contrary to the mandatory provisions of

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the law. While [section 49.98](#) does not reference [section 49.46](#) dealing with public measure voting marks, it requires the rejection of voting marks that are unauthorized marks under [sections 49.92](#) through [49.97](#). *Id.* § [49.98](#). We see no difference between the basic voting mark requirements in [section 49.46](#) and [section 49.92](#). Both require the use of an appropriate mark, which may include the use of a check or cross. *See id.* §§ [49.46](#), [49.92](#). Moreover, chapter 277--which allows the board to conduct the special election in this case--directs that those sections of chapter 49 are applicable to this election. *See id.* § [277.3](#) ("The provisions of chapters 39 to 53 shall apply to the conduct of all school elections ....").

[5][6] Generally, a vote is counted in an election if the voter affixed any mark to the ballot that "fairly indicates" an intent to vote for a particular candidate or measure. *See Devine*, 268 N.W.2d at 623. However, this rule does not apply if the voter violates "a mandatory provision of the election law" in casting the ballot. *Id.* Thus, the intent of a voter to vote for or against a public measure is the prevailing issue only if the voter has followed the legal requirements in marking the ballot.

The school district argues the four ballots in this case violated the election laws because the voters failed to mark the ballot according to the voting instructions or notice. Even so, the school district argues the marks placed on the ballots do not "fairly indicate" the intent to vote either "Yes" or "No" on Measure B.

[7] In this case, the four disputed ballots were neither marked as required by the statute or as directed by the instructions on the ballot. The statutes require that voting marks on paper ballots be placed in the voting targets. Likewise, the instructions or notice on the ballot directed the voter to mark the ballot by placing the voting mark in the voting target. To be counted, a voting mark must be substantially within the target. *Frakes v. Farragut Cmty. Sch. Dist.*, 255 Iowa 88, 91, 121 N.W.2d 636, 638 (1963). In all four ballots, the voters failed to enter

any mark of any kind in the target opposite the word "Yes" or "No." This violated [sections 49.46](#) and [\\*661 49.92](#), and under [section 49.98](#) the votes cannot be counted.

[8] We recognize the possibility that the voters in this case intended to vote "No" on each ballot, particularly on the three ballots where the voters filled in the letter "o" in the word "No" and left the oval target immediately to the left of the word "No" blank. However, our statutes do not permit such intent to prevail when the ballots were marked in an unauthorized manner. Importantly, this conclusion does not foreclose the necessity of determining intent in certain cases. There are times when a voting mark does not strictly meet the ballot instructions or statutory requirements, but nevertheless is marked in such a way that it is not unauthorized. *See Beck*, 252 Iowa at 197, 106 N.W.2d at 586 (recognizing the intent of a voter is subject to the requirements of our statutes); *Devine*, 268 N.W.2d at 628 ("The voter's intention, if it can be ascertained, should not be defeated or frustrated by the fact the name of the candidate is misspelled, or the wrong initials were employed, or some other slightly different name of similar pronunciation or sound has been written instead of the actual name of the candidate intended to be voted for."). In these cases the intent of the voter must prevail if it can be determined. That is not the case here, however, as none of the markings were made inside the "No" target. In such a case, the mark is unauthorized and uncountable. While "[t]he primary test of validity is whether the voter's intent is sufficiently shown," this intent cannot be derived from ballots that are marked inconsistently with the voting instructions provided on the ballot and the marking requirements of the statute. *Devine*, 268 N.W.2d at 628.

[9] We also recognize the goal in an election contest is to give effect to the venerable democratic right to vote. It is not to disenfranchise the voter. *See, e.g., id.* at 623 ("The right to vote is a fundamental political right. It is essential to representative government. Any alleged infringement of the

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right to vote must be carefully and meticulously scrutinized." (Citation omitted.)). Yet, our legislature has established certain basic voting requirements that we are obligated to enforce in the absence of a successful constitutional challenge to the statute.

**V. Conclusion.**

We conclude the district court had jurisdiction in this case. We affirm the decision of the district court that the ballots in dispute should not be counted.

**AFFIRMED.**

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**(Cite as: 271 S.C. 505, 248 S.E.2d 580)**

Supreme Court of South Carolina.  
 In re Theodore N. **TAYLOR**, Petitioner,  
 v.  
 John **ROCHE**, as Chairman and James Sexton, W. E.  
**Taylor**, Mrs. Sudie Wicker, Mrs.  
 Cheryl Bannister, Heyward Amick, and David L. Ruff, Indi-  
 vidualy and as members  
 constituting the Newberry County Board of Education, and  
 Daniel R. McLeod as  
 Attorney General for South Carolina, Respondents.  
 Ex parte John **ROCHE**, as Chairman and James Sexton, W.  
 E. **Taylor**, Mrs. Sudie  
 Wicker, Mrs. Cheryl Bannister, Heyward Amick, and David  
 L. Ruff, Individually  
 and as members constituting the Newberry County Board of  
 Education, and Daniel  
 R. McLeod, as Attorney General for South Carolina, Peti-  
 tioners.

**No. 20788.**

Oct. 23, 1978.

Action was brought to enjoin district school board from issuing school building bonds, and case was removed and transferred to original jurisdiction of Supreme Court, and chairman and other members of school board filed motion for summary judgment. The Supreme Court held that where plaintiff, who filed action seeking injunction to prevent school board from issuing school building bonds on ground that new article of State Constitution permitting issuance of school bonds without election, as submitted to voters, was so deceptively worded as to mislead voters, did not first bring his objections before either county board or state board of canvassers, and did not attempt to challenge amendment explanation as given on ballot before general election took place, plaintiff's failure to pursue his statutorily provided remedies precluded his action for injunction.

Motion granted and action dismissed.

West Headnotes

**[1] Elections** **269**  
[144k269 Most Cited Cases](#)

Under common law there is no right to contest election; right to contest election is only under constitutional and statutory provisions, and procedure proscribed by statute must be strictly followed. [Const. art. 2, § 10](#); [Code 1976, §§ 7-1-10](#) et seq., [7-17-10](#) et seq.

**[2] Elections** **269**

[144k269 Most Cited Cases](#)

Determination of election contests is judicial only when and to extent authorized by statute. [Const. art. 2, § 10](#); [Code 1976, §§ 7-1-10](#) et seq., [7-17-10](#) et seq.

**[3] Injunction** **87**

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Where plaintiff, who filed action seeking injunction to prevent school board from issuing school building bonds on ground that new article of State Constitution permitting issuance of school bonds without election, as submitted to voters, was so deceptively worded as to mislead voters, did not first bring his objections before either county board or State Board of Canvassers, and did not attempt to challenge amendment explanation as given on ballot before general election took place, plaintiff's failure to pursue his statutorily provided remedies precluded his action for injunction. [Const. art. 2, § 10](#); art. 10, § 1 et seq.; Act July 22, 1976, 59 St. at Large, p. 2217; Act May 30, 1977, 60 St. at Large, § 6, p. 244; [Code 1976, §§ 7-1-10](#) et seq., [7-13-2110](#) et seq., [7-13-2130](#), [7-17-10](#) et seq., [59-71-10](#) et seq.

**\*\*580 \*506** Atty. Gen. Daniel R. McLeod and Asst. Atty. Gen. Kenneth P. Woodington, Columbia, Joseph W. Hudgens, of Pope & Schumpert, Newberry, and Huger Sinkler, of Sinkler, Gibbs & Simons, Charleston, for petitioners.

Jack F. McGuinn and Lewis C. Lanier, Columbia, for respondents.

Joseph H. Earle, Jr., Greenville, and Theodore B. Guerard, of Guerard & Applegate, Charleston, for Greenville County, O. Wayne Corley and Daniel R. McLeod, Jr., of McNair, Konduros, Corley, Singletary & Dibble, Columbia, in their own behalf, amici curiae.

**\*\*581 \*507** PER CURIAM:

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This action was originally instituted on August 11, 1978 by the plaintiff below, Theodore N. Taylor, in the Court of Common Pleas for Newberry County seeking both a temporary and permanent injunction against John Roche, Chairman of the Board of the Newberry County School District, and his fellow board members, the defendants below.[\[FN1\]](#) to prevent the School Board from issuing School Building Bonds of the School District of Newberry County in the amount of \$2,700,000. On motion before this Court, of the petitioners here, and defendants below, the case was removed from the Court of Common Pleas of Newberry County and was transferred to the original jurisdiction of this Court by Per curiam order dated August 24, 1978.[\[FN2\]](#) The matter is now before this Court on a Motion for Summary Judgment propounded by the petitioners here, the defendants below.

[FN1.](#) The Attorney General is a statutorily required party. [S.C.Code Ann. Section 15-53-80 \(1976\)](#)

[FN2.](#) [S.C.Code Ann., Sections 7-13-2110, Et seq. \(1976\)](#) (enacted by Act 205 of 1975) established a Constitutional Ballot Commission comprised of the Attorney General, the Director of the State Election Commission and the Director of the Legislative Council with the duty of examining each proposed amendment to the State Constitution. It further provides that if the amendment is of such a nature that it might not be clearly understood by the voters, it becomes the duty of the commission to provide a simplified or more detailed explanation, where necessary or appropriate, of the meaning and effect of the amendment. This explanation is printed on the paper ballot used in the election or otherwise made available where mechanical devices are used for voting.

Section 7-13-2130 provides that the South Carolina Supreme Court shall have exclusive and original jurisdiction in any proceeding challenging the amendment explanations prepared by the Ballot Commission.

The record here showed that the ballot used contained the simplified explanation of the Ballot Commission. While the language of the Complaint

related to the form of the ballot as it appeared in the proposing resolution (Act 750 of 1976) it was clear that this Court's determination would depend not merely upon the language of the question employed by the General Assembly but also upon the "simplified explanation" as well. It was therefore, clear that Section 7-13-2130 was applicable and this Court assumed original jurisdiction.

The gravamen of the Complaint (styled Petition) is that new Article X of the South Carolina Constitution, which became effective from and after November 30, 1977,[\[FN3\]](#) was \*508 improperly submitted at the 1976 general election with the result that the amendatory process failed and new Article X is nugatory. The plaintiff contends that the form of question on the ballot used to obtain the approval of the electorate at the 1976 general election was so confusing and deceptively worded that it misled the voters. The defendants concede that the bonds may be issued only if new Article X is effective. [\[FN4\]](#)

[FN3.](#) Act No. 71, Section 3 of the 1977 Joint Acts and Resolutions of South Carolina.

[FN4.](#) In addition to the bonds in question, other general obligation bonds of other political subdivisions of South Carolina have been sold recently and may not be delivered with this litigation pending, and other issues of the political subdivisions and of the State itself may not be offered until the question is decided. Also, this Court has been informed that many bond issues have already been sold by the State and its political subdivisions in reliance upon new Article X following its effective date.

The proposed bonds are being issued pursuant to the provisions of [S.C.Code Ann., Section 59-71-10, Et seq. \(1976\)](#), known as the School Bond Act. The bonds are to be issued without the election prescribed by the School Bond Act prior to its amendment by Act 125 of the Joint Acts and Resolutions of South Carolina (1977), which was designed as the statutory implementation of new Article X. Section 6 of the Act removes the requirement of the election. It is the plaintiff's contention that the ballot question created a latent

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defect in the amendment by misleading him so that he did not know that the election requirement was being removed until he received notice of the proposed issuance of the bonds in Newberry County.

The Petitioners-Defendants (hereinafter referred to as the defendants) present three basic arguments in their motion for summary judgment:

**\*\*582** (1) Whether the failure of the plaintiff to contest the result of the general election held November 2, 1976, which submitted new Article X for the approval of the electorate, before the State Board of Canvassers, precludes him from contesting the election at this time?

**\*509** (2) Whether the decision of this Court in [Hyder v. Edwards, 269 S.C. 138, 236 S.E.2d 561 \(1977\)](#) constitutes Res judicata with respect to the validity of the adoption of new Article X?

(3) Whether the question employed to submit new Article X to the electorate at the election, when read in connection with the simplified explanation of the question, both of which were printed on the ballot, fairly apprised the electorate of the scope and purpose of new Article X?

Because we have determined that the first question is dispositive of the appeal, we need not reach the issues raised in the second and third questions.

[\[1\]\[2\]\[3\]](#) Under the common law there is no right to contest an election. The right to contest an election exists only under the constitutional and statutory provisions, and the procedure proscribed by statute must be strictly followed. The determination of election contests is judicial only when and to the extent authorized by statute; and the constitutional and statutory provisions in the various jurisdictions determine what tribunal shall entertain the proceeding, and only such tribunal shall do so. See [29 C.J.S. Elections ss 246, 247, 252 \(1965\)](#); 26 Am.Jur.2d Elections ss 316, 318.

[Article II, Section 10 of the South Carolina Constitution](#) provides in part that "The General Assembly shall . . . establish procedures for contested elections, and enact other provisions necessary to the fulfillment and integrity of the election process." [\[FN5\]](#)

[FN5](#). This amendment was proposed by Joint Resolution No. 1271 of 1970 and was ratified by Act 277 of 1971.

Title 7 of the South Carolina Code (1976) is known as the "South Carolina Election Law;" [\[FN6\]](#) and is applicable to all elections in South Carolina. [\[FN7\]](#)

[FN6. S.C.Code Ann., Section 7-1-10 \(1976\).](#)

[FN7. Id., Section 7-1-40.](#)

**\*510** [Sections 7-17-10, Et seq. of the S.C.Code Ann. \(1976\)](#) provide, Inter alia, for the canvassing of votes.

The County Board of Canvassers decides "all cases under protest or contest that may arise in their respective counties in the case of county officers and less than county offices." Section 7-17-30. Appeal from the decision of the County Board is to the State Board of Canvassers. Section 7-17-60. The State Board acts in an appellate judicial capacity on those appeals. Section 7-17- 250. Appeals from the State Board are taken directly to the Supreme Court on petition for Writ of Certiorari. Section 7-17-250. The actions of the State Board in this respect are final and may be reviewed by the Supreme Court only for errors of law, but not findings of fact, unless wholly unsupported by the evidence. E. g. [Redfearn v. Board of State Canvassers, 234 S.C. 113, 107 S.E.2d 10 \(1959\)](#). It is also clear that the protest concerning the election process must be made to the Board of Canvassers within the statutorily required time, or the suit will be barred. E. g. [Smith v. Hendrix, 265 S.C. 417, 219 S.E.2d 312 \(1975\)](#).

The State Board of Canvassers meets within 10 days after any "general election" for the purpose of "canvassing the vote for all officers voted for at such election, . . . and for the purpose of canvassing the vote on all Constitutional Amendments and questions and other issues." Section 7-17-220. Among other things the State Board certifies statements of all votes cast for and against Constitutional Amendments. Section 7-17-240. It is clear that the State Board is charged with deciding "all cases under protest or contest that may arise in the case of Federal officers, State officers and officers involving more than one county." The

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State Board acts in a judicial capacity in hearing the protests and contests. Section 7-17-270. Appeals from the **\*\*583** State Board of Canvassers are directly to the Supreme Court on petition for Writ of Certiorari. Section 7-17-270.

The question which remains is whether the protest and appeal procedure provided in the election laws, including the **\*511** time for and forum in which protests and appeals are to be brought, apply to issues as to the sufficiency of ballot questions for constitutional amendments? We hold that they do.

In 1875, Chief Justice Moses said that "The term (canvassers) employed to designate the duty to be performed by the commissioners would seem to impose an obligation beyond that of merely counting the ballots and comparing the statements of managers." " 'Canvassing' implies 'search,' 'scrutiny,' 'investigation,' 'examination.' " See [State v. Nerland, 7 S.C. 241, 259 \(1875\)](#); Accord Ex Parte [Mackey, 15 S.C. 322, 332 \(1880\)](#), and [State ex rel. Davis v. State Board of Canvassers, 86 S.C. 451, 68 S.E. 676, 679 \(1910\)](#).

The duties of the Board extend to canvassing the votes. The very definition of canvassing in this State would clearly imply that the Election Laws include hearing protests concerning the election process as to Constitutional Amendments. We have said before that the remedy for a similar question as to whether a Constitutional Amendment was properly adopted was to appeal first to the respective Boards of County Canvassers and then to the Board of State Canvassers. See [Stackhouse v. Floyd, 248 S.C. 183, 149 S.E.2d 437, 444 \(1966\)](#). In that case, the Court held that because the plaintiffs failed to pursue that remedy, the objections raised with regard to the conduct of the election had already been concluded against them by the action of the County Board and the State Board of Canvassers from which no appeal was made. Accord, [Smith v. Hendrix, supra](#).

Here, the plaintiff below did not bring his objections to the election process before either the County Board or the State Board of Canvassers. Nor did he attempt to challenge the explanation before this Court before the general election, as he could have done under Section 7-13-2130. Therefore, we hold that the plaintiff's failure to pursue his statutorily

provided remedies precludes this attack on the election process.

**\*512** We see no unfairness to plaintiff in this holding. He claims that he had no notice that the referendum would no longer be required until after the School Bonds here were announced. Act 125 of 1977, which provided the statutory implementation of new Article X, was approved on May 30, 1977, and made it clear that the election concerning the issuance of School Bonds was no longer required. That provision was expressly made to be effective on the effective date of new Article X. Plaintiff, therefore, had notice of the alleged change many months before he brought this action and, considering the millions of dollars in general obligation bonds issued in reliance by the State and its political subdivisions, would therefore have been precluded under the doctrine of laches in any case.

Since plaintiff's failure to pursue his statutorily provided remedies precludes the bringing of this action, there are no genuine issues of material fact to be determined. Accordingly, the defendant's motion for summary judgment is granted and this action is dismissed.

It is so ordered.

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## H

Supreme Court of South Carolina.  
 Charlene TAYLOR, John Sketers and Delores Wilson, Appellants,  
 v.

**TOWN OF ATLANTIC BEACH ELECTION COMMISSION**, Irene Armstrong, Jake Evans, and Sherry Suttles, Respondents.  
**No. 25940.**

Heard Sept. 21, 2004.  
 Decided Feb. 14, 2005.  
 Rehearing Denied March 16, 2005.

**Background:** Unsuccessful candidates appealed decision of municipal election commission certifying results of nonpartisan election for mayor and town council. The Circuit Court, Horry County, [Edward B. Cottingham, J.](#), affirmed commission's decision, and unsuccessful candidates appealed.

**Holdings:** The Supreme Court, [Burnett, J.](#), held that:  
 (1) commission fulfilled its statutory duty under existing law when it certified election results, and  
 (2) irregularity as to compromised secrecy of challenged ballots did not affect fundamental integrity of election or gave rise to a constitutional violation sufficient to set aside election results.  
 Affirmed.

### West Headnotes

**[1] Elections**  **305(6)**  
[144k305\(6\) Most Cited Cases](#)

**[1] Elections**  **305(7)**  
[144k305\(7\) Most Cited Cases](#)

In municipal election cases, the Supreme Court reviews the judgment of the circuit court only to correct errors of law and its review does not extend to findings of fact unless those findings are wholly unsupported by the evidence.

**[2] Elections**  **227(1)**  
[144k227\(1\) Most Cited Cases](#)

**[2] Elections**  **291**

[144k291 Most Cited Cases](#)

Supreme Court will employ every reasonable presumption to sustain a contested election, and will not set aside an election due to mere irregularities or illegalities unless the result is changed or rendered doubtful.

**[3] Elections**  **298(3)**  
[144k298\(3\) Most Cited Cases](#)

Absent fraud, a constitutional violation, or a statute providing that an irregularity or illegality invalidates an election, the Supreme Court will not set aside an election for a mere irregularity.

**[4] Elections**  **227(1)**  
[144k227\(1\) Most Cited Cases](#)

Voters who have done all in their power to cast their ballots honestly and intelligently are not to be disfranchised because of an irregularity, mistake, error, or even wrongful act, of the officers charged with the duty of conducting the election, which does not prevent a fair election and in some way affect the result.

**[5] Elections**  **269**  
[144k269 Most Cited Cases](#)

The right to contest an election exists only under the state constitutional and statutory provisions, and the procedure proscribed by statute must be strictly followed.

**[6] Elections**  **305(6)**  
[144k305\(6\) Most Cited Cases](#)

**[6] Elections**  **305(7)**  
[144k305\(7\) Most Cited Cases](#)

The circuit court, sitting in an appellate capacity, does not conduct a de novo hearing or take testimony regarding the decision of a municipal election commission; circuit court must examine the decision for errors of law, but it must accept the factual findings of the commission unless they are wholly unsupported by the evidence. [Code 1976, § 5-15-140.](#)

**[7] Elections**  **265.5**  
[144k265.5 Most Cited Cases](#)

Municipal election commission fulfilled its statutory duty under existing law when it certified results of nonpartisan election for mayor and town council and advised unsuccessful

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ful candidates by letter that they had not proved late opening of polls affected outcome of election, that allegations of fraud and bribery were not proven, and that further allegations of ballots being seen and ballots being removed from the voting place were also not proven. [Code 1976, § 5-15-130.](#)

**[8] Elections** 🔑300

[144k300 Most Cited Cases](#)

**[8] Elections** 🔑303

[144k303 Most Cited Cases](#)

Supreme Court would decline to impose standards for written orders on election commissions beyond those imposed by statute requiring an election commission to conduct a hearing, decide the issues raised, file a report with the testimony and exhibits, and notify the parties of the decision. [Code 1976, § 5-15-130.](#)

**[9] Elections** 🔑305(3)

[144k305\(3\) Most Cited Cases](#)

Unsuccessful candidates' claims that circuit court erred in affirming municipal election commission's denial of the election protests because the constitutional and statutory right to a secret ballot of those who voted by challenged ballot was violated were sufficiently preserved for review on appeal.

**[10] Elections** 🔑285(4)

[144k285\(4\) Most Cited Cases](#)

There are two prerequisites to maintaining an election contest: (1) contest notice must allege irregularities or illegalities; and (2) alleged irregularities or illegalities must have changed or rendered doubtful the result of the election in the absence of fraud, a constitutional violation, or a statute providing that such irregularity or illegality shall invalidate the election.

**[11] Elections** 🔑285(1)

[144k285\(1\) Most Cited Cases](#)

A notice of election contest should briefly state facts or a combination of facts sufficient to apprise the election commission and winning candidate of the reason for the challenge; it is not sufficient to allege fraud generally or mere conclusions of the protesting person. [Code 1976, § 5-15-130.](#)

**[12] Elections** 🔑305(3)

[144k305\(3\) Most Cited Cases](#)

The circuit court, sitting in an appellate capacity, may not consider issues which were not raised to the election commission.

**[13] Elections** 🔑227(8)

[144k227\(8\) Most Cited Cases](#)

Irregularity as to compromised secrecy of challenged ballots did not affect fundamental integrity of municipal election for mayor and town council or give rise to a constitutional violation sufficient to set aside election results. [Code 1976, § 7-13-830.](#)

**[14] Elections** 🔑305(3)

[144k305\(3\) Most Cited Cases](#)

Unsuccessful candidates' claims, that circuit court erred in affirming municipal election commission's denial of their election protests because constitutional and statutory right to secret ballot of 28 persons who voted by absentee ballot allegedly was violated and commission was required by statute to order a new election due to alleged irregularities based on the number of voters who signed the poll list, were not preserved for appellate review; candidates failed to raise either issue in their notice of contest letters, issue of absentee ballot secrecy was not raised to commission or to circuit court, and issues related to signing of poll list were not raised to commission.

**\*\*501 \*11 Ernest A. Finney, Jr.**, of the Finney Law Firm, of Sumter, [Emma Ruth Brittain](#) and Matthew R. Magee of Thompson & Henry, P.A., of Myrtle Beach, and [Helen T. McFadden](#), of Kingstree, for Appellants.

[John C. Zilinsky](#), of Conway, for Respondents Irene Armstrong, Jake Evans, and Sherry Suttles.

[Louis Milton Cook](#), of Louis M. Cook & Associates, of North Myrtle Beach, and [Darryl Caldwell](#), of [Duff Turner White & Boykin](#), of Columbia, for Respondent Town of Atlantic Beach Election Commission.

Justice [BURNETT](#):

This is an election protest. We affirm.

**FACTUAL AND PROCEDURAL BACKGROUND**

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The Municipal Election Commission of the Town of Atlantic Beach (the Commission) certified the results of a non-partisan election held November 4, 2003: Irene Armstrong, mayor; Jake Evans, town council; Sherry Suttles, town council. [\[FN1\]](#)

[FN1](#). The certified results of the November 4, 2003, election were:

*Mayor's seat*: Irene Armstrong, 104; Charlene Taylor, 18; Josephine Isom, 34, Gloria Lance, 13.

*Town council seat* (two to be elected): Jake Evans, 110; Sherry Suttles, 65; Retha Pierce, 52; Kenneth McIver, 24; William Cain, 3; Erica Lewis, 2; Russell Skeeters, 17; John Sketers, 17; Delores Wilson, 16; Russell Reave, 1.

Respondents have not begun serving in their respective positions pending the outcome of this appeal. See [S.C.Code Ann. § 5-15-120 \(2004\)](#) ("Newly elected officers shall not be qualified until at least forty-eight hours after the closing of the polls and in the case a contest is finally filed the incumbents shall hold over until the contest is finally determined."); [S.C.Code Ann. § 5-15-140 \(2004\)](#) ("notice of appeal shall act as a stay of further proceedings pending the appeal").

**\*\*502** On November 5, 2003, Charlene Taylor, John Sketers, and Delores Wilson (Appellants) filed letters contesting the election results. The Commission reviewed challenged ballots at a **\*12** hearing on November 6, 2003, and denied the candidates' protests following a separate hearing on November 8, 2003.

On appeal the circuit court affirmed the Commission's decision. This appeal is pursuant to [S.C.Code Ann. § 14-8-200\(b\)\(5\) \(Supp.2003\)](#) and [Rule 203\(d\)\(1\)\(E\), SCACR](#).

### ISSUES

1. Did the circuit court err in refusing to remand the case to the Commission for explicit rulings and a more definitive written order on allegations raised by Appellants at a hearing before the Commission?
2. Did the circuit court err in affirming the Commission's denial of the election protests because the constitutional

and statutory right to a secret ballot of those who voted by challenged ballot was violated?

3. Are Appellants' remaining issues preserved for appellate review?

### STANDARD OF REVIEW

[\[1\]\[2\]\[3\]\[4\]](#) In municipal election cases, we review the judgment of the circuit court only to correct errors of law. Our review does not extend to findings of fact unless those findings are wholly unsupported by the evidence. We will employ every reasonable presumption to sustain a contested election, and will not set aside an election due to mere irregularities or illegalities unless the result is changed or rendered doubtful. In the absence of fraud, a constitutional violation, or a statute providing that an irregularity or illegality invalidates an election, we will not set aside an election for a mere irregularity. *E.g.* [Broadhurst v. City of Myrtle Beach Election Commn.](#), 342 S.C. 373, 379, 537 S.E.2d 543, 546 (2000); [George v. Mun. Election Commn. of Charleston](#), 335 S.C. 182, 186, 516 S.E.2d 206, 208 (1999); [Sims v. Ham](#), 275 S.C. 369, 271 S.E.2d 316 (1980); [May v. Wilson](#), 199 S.C. 354, 19 S.E.2d 467 (1942); [State v. Jennings](#), 79 S.C. 246, 60 S.E. 699 (1908). "Voters who have done all in their power to cast their ballots honestly and intelligently are not to be disfranchised because of an irregularity, mistake, error, or even wrongful act, of the officers charged with the duty of conducting the election, which does not prevent a fair election and in some way affect **\*13** the result." [Berry v. Spigner](#), 226 S.C. 183, 190, 84 S.E.2d 381, 384 (1954) (internal quotes omitted).

### LAW AND ANALYSIS

#### 1. DENIAL OF REMAND TO COMMISSION

The Commission by letter advised Appellants had not proved the late opening of the polls affected the outcome of the election; Appellant Taylor's "allegations of fraud and bribery were not proven"; and Appellant Sketers' "allegations of ballots being seen and ballots being removed from the voting place were not proven." [\[FN2\]](#) The circuit court affirmed.

[FN2](#). Appellants raised the following issues in their notice of contest letters to the Commission:  
*Appellant Taylor* (including attached statement of

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poll watcher Patricia Bellamy): fraudulent registration, bribery of voters, late opening of voting site, loud or boisterous behavior at the poll caused voters to stay away, improper dismissal of challenges, and improper assistance provided to voters by a poll watcher.

*Appellant Sketers*: late opening of voting site, ballots were allowed to be seen, ballots were removed from the voting place, improper assistance was given to voters, intimidation of his poll watcher when she tried to challenge voters, and loud or boisterous behavior at the poll caused voters to stay away.

*Appellant Wilson*: late opening of voting site, corrupt conduct, and excessive arguing over challenges caused voters to stay away.

Appellants contend the circuit court erred in denying their request to remand the case to the Commission for more definitive findings and rulings in a written order on issues they had raised before the Commission. Appellants acknowledge an election protest generally is limited to allegations contained in **\*\*503** the written notice of protest. They urge the Court to require some degree of concomitant specificity by the election commission which hears the protest; otherwise, it is difficult or impossible for circuit or appellate courts to properly review the decision. Appellants do not suggest such orders be required to contain formal findings of fact or conclusions of law similar to those demanded of lower courts or government agencies in other settings. Appellants ask the Court to either remand the case to the Commission or set aside the election for reasons set forth in their appeal.

**\*14** Respondents assert the circuit court did not err in refusing to remand the case to the Commission for further review. They argue there is no need to require greater specificity or clarity in decisions issued by election commissions, and urge the Court to reject Appellants' call for a new standard for such orders.

[5] There was no right to contest an election under the common law. *Broadhurst*, 342 S.C. at 383, 537 S.E.2d at 548. "The right to contest an election exists only under the [state] constitutional and statutory provisions, and the procedure proscribed by statute must be strictly followed." *Taylor v.*

*Roche*, 271 S.C. 505, 509, 248 S.E.2d 580, 582 (1978); see also *S.C. Const. art. II*, 10 ("General Assembly shall ... establish procedures for contested elections, and enact other provisions necessary to the fulfillment of and integrity of the election process").

Statutes applicable to municipal elections provide:

Within forty-eight hours after the closing of the polls, any candidate may contest the result of the election as reported by the managers by filing a written notice of such contest together with a concise statement of the grounds therefor with the Municipal Election Commission. Within forty-eight hours after the filing of such notice, the Municipal Election Commission shall, after due notice to the parties concerned, *conduct a hearing on the contest, decide the issues raised, file its report together with all recorded testimony and exhibits with the clerk of court of the county in which the municipality is situated, notify the parties concerned of the decisions made*, and when the decision invalidates the election the council shall order a new election as to the parties concerned.

*S.C.Code Ann. 5-15-130 (2004)* (emphasis added).

[6] The decision of the municipal election commission may be appealed to the court of common pleas within ten days after a party receives notice of it. *S.C.Code Ann. 5-15-140 (2004)*. The circuit court, sitting in an appellate capacity, does not conduct a *de novo* hearing or take testimony. The circuit court must examine the decision for errors of law, but it must accept the factual findings of the commission unless they are wholly unsupported by the evidence. **\*15***Blair v. City of Manning*, 345 S.C. 141, 546 S.E.2d 649 (2001); *Butler v. Town of Edgefield*, 328 S.C. 238, 248, 493 S.E.2d 838, 843 (1997).

Appellants have not cited, nor have we have found, any South Carolina statute or case establishing standards for written orders issued by an election commission. Appellants initially asserted the Administrative Procedures Act (APA) may apply to such a proceeding. The circuit court correctly recognized the APA does not apply to the appeal of a decision by a municipal election commission. See *S.C.Code Ann. 1-23-310(2) and (3) (Supp.2003)* (defining "agency" and "contested case").

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[7][8] We affirm the circuit court's ruling the Commission fulfilled its statutory duty under existing law. [Section 5-15-130](#) requires an election commission conduct a hearing, decide the issues raised, file a report with the testimony and exhibits, and notify the parties of the decision. The statute does not require a written order containing findings of fact or conclusions of law similar to those, e.g., required of tribunals in APA or family court proceedings. *Cf.* [S.C.Code Ann. 1-23-350 \(1986\)](#) (establishing standards for written orders in APA cases, which require findings of fact and conclusions of law); [Rule 26\(a\), SCRFC](#) (order or judgment in domestic relations case shall set forth specific findings of fact and conclusions of law). We decline to impose standards for written orders on election commissions beyond those imposed by statute. It is within the plenary **\*\*504** power of the Legislature, not this Court, to promulgate election standards or enact statutory election requirements which address the necessity or substance of written orders issued by an election commission.

## 2. SECRECY OF CHALLENGED BALLOTS

Twenty-three voters cast challenged ballots. All were included in the results except the vote of one person who no longer lived in Atlantic Beach. Patricia Bellamy, a poll watcher for unsuccessful mayoral candidate Taylor, challenged most of the ballots due to allegedly questionable addresses.

Poll manager Vanessa Warren stated in a letter to the Commission that challenged voters "were told to write the candidates' names they were voting for on a blank sheet of paper with their signature." Further, the "fail-safe" printed **\*16** ballots listing candidates' names were not used "because we were rushing and did not get situated." Warren acknowledged before the Commission the procedures followed were improper. Appellant Sketers stated in his notice of contest the "ballots were allowed to be seen."

Violet Taylor, a witness for Appellant Taylor whose vote was challenged, testified she "was not given a printed ballot to vote on. I was given a blank sheet of paper and I was told to step to the side and write the names of the candidates I was choosing in pencil." Six of the twenty-one challenged ballots contained in the record were signed by the voter.

The Commission rejected the assertion that "ballots were allowed to be seen." Appellants in their notice of appeal to circuit court attacked the challenged ballot procedures. The circuit court ruled Appellants had failed to raise issues related to the challenged ballots to the Commission and rejected Appellants' motions to reconsider the matter or remand it to the Commission.

[9] Appellants argue the circuit court erred in affirming the Commission's denial of the election protests because the constitutional and statutory right to a secret ballot of those who voted by challenged ballot was violated. Appellants assert the issues were sufficiently raised to the Commission, although they concede the Commission hearing did not result in an "exemplary record" because they were not then represented by counsel. We conclude the issues are sufficiently preserved.

Respondents argue that the issue of secrecy of the challenged ballots is not preserved for appellate review. They further assert the issue is without merit because it was "not the kind of systemic invasion of privacy that affects the fundamental integrity of the electoral process."

[10] "There are two prerequisites to maintaining an election contest in South Carolina: (1) the contest notice must allege irregularities or illegalities; and (2) the alleged irregularities or illegalities must have changed or rendered doubtful the result of the election in the absence of fraud, a constitutional violation, [or] a statute providing that such irregularity or illegality shall invalidate the election." *Butler v. Town of Edgefield*, 328 S.C. 238, 246, 493 S.E.2d 838, 842 (1997).

**\*17** [11][12] A notice of contest filed pursuant to [Section 5-15-130](#) should briefly state facts or a combination of facts sufficient to apprise the election commission and winning candidate of the reason for the challenge. It is not sufficient to allege fraud generally or mere conclusions of the protesting person. *Butler*, 328 S.C. at 245-46, 493 S.E.2d at 842. The circuit court, sitting in an appellate capacity, may not consider issues which were not raised to the election commission. The circuit court has no authority to conduct a full hearing when one is denied by the election commission; nor does it have authority to take testimony or conduct a *de novo* hearing. *Butler*, 328 S.C. at 248, 493 S.E.2d at 843;

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[Blair, 345 S.C. at 144, 546 S.E.2d at 651.](#)

We recently emphasized the importance of ballot secrecy in [George, 335 S.C. 182, 516 S.E.2d 206](#). There we held the total absence of voting booths and foldable ballots in a municipal election violated voters' constitutional and statutory right to cast a secret ballot. We reviewed the occasionally violent nature of past elections and reasons underlying \*\*505 the nation's gradual move toward secret ballots. This Court and many others long have emphasized the importance of secret ballots. See [George, 335 S.C. at 187-190, 516 S.E.2d at 209-210](#) (listing cases and statutes); [Corn v. Blackwell, 191 S.C. 183, 4 S.E.2d 254 \(1939\)](#) (holding ballot secrecy was violated when numbering system for ballots and voter sign-in lists could be used to identify a particular voter's ballot); [State ex rel. Birchmore v. State Bd. of Caversers, 78 S.C. 461, 468-469, 59 S.E. 145, 147 \(1907\)](#) (holding ballot secrecy was violated when voters were required to place their ballots in "for" and "against" boxes that plainly revealed their choice).

It is undisputed the proper procedure was not followed with regard to the twenty-two challenged ballots. Voters should have been given printed ballots listing the candidates' names after appropriate determinations by the poll manager, been provided with a private place to cast their ballot, and absolutely not been asked or required to sign their name on the ballot. The ballot should have been placed in a separate envelope with the name of the voter and challenger written on the envelope. See [S.C.Code Ann. § 7-13-830 \(Supp.2003\)](#) (establishing procedures for handling challenged ballots); \*18 [Greene v. S.C. Election Commn., 314 S.C. 449, 445 S.E.2d 451 \(1994\)](#) (discussing challenged ballots); [S.C.Code Ann. § 5-15-10 \(2004\)](#) (municipal elections shall be conducted pursuant to provisions set forth in Title 7).

[13] However, the present case is distinguishable from previous cases addressing ballot secrecy. The secrecy of the six challenged ballots signed by the voter undoubtedly was compromised. The secrecy of the remaining sixteen challenged ballots may have been compromised by the voter "stepping aside" to cast it in potential sight of other voters or poll workers. We agree with Respondents there was no systemic invasion of privacy, as was evident in [George](#); [Corn](#), and [Birchmore](#), which affected the fundamental integrity of

the election and gave rise to a constitutional violation sufficient to set aside the election results. We conclude this issue constitutes an irregularity that did not affect the result of the election, and the record does not demonstrate evidence of fraud, a constitutional violation, or a statute providing this irregularity should invalidate the election.

### 3. PRESERVATION OF REMAINING ISSUES

[14] Appellants assert the circuit court erred in affirming the Commission's denial of their election protests because (1) the constitutional and statutory right to a secret ballot of twenty-eight persons who voted by absentee ballot allegedly was violated and (2) the Commission was required by statute to order a new election due to alleged irregularities based on the number of voters who signed the poll list.

These issues are not preserved for appellate review. Appellants failed to raise either issue in their notice of contest letters. See footnote 2, *supra*. The issue of absentee ballot secrecy was not raised to the Commission or to the circuit court. Issues related to the signing of the poll list were not raised to the Commission. Appellants did allege in their notice of appeal to circuit court that challenged ballot voters had failed to sign the poll list and questioned whether those voters' identities were properly recorded, but their arguments came too late. See [Butler, 328 S.C. at 248, 493 S.E.2d at 843](#) (circuit court, sitting in an appellate capacity, may not consider issues which were not raised to the election commission and it has no authority to conduct a full hearing when one is \*19 denied by the election commission; nor does it have authority to take testimony or conduct a *de novo* hearing); [Blair, 345 S.C. at 144, 546 S.E.2d at 651](#) (stating same principles).

### CONCLUSION

We affirm the circuit court's order upholding the results of the election held November 4, 2003. We decline to impose standards for written orders issued by election commissions beyond those imposed by statute. We conclude the alleged violation of secrecy of the challenged ballots constitutes an irregularity that did not affect the result of the election. There is no evidence of fraud, a constitutional violation, or a statute providing this irregularity should invalidate the election. \*\*506 Lastly, Appellants remaining issues are not pre-

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served for appellate review because they were not raised to the election commission.

Accordingly, we order that Respondents Irene Armstrong, Jake Evans, and Sherry Suttles, as the winning candidates, be forthwith seated in their respective positions.

**AFFIRMED.**

[TOAL](#), C.J., [MOORE](#), [WALLER](#) and [PLEICONES](#), JJ.,  
concur.

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C

Supreme Court of Arizona, In Banc.  
Robert F. TELLEZ, Petitioner,

v.

The SUPERIOR COURT of the State of Arizona, IN AND  
FOR the COUNTY OF PIMA, and

the Honorable Jack G. Marks, Judge of the Superior Court,  
Division 8, and the

Pima County Board of Supervisors, a body politic, and  
Thomas Jay, Dennis

Weaver, and Pete Rubi, as members of the Board of Super-  
visors, and Wesley

Bolin, Secretary of State of the State of Arizona, and Bill  
Dumes, Respondents.

No. 9419.

Feb. 5, 1969.

Original proceeding in mandamus. The Supreme Court, McFarland, J., held that where ballots for primary election for Democratic candidate for county treasurer contained four names, including incumbent, and incumbent died prior to election and at election he received highest number of votes, the candidate receiving next highest number of votes did not receive 'highest number of votes' within constitutional provision that person receiving highest number of legal votes at election shall be declared elected, and he was not nominated, and Democratic Party of county had right to designate party's nominee to be placed on ballot.

Permanent writ issued.

West Headnotes

[1] Elections 126(7)

[144k126\(7\) Most Cited Cases](#)

Where ballots for primary election for Democratic candidate for county

treasurer contained four names, including incumbent, and incumbent died prior to election and at election he received highest number of votes, the candidate receiving next highest number of votes did not receive "highest number of votes" within constitutional provision that person receiving highest number of legal votes at election shall be declared elected, and he was not nominated, and Democratic Party of

county had right to designate party's nominee to be placed on ballot. [A.R.S. § 16-604](#); [A.R.S.Const. art. 7, § 7](#).

[2] Elections 235

[144k235 Most Cited Cases](#)

[2] Elections 239

[144k239 Most Cited Cases](#)

Votes cast for a deceased, disqualified or ineligible person are not to be treated as void or thrown away but must be counted in determining result of election as regards to other candidates where such deceased or disqualified person received highest number of votes; result of application of rule is to render election nugatory and to prevent election of person receiving next highest number of votes.

\*170 \*\*107 George B. Morse, Tucson, for petitioner.

Gary K. Nelson, Atty. Gen., Carl Waag, Asst. Atty. Gen., for respondent Secretary of State.

William J. Schafer, III, Pima County Atty., Rose Silver, Sp. Deputy to Pima County Atty., Tucson, for respondent Jack G. Marks, Judge of Superior Court of Pima County.

Robert N. Hillock, Tucson, for respondent Pima County Bd. of Supervisors.

Lawrence D'Antonio, Tucson, for respondent Bill Dumes.

McFARLAND, Justice.

This matter came before this Court on a writ of certiorari filed by Robert F. Tellez, petitioner, asking that we review the order of the Honorable Jack Marks, dated Sept. 20, 1968, in which he ordered, adjudged and decreed that a writ of mandamus be forthwith issued by the Clerk of the Superior Court of Pima County directing the Board of Supervisors to issue a certificate of nomination to Bill Dumes and to place his name on the ballot at the general election. This Court, after due consideration of the record and the matters presented by the petitioner and respondents at the hearing, entered a peremptory writ of mandamus, with a decision to follow, the pertinent part of which is:

'NOW, THEREFORE, YOU, HONORABLE JACK G. MARKS, Judge of the Superior Court of Pima County, Arizona, are hereby commanded to set aside the judgment

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entered in Pima County, Superior Court cause number 109553, entitled BILL DUMES, Petitioner, v. BOARD OF SUPERVISORS FOR THE COUNTY OF PIMA, STATE OF ARIZONA, et al; quash the Writ of Mandamus issued by Judge Jack G. Marks on September 25, 1968, in the Superior Court of Pima County, Arizona, in said action.

'It is further ordered and commanded that the Board of Supervisors of Pima County recall and cancel the certificate heretofore issued on September 23, 1968, to BILL DUMES as the Democratic candidate nominated at the primary election held September 10, 1968, in Pima County.

'The Board of Supervisors is further ordered and directed that should a designee as candidate for such office be selected by the Democratic Party of Pima County, pursuant to [Sec. 16--604, A.R.S.](#) 1956, then such designee shall be certified as the Democratic candidate for said office, and the Board of Supervisors shall cause said person's name to be printed on the General Election ballot in the space provided for the Democratic candidate for the office of Treasurer of Pima County, Arizona.'

**\*171 \*\*108** The peremptory writ of mandamus was based upon the following facts: Prior to August 22, 1968, ballots for the use of qualified electors registered as affiliated with the Democratic Party and eligible to vote in the primary election to be held on September 10, 1968, had been distributed and used, which included candidates for the office of County Treasurer of Pima County, Arizona. The ballots contained the names of Carroll H. Christian, Thomas G. Dorgan and Bill Dumes for the nomination of the office of County Treasurer of Pima County, Arizona. On August 22, 1968, Carroll H. Christian, the then duly elected incumbent Treasurer of Pima County, Arizona, died. At the election, the votes cast for the Democratic Party candidates for the office of Treasurer of Pima County were as follows: Carroll H. Christian 8,087; Bill Dumes 7,864; Thomas G. Dorgan 7,511; Robert F. Tellez 5,209. The votes cast for Robert F. Tellez were by way of write-ins. Thereafter Bill Dumes filed a petition in the Superior Court of the State of Arizona in and for the County of Pima for a writ of mandamus to compel the issuance of a certificate of nomination to place his name upon the official ballot in the ensuing general elec-

tion.

The trial court, after a hearing and the entering of findings of fact and conclusions of law, entered an order for the issuance of a writ of mandamus as prayed for by the petitioner Bill Dumes.

[1] The question presented to this Court is whether Bill Dumes received the highest number of votes within the meaning of the [Constitution of the State of Arizona, Article 7, s 7](#), A.R.S.:

'In all elections held, by the people, in this State, the person, or persons, receiving the highest number of legal votes shall be declared elected.'

It was the contention of Bill Dumes that, Carroll Christian having been deceased before the election, the votes for him should not be counted and that Bill Dumes having received the next highest vote should be declared nominated.

There are two theories in regard to votes cast for a deceased. One is known as the English Rule. It takes the view that votes cast for a deceased, disqualified or ineligible person are to be treated as void and thrown away and are not to be counted in determining the results of the election. This, however, is dependent upon whether the electors before the election receive due notice that the candidate is deceased or disqualified. The lower court evidently followed this rule as it set forth in its finding of facts a detailed account of newspaper articles, television and radio broadcasts of the death of Carroll Christian and stated that they were 'to the extent that the death of Carroll H. Christian, while serving as Treasurer of Pima County, Arizona, presumably would have been generally known to the qualified electors of the Democratic Party in the said primary election.' Also, a finding that Carroll H. Christian who had died prior to the primary election was not a person within the meaning of the provision of the Constitution.

[2] The general rule which we think the better is that the votes cast for a deceased, disqualified or ineligible person are not to be treated as void or thrown away but must be counted in determining the result of an election as regards to other candidates where such deceased or disqualified person received the highest number of votes. The courts have held that the result of its application is to render the election

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nugatory and to prevent the election of the person receiving the next highest number of votes. Corpus Juris Secundum states the majority rule to be as follows:

'Votes cast for a deceased, disqualified, or ineligible person, although ineffective to elect such person to office, are not to be treated as void or thrown away but are to be counted in determining the result of the election as regards the other candidates.' [29 C.J.S. Elections s 243, p. 676.](#)

In the case of [Ingersoll v. Lamb, 75 Nev. 1, 333 P.2d 982](#), Robert J. Ingersoll and \*172 \*\*109 Lester V. Smith were candidates for the office of county assessor at an election held on November 4, 1958, and Smith died on October 21, 1958. His death received wide publicity. The question was whether the petitioner, Ingersoll, had been elected.

'Petitioner and Lester V. Smith were candidates for such office at the general election held November 4, 1958. Smith died October 21, 1958 while he was serving as sheriff and ex-officio assessor. His death received wide publicity and most, if not all, electors voting at said general election had knowledge of his death. Smith received 1,489 votes and petitioner 1,161.

'No constitutional or statutory provision explicitly governs the situation, nor does any prior decision of this court direct the solution. The decisions of the courts of other jurisdictions are diametrically opposed, each asserting its views in positive and uncompromising language. Under such guidance as it afforded by our constitution and laws and our theories of popular government, and under authority of those cases which we think follow the better and more logical rule (as well, it would seem, as the majority rule), we have concluded that petitioner, not having received the highest number of votes case, is not entitled to receive a certificate of election.

'\* \* \* In a comprehensive annotation in [133 A.L.R. 319, 321](#), we read: 'The general rule--that votes cast for a deceased, disqualified, or ineligible person are not to be treated as void or thrown away, but are to be counted in determining the result of the election as regards the other candidates--has been most frequently applied in cases where the highest number of votes were cast for the deceased or dis-

qualified person. The result of its application in such cases is to render the election nugatory, and to prevent the election of the person receiving the next highest number of votes. The rule has been applied, or recognized as applicable, under such circumstances, in the following cases:' This is followed by citations to cases from 28 states, Puerto Rico, England, Australia and Canada. We find no better reason for the general rule than that stated by the Supreme Court of California in 1859, in [Saunders v. Haynes, 13 Cal. 145](#), extensively cited, and referred to in 7 Calif. Law Review 64 as stating that the rule is 'well established.' 'An election is the deliberate choice of a majority or plurality of the electoral body. This is evidenced by the votes of the electors. But if a majority of those voting, by mistake of law or fact, happen to cast their votes upon an ineligible candidate, it by no means follows that the next to him on the poll should receive the office. If this be so, a candidate might be elected who received only a small portion of the votes and who never could have been elected at all but for this mistake. The votes are not less legal votes because given to a person in whose behalf they cannot be counted; and the person who is the next to him on the list of candidates does not receive a plurality of votes because his competitor was ineligible. The votes cast for the latter, it is true, cannot be counted for him; but that is no reason why they should, in effect, be counted for the former, who, possibly, could never have received them. It is fairer, more just, and more consistent with the theory of our institutions to hold the votes so cast as merely ineffectual for the purpose of an election, than to give them the effect of disappointing the popular will, and electing to office a man whose pretensions the people had designed to reject.'

'The same kind of reasoning was used in [State ex rel. Herget v. Walsh, 7 Mo.App. 142](#), where the court asked: 'If the voter can make his vote effective only by voting in a certain way, and if the result of his voting in this way is to secure a new election at which the majority can elect, how can it be assumed that the voter intended to throw away his vote?' The court later adds, '\* \* \* and it is only by a fiction, raised, if at all, by the law, that the majority in such cases throw their votes away.' A like philosophy is expounded in [\\*173\\*\\*110 Derringe v. Donovan, 308 Pa. 469, 162 A. 439, 441](#), which logically shows that a contrary rule would be 're-

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pugnant to the principle of majority rule, which is the cornerstone of orderly government.' Contrary to the rule stated in [Dunagan v. Jones, Tex.Civ.App., 1935, 76 S.W.2d 219, 222](#), that where a vote is cast for a candidate known to be dead the effect is 'a deliberate intent to waste it' and a 'wanton' misapplication of it, it was said in [Sanders v. Rice, 41 R.I. 127, 102 A. 914, L.R.A.1918C, 1153](#), that votes so cast were not in such willful defiance of law as to be thrown away but could be counted in support of a showing that the opposing candidate had not received a majority. This, in short, is the application of what has come to be known as 'the American rule,' which we adopt as opposed to what is known as 'the English rule,' Annotation [133 A.L.R. 319, 340](#), followed by a number of the American courts.

'Petition denied.' [333 P.2d at 983, 984](#).

The following cases follow the majority rule: [Clark v. Porter, 223 Ark. 682, 268 S.W.2d 383](#); [People ex rel. Rosenberg v. Keating, 112 Colo. 26, 144 P.2d 992](#); [Thompson v. Stone, 205 Ga. 243, 53 S.E.2d 458](#); [Bogie v. Hill, 286 Ky. 732, 151 S.W.2d 765](#); [Payne v. Gentry, 149 La. 707, 90 So. 104](#); [Mansur v. Morris, 355 Mo. 424, 196 S.W.2d 287](#); [Woll v. Jensen, 36 N.D. 250, 162 N.W. 403](#); [Ingersoll v. Lamb, supra](#); [In re Primary Election Held in Lackawanna County, 345 Pa. 228, 27 A.2d 189](#); [Blackwood v. Hollingsworth, 195 Tenn. 427, 260 S.W.2d 164](#); [State ex rel. Schmidt v. White, 257 Wis. 560, 44 N.W.2d 523](#); [State ex rel. La Follette v. Kohler, 200 Wis. 518, 228 N.W. 895, 69 A.L.R. 348](#). See also annotations [133 A.L.R. 319](#).

In accordance with the majority rule we hold that Bill Dumes was not nominated to the office of Treasurer of Pima County.

The next question is the effect of [A.R.S. s 16--604](#), as amended, which reads as follows:

'A vacancy occurring due to death, mental incapacity or voluntary withdrawal of a candidate after a primary election may be filled by the political party committee of the state, county, city or town as the case may be, by filing the name of the candidate to fill such vacancy with the officer with whom nomination petitions are filed at any time before the official ballots are printed.'

While this section does not state when the death must have occurred to result in a vacancy, there can be little doubt that

in the instant case Carroll Christian's death was the cause of the vacancy in the nomination on the Democratic ticket for county treasurer. We read the words 'after a primary election' to apply only to the words 'voluntary withdrawal of a candidate.' It is our opinion that it was the intent of the legislature to provide means of filling such vacancies regardless of whether the death occurred before or after the election. We therefore hold that the Democratic Party of Pima County had the right to designate the Party's nominee to be placed on the ballot.

The writ of mandamus heretofore issued by this Court is made permanent.

UDALL, C.J., LOCKWOOD, V.C.J., and STRUCKMEYER and HAYS, JJ., concur.

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C

Supreme Court of Georgia.

**THOMPSON**

v.

**STONE.**

**No. 16637.**

May 10, 1949.

Error from Superior Court, Fulton County; Bond Almand, Judge.

Election contest proceeding by R. C. Thompson against Carl L. Stone. Thereafter Stone filed in the superior court, a proceeding in the nature of quo warranto to inquire into the right of Thompson to act as constable of the district. The commissions of office issued to both parties were ordered cancelled and Thompson brings error.

Affirmed.

West Headnotes

**[1] Elections**  **275**

[144k275 Most Cited Cases](#)

The jurisdiction conferred upon an ordinary to hear and determine a contest arising out of an election of a constable is limited, and he has no power other than that expressly conferred by the statute. Code, §§ 34-3001, 34-2801, 34-2802, 34-2803.

**[2] Elections**  **298(1)**

[144k298\(1\) Most Cited Cases](#)

In a proceeding to contest the election of a constable the ordinary does not act in a judicial or quasi-judicial capacity, but his sole jurisdiction is to determine whether the person filing the contest or the one who is declared elected received the greater number of legal votes, and in case the contestant received it, to declare him duly elected. Code, §§ 34-3001, 34-2801-34-2803.

**[3] Elections**  **304**

[144k304 Most Cited Cases](#)

It is only where decision and judgment of the ordinary in a contest arising out of an election of a constable as to which

of the candidates received the greater number of legal votes in the election, that the judgment is final and conclusive on the parties. Code, §§ 34-3001, 34-2801-34-2803.

**[4] Elections**  **296**

[144k296 Most Cited Cases](#)

Where petition filed in contest of an election of a constable fails to set out a valid and sufficient ground of contest and a ground coming within jurisdiction of the ordinary, ordinary should dismiss the petition on motion made for that purpose. Code, §§ 34-3001, 34-2801-34-2803.

**[5] Elections**  **298(1)**

[144k298\(1\) Most Cited Cases](#)

Where sole ground of contest of election of constable was that person whose name was certified as having received the greatest number of legal votes cast, was not qualified for the office because not a duly registered voter, a judicial question was raised, the determination of which would be without the scope of jurisdiction conferred on the ordinary in an election contest case. Code, §§ 34-3001, 34-2801-34-2803.

**[6] Quo Warranto**  **11**

[319k11 Most Cited Cases](#)

(Formerly 319k1)

Where ordinary in a contest of election of a constable was without jurisdiction because contest involved a judicial question, one whose name was certified as having received the greatest number of legal votes cast in the capacity of a citizen could thereafter institute a proceeding in the nature of quo warranto for the purpose of inquiring into the right of his opponent to exercise the function of office of constable by virtue of the void judgment of the ordinary. Code, § 64-201.

**[7] Courts**  **90(2)**

[106k90\(2\) Most Cited Cases](#)

by

Where decision of the Supreme Court was not concurred in by a full bench, decision if conflicting, must yield to older full-bench decisions which had passed upon the identical question.

**[8] Elections**  **235**

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[144k235 Most Cited Cases](#)

The effect, where a person who is ineligible to hold office receives a majority of the votes cast in an election, is not to give the office to the qualified person having the next highest number of votes, but to invalidate the election, and in such case, a new election must be held.

**[9] Elections**  **235**[144k235 Most Cited Cases](#)

Where election for constable was void because one who received the greatest number of legal votes cast was not qualified as a candidate because he was not a duly registered voter of the county at the time of the election, trial judge properly held the election to be void, and properly ordered the commissions of office issued to both candidates vacated, annulled, and cancelled. Code, §§ 34-3001, 34-2801-34-2803.

*\*\*458 Syllabus by the Court.*

**\*243** 1. A petition filed with the ordinary to contest an election for constable which fails to state a ground for contest that the ordinary has jurisdiction to hear and determine should be dismissed; and since the petition in the instant case failed to state such a ground, the ordinary erred in refusing on motion to dismiss the petition, **\*\*459** and his subsequent findings and orders were nugatory.

2. Unless the votes for an ineligible person are expressly declared to be void in an election contest proceeding for that purpose, the effect of such person receiving a majority of the votes cast is not to give the office to the qualified person having the next highest number of votes, but to invalidate the election.

On December 4, 1948, an election for Constable was held for the 1322nd District, G. M., East Point, Fulton County, Georgia. R. C. Thompson received 166 votes, and Carl L. Stone received 275 votes. In the subsequent court proceedings they occupied different statuses as plaintiff and defendant, and for clarity and convenience will be referred to throughout this statement of facts and the opinion as Thompson and Stone. The result of the election was duly reported by the election managers to the Ordinary of Fulton County, who certified the name of Stone to the county commissioners as having been elected. After giving the required bond and taking the oath of office, Stone was issued a com-

mission and entered upon a discharge of the duties of the office of constable of the district. On December 16, 1948, Thompson filed with the ordinary a purported election contest, which was based on the sole ground that Stone, at the time of the election, was not qualified as a candidate for the office as provided by the laws of Georgia, Code, §§ 24-803 and 24-402. He prayed that his contest of the election be inquired into and that he be declared the lawfully elected constable, rather than Stone. Stone filed a motion to dismiss the proceeding, on the ground it was not an election contest as contemplated by the Code, § 34-3001, since it was not alleged therein that Stone did not receive the highest number of legal votes cast in the election, and that it raised a question which was judicial in its nature, and the ordinary did not have the authority to pass upon a judicial question **\*244** such as the ineligibility or disqualification of a candidate who had received the highest number of legal votes. The ordinary reserved his opinion on the motion to dismiss, and heard evidence on behalf of both parties. There was no dispute concerning the legality of the votes cast for either candidate, or the results of the election. And it was uncontradicted that on the day of the election Stone was not a duly registered voter of the county. On January 4, 1949, the ordinary passed an order in which he held that Stone was not a qualified candidate for the office of constable on the day of the election, and that his name should not have appeared on the ballot. He held the election of Stone null and void, and declared Thompson the elected constable for the district. Based on this order, the clerk of the county commissioners administered the oath and issued a commission for the office of constable to Thompson.

Thereafter, and on January 12, 1949, Stone filed in the superior court a proceeding in the nature of a quo warranto to inquire into the right of Thompson to act as constable of the district. The suit was brought by Stone both as a citizen of the district, and as a claimant to the office. He later abandoned his claim to the office and admitted to the court that on the day of the election he was not a duly qualified voter of the county. The petition and information show the undisputed facts set out above and, in addition, it was alleged and contended by Stone that Thompson did not file a legal election contest with the ordinary as contemplated by the Code, § 34-3001; that the ordinary exceeded his jurisdiction and

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passed upon a matter over which he had no legal authority to pass; that the ordinary had no authority to declare \*\*460 one elected who received a minority of the legal votes cast, after first finding that the candidate who received the greatest number of legal votes was ineligible to hold the office because he was not a registered voter on the day of the election. Thompson filed a plea, designated as a plea to the jurisdiction, and demurrers, general and special, to the petition and information, by which he sought to have the proceeding dismissed on the ground that Stone, by participating in the contest, was bound by the ordinary's determination of the matter and had therefore exhausted his remedy. The plea and demurrers, which raised substantially the same questions, were \*245 overruled by the court, to which ruling exceptions pendente lite were duly filed. The trial judge, after hearing evidence and without the intervention of a jury, found that Thompson had no legal title to the office of constable, or right to assume to act as such, for the reason that Stone received the highest number of legal votes cast in the election, and the ordinary had no authority, after declaring Stone to the ineligible, to enter thereafter an order declaring that Thompson had been elected to the office. He further found that Stone was not eligible to hold the office for the reason that he was not a duly registered voter of the county on the day of the election. The commissions of office issued to both parties were ordered vacated, annulled, and cancelled.

Thompson assigned error on the judgment ousting him from office and canceling his commission of office, and on the exceptions pendente lite. The only ruling before the court as to Stone concerns his right as a citizen to institute and maintain a proceeding in the nature of a quo warranto to inquire into the right of Thompson to hold the office.

S. T. Allen, Atlanta, for plaintiff in error.

Daniel Duke, Atlanta, for defendant in error.

CANDLER, Justice (after stating the foregoing facts.)

[1][2][3][4] 1. 'Whenever any contest shall arise over an election of any constable \* \* \* the same shall be filed with, heard and determined by the ordinary of the county wherein such contest may arise, under the same rules and regulations

as to the mode of procedure as prescribed in contests where commission is issued by the Governor.' Code, §§ 34-3001, 34-2801, 34-2802, 34-2803. The jurisdiction conferred upon an ordinary to hear and determine a contest arising out of an election of constable is limited, and he has no power other than that expressly conferred by statute. [McDonald v. DeLaPerriere](#), 178 Ga. 54, 172 S.E. 1. In such a proceeding the ordinary does not act in a judicial or quasijudicial capacity. [Cutts v. Scandrett](#), 108 Ga. 620, 34 S.E. 186; [Shirley v. Gardner](#), 160 Ga. 338, 127 S.E. 855. His sole authority and jurisdiction is 'to determine \* \* \* whether the person filing the contest or the one who was declared elected received the greater number of legal votes, and, in case the contestant received it, to declare him duly elected.' [Walton v. Booth](#), 151 Ga. 452, 107 S.E. 63, 64; \*246 [Simpson v. Rimes](#), 141 Ga. 822, 82 S.E. 291. And it is only where the decision and judgment of the ordinary is based upon a hearing as to which of the candidates received the greatest number of legal votes in the election, that such judgment is final and conclusive on the parties. [Harris v. Glenn](#), 141 Ga. 687, 81 S.E. 1103; [Tupper v. Dart](#), 104 Ga. 179, 30 S.E. 624; [Kinman v. Monk](#), 179 Ga. 132, 175 S.E. 458; [Burgess v. Friar](#), 183 Ga. 386, 188 S.E. 526. Where the petition filed in a contest of an election fails to set out a valid and sufficient ground of contest, and a ground coming within the jurisdiction of the Ordinary in such a case, it is error for the ordinary to refuse to dismiss such petition on motion made for that purpose. [Norwood v. Peebles](#), 158 Ga. 162, 122 S.E. 618; [West v. Lewis](#), 188 Ga. 437, 439, 4 S.E.2d 171.

[5][6] In the present case, there is no contention that any vote cast in the election of constable was illegal, or that the result of the election as certified by the election managers to the ordinary was not correct. The sole ground of contest, as alleged in the petition filed for that purpose, was that Stone, whose name was \*\*461 certified as having received the greatest number of legal votes cast, was not qualified as a candidate for the office because he was not a duly registered voter of the county on the day of the election. Clearly this was an attempt to raise a judicial question, a determination of which would be without the scope of authority conferred on the ordinary in an election contest case. The ordinary therefore erred in refusing to dismiss the petition on motion of Stone, and the subsequent findings and orders were void.

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This being true, Stone, in the capacity of a citizen of the District, could thereafter institute and maintain a proceeding in the nature of a quo warranto for the purpose of inquiring into the right of Thompson to exercise the functions of the office of constable in the district under and by virtue of the void judgment of the ordinary. Code, § 64-201; [Hathcock v. McGouirk](#), 119 Ga. 973, 47 S.E. 563; [Malone v. Minchew](#), 170 Ga. 687, 153 S.E. 773; [Sweat v. Barnhill](#), 171 Ga. 294(10), 155 S.E. 18.

[7][8] 2. Thompson, the plaintiff in error, contends that where a person who is ineligible to hold an office receives a majority of the votes cast in an election, the effect is not to invalidate the election, but to declare the qualified person who receives the next highest number of votes to be elected. He relies upon \*247[Pearson v. Lee](#), 173 Ga. 496, 160 S.E. 499, as authority for that contention. While that decision contains some language which might appear to be in conflict with the ruling made by the trial court in the present case, yet the court was there dealing with a mandamus proceeding brought to require the clerk of the superior court to call an election for ordinary, and the question before the court was whether or not a vacancy existed in that office. The decision was not concurred in by a full bench, and if conflicting, must yield to older full-bench decisions which have passed on the identical question now before the court. In [Dobbs v. Mayor and Council of Buford](#), 128 Ga. 483, 57 S.E. 777, 11 Ann.Cas. 117, this court held: 'The effect, where a person who is ineligible to hold the offic receives a majority of the votes cast in an election, is not go give the office to the qualified person having the next highest number of votes, but to invalidate the election; and in such a case a new election must be held.' In [Crovatt v. Mason](#), 101 Ga. 246, 257, 28 S.E. 891, 895, this court held: 'In the case of the State [ex rel. Hardwick] v. Swearingen, 12 Ga. 23, this court held that 'a person receiving only a minority of the legal votes polled is not entitled to be installed into an office, notwithstanding the incumbent be removed on account of some personal disqualification. Under such circumstances, a new election will be ordered.' The American doctrine, supported by an undoubted preponderance of authority, is that though the candidate receiving the highest number of votes, because of his ineligibility, fail of an election, yet the votes cast for him are so far effectual as to prevent

the election of other candidates, and there is no election at all. [State v. Giles](#), 52 Am.Dec. 149; [State v. Smith](#), 14 Wis. 497; [Saunders v. Haynes](#), 13 Cal. 145; [Fish v. Collens](#), 21 La. Ann. 289; [State v. Vail](#), 53 Mo. 97; [Sublett v. Bedwell](#), 47 Miss. 266, 12 Am.Rep. 338; [Com. v. Cluley](#), 56 Pa. 270 [94 Am.Dec. 75]. Unless the votes for an ineligible person are expressly declared to be void, the effect of such person receiving a majority of the votes cast is, according to the weight of American authority and the reason of the matter, that a new election must be held, and is not to give the office to the qualified person having the next highest number of votes.'

[9] Accordingly, the trial judge did not err in holding the election void because of Stone's admitted ineligibility, and in the judgment ordering the commissions of office issued to Stone and Thompson vacated, annulled, and cancelled.

Judgment affirmed.

All the Justices concur.

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C

Supreme Court of Appeals of West Virginia.  
Leonard **UNDERWOOD** and Walter Price, III, Etc.  
v.  
The **COUNTY COMMISSION OF KANAWHA  
COUNTY**, Etc.  
**No. 17289.**

Oct. 2, 1986.

Two candidates in primary election petitioned for writ of mandamus to compel county commission, sitting as board of canvassers, to perform certain statutorily required acts. The Circuit Court, Kanawha County, denied writ, and candidates appealed. The Supreme Court of Appeals, Neely, J., held that: (1) county commission was required to compare number of ballots cast in precinct with number of poll tickets issued before it certified election; (2) quorum of county commission was required to be continuously present during entire canvass; and (3) Supreme Court of Appeals was authorized to order that duplicate deck used to tabulate results of election race be made available so that it could be compared with deck used in actual count, to determine whether there were any further undiscovered errors in deck employed in actual count and whether deck employed in actual count had been tampered with.

Writ awarded as moulded.

West Headnotes

**[1] Statutes**  **227**  
[361k227 Most Cited Cases](#)

It is well established that word "shall," in absence of language in statute showing contrary intent on part of legislature, should be afforded mandatory connotation.

**[2] Elections**  **260**  
[144k260 Most Cited Cases](#)

Election statute required that county commission, sitting as board of canvassers, compare number of ballots cast in precinct with number of poll tickets issued before certifying election. [Code, 3-6-9.](#)

**[3] Elections**  **260**  
[144k260 Most Cited Cases](#)

Election statute required that quorum of county commission, sitting as board of canvassers, be continuously present during entire canvass, including specifically when statutorily required hand count of ballots was conducted. [Code, 3-4A-28\(4\), 3-6-9.](#)

**[4] Mandamus**  **74(4)**  
[250k74\(4\) Most Cited Cases](#)

Writ of mandamus to compel county commission, sitting as board of canvassers, to perform certain acts with respect to primary election would not change outcome of races involving candidates seeking writ, and thus writ would not be issued, where one challenging candidate won his race and other challenging candidate lost his race by such great margin that he did not expect relief to alter outcome. [Code, 3-4A-28\(4\), 3-6-9.](#)

**[5] Elections**  **260**  
[144k260 Most Cited Cases](#)

Election statute authorized Supreme Court of Appeals to order that duplicate deck used to tabulate results of election races placed with state election commission be made available so that it could be compared with deck used in actual count to determine whether there existed any further undiscovered errors in deck employed in actual count, and whether deck employed in actual count had been tampered with, where errors in deck used to tabulate results of election race were identified after and not as result of test required under election statute. [Code, 3-4A-26.](#)

**Elections**  **260**  
[144k260 Most Cited Cases](#)

Election statute required that quorum of county commission, sitting as board of canvassers, be continuously present during entire canvass, including specifically when statutorily required hand count of ballots was conducted. [Code, 3-4A-28\(4\), 3-6-9.](#)

**\*\*444 \*741** Syllabus by the Court

1. "It is well established that the word "shall," in the absence of language in the statute showing a contrary intent on the part of the Legislature, should be afforded a mandatory connotation." Syl. Pt. 1, [Nelson v. West Virginia Public Employees Ins. Bd.](#), 171 W.Va. 445, 300 S.E.2d 86 (1982).

2. [W.Va.Code 3-6-9 \[1985\]](#) requires that the county com-

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mission, sitting as a board of canvassers, compare the number of ballots cast in a precinct with the number of poll tickets issued before certifying an election.

3. [W.Va.Code 3-6-9 \[1985\]](#) requires that a quorum of the county commission, sitting as a board of canvassers, be continuously present during the entire canvass, including specifically the hand count of five percent of the precinct ballots prescribed by [W.Va.Code 3-4A-28\(4\)](#) [1982].

4. Where errors in the decks used to tabulate the results of election races are identified after and not as a result of the public test required by [W.Va.Code 3-4A-26 \[1982\]](#), that section authorizes the circuit court or the supreme court of appeals to order that the duplicate deck placed with the state election commission be made available so that it may be compared with the deck used in the actual count to determine: 1) whether there exist any further undiscovered errors in the deck employed in the actual count, and 2) whether the deck employed in the actual count has been tampered with.

Leonard I. Underwood, St. Albans, Walter Price, III, pro se.

\*\*445 Gary A. King, St. Albans, for appellee.

NEELY, Justice:

This is an appeal from a denial of a writ of mandamus in the Circuit Court of Kanawha County. Appellants seek to compel the County Commission of Kanawha County, sitting as the Board of Canvassers, to perform certain acts required by [W.Va.Code 3-1-1 et seq.](#) [1986 Replacement Vol.]. The controversy arises out events surrounding the 13 May 1986 primary election in Kanawha County. Because the appellants allege several deficiencies, we shall deal with each separately.

\*742 I

[1][2] The parties first stipulate that the county commission conducted the canvass without physically inspecting the poll books and poll tickets used in the election. [W.Va.Code 3-6-9 \[1985\]](#) provides in part:

They [the county commissioners] shall convene as the canvassing board at the courthouse on the fifth day (Sundays excepted) after every election held in their county, or in any district thereof, and the officers in

whose custody the ballots, poll books, registration records, tally sheets and certificates have been placed shall lay them before the board for examination. \* \* \*

The statute clearly directs the custodial officers to place before the commission all of the items listed, including poll books and poll tickets. Moreover, this is presumably not done just for drill. Comparison of the number of ballots cast in a precinct with the number of poll tickets reveals whether the number of ballots cast is (as it should be) identical with the number of people who voted. Thus, a poll ticket audit should reveal whether a ballot box has been stuffed or ballots have been removed. Such a poll ticket audit was not conducted by the commission.

The appellees urge that [W.Va.Code 3-6-9 \[1985\]](#) is merely directory, and that such a poll ticket audit is therefore not required. However, the language of the statute is explicit: the custodial officers *shall* lay the poll books before the commissioners. "It is well established that the word 'shall,' in the absence of language in the statute showing a contrary intent on the part of the Legislature, should be afforded a mandatory connotation." Syl. Pt. 1, [Nelson v. West Virginia Public Employees Ins. Bd.](#), 171 W.Va. 445, 300 S.E.2d 86 (1982). The poll ticket audit is therefore a mandatory, non-discretionary duty that the commission is bound to perform.

## II

[3] The parties next stipulate that a quorum of the board of canvassers was not continuously present in the Kanawha County Courthouse Complex during the hand count of the ballots. [W.Va.Code 3-4A-28\(4\)](#) [1982] provides in part:

During the canvass and any requested recount, at least five percent of the precincts shall be chosen at random and the ballot cards cast therein counted manually. The same random selection shall also be counted by the automatic tabulating equipment. If the variance between the random manual count and the automatic tabulating equipment count of the same random ballots, is equal to or greater than one percent, then a manual recount of all ballot cards shall be required. \* \* \*

[W.Va.Code 3-6-9 \[1985\]](#) provides in part:

\* \* \* They [the board of canvassers] may adjourn from time to time, but no longer than absolutely necessary, and, when a majority of the commissioners are not present,

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their meeting shall stand adjourned until the next day, and so from day to day, until a quorum is present. \* \* \*

[W.Va.Code 3-6-9 \[1985\]](#) thus requires the presence of a quorum during the entire canvass, and that includes specifically when the hand count required by [W.Va.Code 3-4A-28\(4\) \[1982\]](#) is conducted. Once again the statutory language is explicit: "When a majority of the commissioners are not present, their meeting *shall* stand adjourned ... until a quorum is present." \*\*446 [emphasis supplied]. The requirement of the presence of a quorum at the hand count is therefore mandatory, not directory. *Nelson, supra*.

### III

[4] Appellants pray that we issue a writ ordering the county commission to refrain from certification of the 13 May 1986 primary election until such time as the commission: 1) conducts a canvass of the returns employing a poll ticket audit, and 2) conducts the hand count prescribed by [W.Va.Code 3-4A-28\(4\) \[1982\]](#) in the presence of a quorum of the board of canvassers.

We note initially that Mr. Underwood and Mr. Price, the appellants in this proceeding, are the only candidates requesting this relief. None of the other candidates for nomination in the 13 May 1986 primary election has registered with this Court any \*743 dissatisfaction with the manner in which the canvass was conducted. Mr. Underwood won his race. Mr. Price concedes that he lost his race by so great a margin that he does not expect the relief requested to alter the outcome. Therefore, because the requested relief would not change the outcome of either of the appellants' races, we decline to issue the writ. However, the requirements of a poll ticket audit and the presence of a quorum of the commission during the hand count shall be strictly applied in the future.

### IV

[5] Finally, the parties stipulate that there were errors in the application deck used to tabulate the votes in the Kanawha County races. [FN1] These errors were not identified during the public test required by [W.Va.Code 3-4A-26 \[1982\]](#). After the public test, the deck was certified errorless by the commission, and a certified, duplicate copy of the application deck was sent by certified mail to the offices of the state election commission in accordance [W.Va.Code](#)

[3-4A-26 \[1982\]](#). Pursuant to [W.Va.Code 3-4A-26 \[1982\]](#), the deck was again tested immediately before and immediately after the official count. However, the errors were still not identified. [FN2] The errors were finally brought to the attention of the commission before the canvass. The commission then rectified the identified errors and re-tabulated the votes in the affected races pursuant to [W.Va.Code 3-4A-29\(1\) \[1969\]](#).

[FN1] There are three different methods of voting used in the various counties of West Virginia. The first is the hand-marked, paper ballot. The second is the mechanical voting machine. The third is the hand-punched, computerized ballot. With this third method, the voter punches out holes in a ballot card, each hole corresponding to a candidate. The punched ballots are then run through a computer, which tabulates the votes cast for each candidate. It is this third voting method that is employed in Kanawha County.

[FN2] We note that the errors identified pertained only to decks used in the tabulation of results in district political party executive committee races. There are 72 separate party executive committee races spread among the 257 election precincts. Each committee race, concerning as it does but a small subset of precincts, requires a separate sub-program to supplement the larger, county-wide program. It is not alleged that the identified errors in the application deck had any effect on the tabulation of the results in any county-wide races.

Appellants claim that the existence of these errors in the deck places the integrity of the entire deck, and therefore the integrity of the entire election, in question. Further, appellants contend that the failure to identify program errors despite seven previous tests of the deck raises the possibility that the deck was tampered with after it was certified as errorless by the commission. Appellants therefore request that we order the release of the duplicate deck sealed at the offices of the state election commission so that the decks may be examined and compared.

[W.Va.Code 3-4A-26 \[1982\]](#) provides in pertinent part:

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\* \* \* Immediately after conclusion of this completed test, a certified duplicate copy of the program deck shall be sent by certified mail to the offices of the state election commission, where it shall be preserved and secured for one year, \*\*447 and made available for comparison or analysis by order of a circuit court or the supreme court of appeals. \* \* \*

The integrity of the mechanism for tabulating the results of public elections is unquestionably a matter of the utmost public concern. We therefore order that the program and application decks placed with the state election commission, including all clear cards, option cards, and office definition cards, be brought from the office of state election commission for purposes of analysis and comparison with the decks employed in the actual count.

Accordingly, for the reasons set forth above, the judgment of the circuit court of Kanawha County is reversed and the writ of mandamus for which appellants prayed below is here awarded, as moulded, and the case is remanded for further proceedings consistent with this opinion.

Writ awarded as moulded.

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(Cite as: 675 So.2d 1138)

C

Court of Appeal of Louisiana,  
Fifth Circuit.  
Andy VALENCE

v.

Robert ROSIERE, W. Fox McKeithen, as Secretary of  
State for the State of  
Louisiana and Jerry Fowler, as Commissioner of Elections  
for the State of  
Louisiana.  
No. 96-CA-390.

May 9, 1996.

Defeated candidate brought action to contest election against successful candidate. The 24th Judicial District Court, Parish of Jefferson, No. 492- 505, [Patrick J. McCabe, J.](#), granted successful candidate's exception of no cause of action. Defeated candidate appealed. The Court of Appeal, [Daley, J.](#), held that defeated candidate's allegations of improper conduct, and that he could not timely challenge qualifications of certain voters despite due diligence, were sufficient to allege cause of action to contest election.

Vacated and remanded.

West Headnotes

**[1] Pleading** 🔑228.20

[302k228.20 Most Cited Cases](#)

For purpose of determining validity of exception of no cause of action, all well-pleaded allegations of fact are accepted as true and must be construed most favorably from plaintiff's standpoint to afford him opportunity to present his evidence at trial.

**[2] Elections** 🔑285(3)

[144k285\(3\) Most Cited Cases](#)

General charges of fraud and irregularities are not sufficient to state cause of action to contest election.

**[3] Elections** 🔑227(1)

[144k227\(1\) Most Cited Cases](#)

If court finds proven frauds and irregularities are of such serious nature as to deprive voters of free expression of their will, it will decree nullity of entire election, even though

contestant might not be able to prove that he would have been elected but for such fraud and irregularities.

**[4] Elections** 🔑285(4)

[144k285\(4\) Most Cited Cases](#)

Generally, allegations of petition in action to contest election must show sufficient number of contested votes to change results of election or exception of no cause of action will be maintained. [LSA-R.S. 18:1432](#), subd. A.

**[5] Elections** 🔑285(3)

[144k285\(3\) Most Cited Cases](#)

Allegations that successful candidate improperly witnessed request for absentee ballot and assisted other voter in casting ballot, that seven nonresidents voted in election, that one ballot was forged, and that defeated candidate was not able to ascertain whether additional 11 signatures were forged with sufficient time to challenge election, despite due diligence, were sufficient to allege cause of action to challenge voters. [LSA-R.S. 18:564](#), [18:1310](#), subd. B(1), 18:1315, 18:1434.

\*1139 [Gerald J. Nielsen](#), Metairie, for Andy Valence, Plaintiff/Appellant.

[Wayne C. Guidry](#), Grand Isle, for Robert Rosiere, Defendant/Appellee.

[Sheri M. Morris](#), Baton Rouge, for W. Fox McKeithen, Secretary of State, Defendant/Appellee.

[Carey T. Jones](#), Denham Springs, for Jerry Fowler, Commissioner of Elections, Defendant/Appellee.

Before [GOTHARD](#), [CANNELLA](#) and [DALEY](#), JJ.

[DALEY](#), Judge.

This is an election contest concerning the mayoral election in Grand Isle, Louisiana. The incumbent, Andy Valence, plaintiff, received 524 votes to 541 votes received by Robert Rosiere, defendant, a difference of 17 votes. Valence filed a "Petition to Contest Election" alleging that but for substantial irregularities, errors, fraud and other unlawful activities committed by Rosiere and/or his supporters he would have been reelected Mayor of Grand Isle. Defendants, Rosiere, the Secretary of State, W. Fox McKeithen, and Commis-

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sioner of Elections, Jerry Fowler, filed exceptions of No Cause of Action alleging Valence did not timely contest the qualification of certain voters as required by statute and thus the challenge is waived pursuant to [LSA-R.S. 18:1434](#). Rosiere also sought sanctions against Valence and his counsel for filing a frivolous lawsuit.

Plaintiff alleges defendant and his supporters stole the mayoral election from him and the people of Grand Isle by participating in widespread acts of fraud and irregularities, mainly through absentee voting. The votes cast by machine resulted in 443 votes for Valence and 412 votes for Rosiere. The absentee vote totaled 210, eighty-one for Valence and 129 for Rosiere. The result being a 17-vote victory margin for defendant, Rosiere.

Based on the requirement of [R.S. 18:1315](#) that absentee votes are to be challenged at least four days before the election, the trial court granted the Exception of No Cause of Action and dismissed Valence's suit. The request for sanctions was denied. Valence appeals. Rosiere answered the appeal seeking sanctions against Valence and his counsel. For the following reasons, we vacate the granting of the Exception of No Cause of Action and remand this matter to the trial court for trial.

[\[1\]\[2\]\[3\]\[4\]](#) For the purpose of determining the validity of an Exception of No Cause of Action all well pleaded allegations of fact are accepted as true and must be construed most favorably from the plaintiff's standpoint to afford him an opportunity to present his evidence at a trial. [Brunet v. Evangeline Parish Bd. Of Sup'rs. of Elections](#), 376 So.2d 633 (La.App. 3 Cir.1979). General charges of fraud and irregularities are not sufficient to state a cause of action. [Dowling v. Orleans Parish Democratic Committee](#), 235 La. 62, 102 So.2d 755 (1958); [Garrison v. Connick](#), 291 So.2d 778 (La.1974); [Lewis v. Democratic Executive Committee](#), 232 La. 732, 95 So.2d 292 (1957). However, "if the court finds the proven frauds and irregularities are of such a serious nature as to deprive the voters of the free expression of their will, it will decree the nullity of the entire election--even though the contestant might not be able to prove that he would have been [elected] but for such fraud and irregularities." [Dowling](#), supra at p. 762; [Garrison](#), supra at p. 781. Generally however, the allegations of the petition must

show a sufficient number of contested votes to change the results of the election or the exception will be maintained. [LSA-R.S. 18:1432\(A\)](#) [\[FN1\]](#); \*1140 [Davis v. McGlothin](#), 524 So.2d 1320 (La.App. 3 Cir.1988), writ denied 525 So.2d 1046 (La.1988); [Dumas v. Jetson](#), 446 So.2d 744 (La.App. 1 Cir.1983).

[FN1. LSA-R.S. 18:1432\(A\)](#) provides:

A. If the trial judge in an action contesting an election determines that: (1) it is impossible to determine the result of election, or (2) the number of qualified voters who were denied the right to vote by the election officials was sufficient to change the result in the election, if they had been allowed to vote, or (3) the number of unqualified voters who were allowed to vote by the election officials was sufficient to change the result of the election if they had not been allowed to vote, or (4) a combination of the factors referred to in (2) and (3) herein would have been sufficient to change the result had they not occurred, the judge may render a final judgment declaring the election void and ordering a new primary or general election for all the candidates, or, if the judge determines that the appropriate remedy is the calling of a restricted election, the judge may render a final judgment ordering a restricted election, specifying the date of the election, the appropriate candidates for the election, the office or other position for which the election shall be held, and indicating which voters will be eligible to vote.

Defendants contend plaintiff is precluded from challenging individual absentee voters or regular voters because he did not timely contest the voters pursuant to the Revised Statutes, Title 18, Sections 1315 and 1434 and thus has waived any objection. The trial court agreed and found Valence waived all challenges to voters not formally lodged during the voting process.

[R.S. 18:1315](#) provides in pertinent part:

#### **CHALLENGE OF ABSENTEE BALLOT**

A. (1) A candidate or his representative, a member of the board, or a qualified elector may challenge an absentee ballot for the grounds specified in [R.S. 18:565\(A\)](#), by per-

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sonally filing his written challenge with the registrar, no later than the fourth day before the election for which the ballot is challenged. Such challenge shall be on a form provided by the commissioner of elections.

\* \* \* \* \*

B. During the counting and tabulating of absentee ballots, any candidate or his representative, member of the board, or qualified elector may challenge an absentee ballot for cause, other than those grounds specified in [R.S. 18:565\(A\)](#).

\* \* \* \* \*

[R.S. 18:565\(A\)](#) provides as follows:

**CHALLENGE OF VOTERS**

A. Grounds for challenge.

A commissioner, watcher, or qualified voter may challenge a person applying to vote in a primary or general election on the ground that:

- (1) The applicant is not qualified to vote in the election,
- (2) The applicant is not qualified to vote in the precinct, or
- (3) The applicant is not the person whose name is shown on the precinct register.

\* \* \* \* \*

Additionally, [R.S. 18:1434](#) provides in pertinent part:

**WAIVER OF OBJECTIONS TO VOTER QUALIFICATIONS WHEN VOTER IS NOT CHALLENGED AT THE ELECTION**

An objection to the qualifications of a voter or to an irregularity in the conduct of the election which, with the exercise of due diligence, could have been raised by a challenge of the voter or objections at the polls to the procedure is deemed waived.

[5] During oral argument counsel for Valence waived the allegations of Paragraph XIII of the petition alleging nonresident voters voted in the election and withdrew Paragraph XXIII of his petition alleging that ten persons voted twice. However, he maintains defendant and his supporters participated in illegal activities which still affected more than 17 votes, a number sufficient to cause a change in the declared winner of the election. Valence now narrows his claim to the following allegations:

1. Seven voters were allowed to vote in the runoff election despite filling out "Address Confirmation at Polls" wherein the voters indicated non-Grand Isle residences.
2. Twelve alleged signature forgeries on absentee ballots.
3. Violations of [LSA-R.S. 18:564 \[FN2\]](#) and \*1141 [18:1310 \[FN3\]](#) by improper assistance in voting by Rosiere and his supporters.

[FN2. LSA-R.S. 18:564\(A\) and \(B\)](#) provide: A.

Voters entitled to assistance. A voter shall not receive assistance in voting unless he is unable to read, or is unable to vote without assistance because of a physical handicap, including blindness.

B. Persons prohibited from assisting voters.

(1) No candidate in any election shall assist any voter in casting his ballot in that election.

(2) No commissioner-in-charge can assist a voter.

(3) No employer or employer's agent can assist an employee in voting.

(4) No union agent can assist a union member in voting.

(5) Except as provided in Paragraphs (1) through (4) of this Subsection, a voter entitled to assistance in voting may receive the assistance of any person of his choice, including a commissioner.

[FN3. LSA-R.S. 18:1310\(A\) and \(B\)\(1\)](#) concerning absentee ballots provide:

A. When a voter receives the absentee voting materials by mail or in person, he first shall fill in all blanks on the certificate on the ballot envelope flap. The voter then shall mark the ballot according to the printed instructions on its face. Then the voter shall place the ballot in the envelope, seal the envelope, and sign the certificate on the ballot envelope flap. B. (1) No candidate in any election shall assist any voter in casting his ballot in that election.

Our review of the allegations of the petition shows plaintiff has alleged facts with sufficient particularity to state a cause of action to contest twenty voters. The alleged illegal activities included improper assistance by Rosiere in witnessing

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one request for an absentee ballot, a violation of LSA-R.S. 18:1310B(1), and the voting on election day by seven non-residents who filled out an "Address Confirmation at Polls" and listed their residences outside of Grand Isle. Plaintiff further alleges one particular ballot was forged and that other questionable signatures were being reviewed by a handwriting expert at the time of filing the petition. On the date of trial the record reflects plaintiff was prepared to attack an additional eleven signatures which he alleges were forged. Plaintiff also alleges he was not able to ascertain this information despite due diligence with sufficient time to challenge the election pursuant to [LSA-R.S. 18:1315](#) and 1434. See also [Fanara v. Candella, 94-491 \(La.App. 3 Cir. 4/18/94\), 640 So.2d 406, 409](#), where the 3rd Circuit recognized that due diligence does not require a candidate to re-search every registered voter to determine their current eligibility to vote.

Accepting these allegations as true as required on an exception of no cause of action, plaintiff has sufficiently identified 20 alleged illegal votes which satisfies the requirements for stating a valid cause of action. Further, under the facts alleged and due to the nature of the alleged illegal activities, plaintiff's contention that, despite due diligence, he was unable to challenge these voters at the times required under Title 18 sections 1315 and 1434 must also be accepted as true for purposes of the exception. The merits of Valence's allegations are not before us and we express no opinion on the validity of the claims asserted.

Accordingly, the allegations of Valence's petition are sufficient to state a cause of action requiring a trial on the merits concerning the allegations of forgery of ballots, nonresident voting as identified by the "Address Confirmation at Polls" and illegal assistance of voters by the defendant, Rosiere.

Based on our decision herein, defendant Rosiere's request for sanctions is denied.

Accordingly, the trial court judgment granting the exceptions of no cause of action is vacated and the matter is remanded to the trial court for further proceedings consistent with this opinion. Each party to bear their respective costs of this appeal.

**JUDGMENT VACATED CASE REMANDED FOR TRIAL**

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### **Briefs and Other Related Documents**

Supreme Court of the United States  
James P. **WESBERRY**, Jr., et al., Appellants,  
v.  
Carl E. **SANDERS**, etc., et al.  
**No. 22.**

Argued Nov. 18 and 19, 1963.  
Decided Feb. 17, 1964.

Action, in the United States District Court for the Northern District of Georgia, by qualified voters to strike down Georgia statute prescribing congressional districts. The three-judge District Court, [206 F.Supp. 276](#), dismissed the complaint, and plaintiffs appealed. The Supreme Court, Mr. Justice Black, held that the complaint presented a justiciable controversy, and that apportionment of congressional districts so that single congressman represented from two to three times as many Fifth District voters as were represented by each of congressmen from other Georgia districts grossly discriminated against voters in Fifth District in violation of constitutional requirement that representatives be chosen by people of the several states.

Reversed and remanded.

Mr. Justice Clark dissented in part; Mr. Justice Harlan and Mr. Justice Stewart dissented.

West Headnotes

#### **[1] Federal Courts 480** [170Bk480 Most Cited Cases](#)

(Formerly 30k1192)

Under circumstances, upon reversal of judgment dismissing complaint alleging unconstitutional disparity among congressional districts, Supreme Court would leave question of relief for further consideration and decision by district court. [42 U.S.C.A. §§ 1983, 1988](#); [28 U.S.C.A. § 1343\(3\)](#); Code Ga. § 34-2301.

#### **[2] Constitutional Law 68(3)** [92k68\(3\) Most Cited Cases](#)

Congressional apportionment cases are justiciable. U.S.C.A.Const. art. 1.

#### **[3] Constitutional Law 68(3)** [92k68\(3\) Most Cited Cases](#)

Constitutional provision that times, places and manner of holding elections should be prescribed by states and Congress does not immunize state congressional apportionment laws which debase citizen's right to vote from power of court to protect constitutional rights of individuals from legislative destruction. U.S.C.A.Const. art. 1, § 4.

#### **[4] Constitutional Law 46(2)** [92k46\(2\) Most Cited Cases](#)

#### **[4] Constitutional Law 68(3)** [92k68\(3\) Most Cited Cases](#)

Complaint alleging deprivation of constitutional rights through disparity in congressional districts was not subject to dismissal either on ground of want of equity or ground of nonjusticiability. [42 U.S.C.A. §§ 1983, 1988](#); [28 U.S.C.A. § 1343\(3\)](#); Code Ga. § 34-2301; U.S.C.A.Const. art. 1, §§ 2, 4; Amend. 14, §§ 1, 2.

#### **[5] United States 10** [393k10 Most Cited Cases](#)

Georgia apportionment of congressional districts so that single congressman represented from two to three times as many Fifth District voters as were represented by each of congressmen from other Georgia districts grossly discriminated against voters in Fifth District in violation of constitutional requirement that representatives be chosen by people of the several states. Code Ga. § 34-2301; U.S.C.A.Const. art. 1, § 2.

#### **[6] United States 10** [393k10 Most Cited Cases](#)

Constitutional command that representatives be chosen by people of the several states means that as nearly as practicable one man's vote in congressional election is to be worth as much as another's. U.S.C.A.Const. art. 1, § 2.

#### **[7] United States 10** [393k10 Most Cited Cases](#)

Those who framed the Constitution meant that no matter

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what mechanics of election, whether state wide or by districts, it was population which was to be basis of House of Representatives. U.S.C.A.Const. art. 1, § 2.

**[8] United States** 10

[393k10 Most Cited Cases](#)

Delegates to Constitutional Convention intended that, in allocating congressmen, number assigned to each state should be determined solely by number of state's inhabitants.

**[9] United States** 7.1

[393k7.1 Most Cited Cases](#)

(Formerly 393k7)

Constitutional provision that representatives are to be chosen by people of the several states must be construed in light of its history. U.S.C.A.Const. art. 1, § 2.

**[10] Elections** 1

[144k1 Most Cited Cases](#)

**[10] United States** 7.1

[393k7.1 Most Cited Cases](#)

(Formerly 393k7)

Right to vote cannot be denied outright, and it cannot, consistently with constitutional provision that representatives should be chosen by people of the several states, be destroyed by alteration of ballots. U.S.C.A.Const. art. 1, § 2.

**[11] Elections** 1

[144k1 Most Cited Cases](#)

No right is more precious in a free country than that of having a voice in the election of those who make laws; other rights, even the most basic, are illusory if right to vote is undetermined.

**[12] United States** 10

[393k10 Most Cited Cases](#)

That it may not be possible to draw congressional districts with mathematical precision is no excuse for ignoring Constitution's plain objective of making equal representation for equal numbers of people fundamental goal for House of Representatives. U.S.C.A.Const. art. 1, § 2.

**\*\*527 \*2** Emmet J. Bondurant II, Atlanta, Ga., for appellants.

Frank T. Cash, Atlanta, Ga., for appellants, pro hac vice, by

special leave of Court.

Paul Rodgers, Atlanta, Ga., for appellees.

Bruce J. Terris, Washington, D.C., for the United States, as amicus curiae, by special leave of Court.

Mr. Justice BLACK delivered the opinion of the Court.

**[1]** Appellants are citizens and qualified voters of Fulton County, Georgia, and as such are entitled to vote in congressional elections in Georgia's Fifth Congressional District. That district, one of ten created by a 1931 Georgia statute, **[FN1]** includes Fulton, DeKalb, and Rockdale Counties and has a population according to the 1960 census of 823,680. The average population of the ten districts is 394,312, less than half that of the Fifth. One district, the Ninth, has only 272,154 people, less than one-third as many as the Fifth. Since there is only one Congressman for each district, this inequality of population means that the Fifth District's Congressman has to represent from two to three times as many people as do Congressmen from some of the other Georgia districts.

**[FN1]** Ga.Code s 34--2301.

**\*3** Claiming that these population disparities deprived them and voters similarly situated of a right under the Federal Constitution to have their votes for Congressmen given the same weight as the votes of other Georgians, the appellants brought this action under [42 U.S.C. ss 1983](#) and [1988](#) and [28 U.S.C. s 1343\(3\)](#) asking that the Georgia statute be declared invalid and that the appellees, the Governor and Secretary of State of Georgia, be enjoined from conducting elections under it. The complaint alleged that appellants were deprived of the full benefit of their right to vote, in violation of (1) Art. I, s 2, of the Constitution of the United States, which provides that 'The House of Representatives shall be composed of Members chosen every second Year by the People of the several States \* \* \*'; (2) the Due Process, Equal Protection, and Privileges and Immunities Clauses of the Fourteenth Amendment; and (3) that part of Section 2 of the Fourteenth Amendment which provides that 'Representatives shall be apportioned among the several States according to their respective numbers \* \* \*.'

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The case was heard by a three-judge District Court, which found unanimously, from facts not disputed, that:

'It is clear by any standard \* \* \* that the population of the Fifth District \*\*528 is grossly out of balance with that of the other nine congressional districts of Georgia and in fact, so much so that the removal of DeKalb and Rockdale Counties from the District, leaving only Fulton with a population of 556,326, would leave it exceeding the average by slightly more than forty per cent.' [FN2]

[FN2. \*Wesberry v. Vandiver\*, D.C., 206 F.Supp. 276, 279--280.](#)

Notwithstanding these findings, a majority of the court dismissed the complaint, citing as their guide Mr. Justice Frankfurter's minority opinion in [Colegrove v. Green](#), 328 U.S. 549, 66 S.Ct. 1198, 90 L.Ed. 1432, an opinion stating that challenges to apportionment \*4 of congressional districts raised only 'political' questions, which were not justiciable. Although the majority below said that the dismissal here was based on 'want of equity' and not on nonjusticiability, they relied on no circumstances which were peculiar to the present case; instead, they adopted the language and reasoning of Mr. Justice Frankfurter's Colegrove opinion in concluding that the appellants had presented a wholly 'political' question. [FN3] Judge Tuttle, disagreeing with the court's reliance on that opinion, dissented from the dismissal, though he would have denied an injunction at that time in order to give the Georgia Legislature ample opportunity to correct the 'abuses' in the apportionment. He relied on [Baker v. Carr](#), 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663, which, after full discussion of Colegrove and all the opinions in it, held that allegations of disparities of population in state legislative districts raise justiciable claims on which courts may grant relief. We noted probable jurisdiction. 374 U.S. 802, 83 S.Ct. 1691, 10 L.Ed.2d 1029. We agree with Judge Tuttle that in debasing the weight of appellants' votes the State has abridged the right to vote for members of Congress guaranteed them by the United States Constitution, that the District Court should have entered a declaratory judgment to that effect, and that it was therefore error to dismiss this suit. The question of what relief should be given we leave for further consideration and decision by the District Court in light of existing circumstances.

[FN3. 'We do not deem (*Colegrove v. Green*) \* \* \* to be a precedent for dismissal based on the nonjusticiability of a political question involving the Congress as here, but we do deem it to be strong authority for dismissal for want of equity when the following factors here involved are considered on balance: a political question involving a coordinate branch of the federal government; a political question posing a delicate problem difficult of solution without depriving others of the right to vote by district, unless we are to redistrict for the state; relief may be forthcoming from a properly apportioned state legislature; and relief may be afforded by the Congress.' 206 F.Supp., at 285 (footnote omitted).

\*5 I.

*Baker v. Carr*, supra, considered a challenge to a 1901 Tennessee statute providing for apportionment of State Representatives and Senators under the State's constitution, which called for apportionment among counties or districts 'according to the number of qualified electors in each.' The complaint there charged that the State's constitutional command to apportion on the basis of the number of qualified voters had not been followed in the 1901 statute and that the districts were so discriminatorily disparate in number of qualified voters that the plaintiffs and persons similarly situated were, 'by virtue of the debasement of their votes,' denied the equal protection of the laws guaranteed them by the Fourteenth Amendment. [FN4] The cause there of the alleged 'debasing' of votes for state legislators--districts containing widely varying numbers of people--was precisely that which was alleged to debase votes for Congressmen \*\*529 in *Colegrove v. Green*, supra, and in the present case. The Court in *Baker* pointed out that the opinion of Mr. Justice Frankfurter in *Colegrove*, upon the reasoning of which the majority below leaned heavily in dismissing 'for want of equity,' was approved by only three of the seven Justices sitting. [FN5] After full consideration of *Colegrove*, the Court in *Baker* held (1) that the District Court had jurisdiction of the subject matter; (2) that the qualified Tennessee voters there had standing to sue; and \*6 (3) that the plaintiffs had stated a justiciable cause of action on which relief could be granted.

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[FN4. 369 U.S., at 188, 82 S.Ct. at 694, 7 L.Ed.2d 663.](#)

[FN5.](#) Mr. Justice Rutledge in *Colegrove* believed that the Court should exercise its equitable discretion to refuse relief because 'The shortness of the time remaining (before the next election) makes it doubtful whether action could, or would, be taken in time to secure for petitioners the effective relief they seek.' [328 U.S., at 565, 66 S.Ct. at 1208, 90 L.Ed. 1432.](#) In a later separate opinion he emphasized that his vote in *Colegrove* had been based on the 'particular circumstances' of that case. [Cook v. Fortson, 329 U.S. 675, 678, 67 S.Ct. 21, 22, 91 L.Ed. 596.](#)

[\[2\]\[3\]\[4\]](#) The reasons which led to these conclusions in *Baker* are equally persuasive here. Indeed, as one of the grounds there relied on to support our holding that state apportionment controversies are justiciable we said:

'\* \* \* [Smiley v. Holm, 285 U.S. 355, 52 S.Ct. 397, 76 L.Ed. 795; Koenig v. Flynn, 285 U.S. 375, 52 S.Ct. 403, 76 L.Ed. 805, and Carroll v. Becker, 285 U.S. 380, 52 S.Ct. 402, 76 L.Ed. 807,](#) concerned the choice of Representatives in the Federal Congress. *Smiley*, *Koenig* and *Carroll* settled the issue in favor of justiciability of questions of congressional redistricting. The Court followed these precedents in *Colegrove* although over the dissent of three of the seven Justices who participated in that decision.' [\[FN6\]](#)

[FN6. 369 U.S., at 232, 82 S.Ct. at 718, 7 L.Ed.2d 663.](#) Cf. also [Wood v. Broom, 287 U.S. 1, 53 S.Ct. 1, 77 L.Ed. 131.](#)

This statement in *Baker*, which referred to our past decisions holding congressional apportionment cases to be justiciable, we believe was wholly correct and we adhere to it. Mr. Justice Frankfurter's *Colegrove* opinion contended that Art. I, s 4, of the Constitution [\[FN7\]](#) had given Congress 'exclusive authority' to protect the right of citizens to vote for Congressmen, [\[FN8\]](#) but we made it clear in *Baker* that nothing in the language of that article gives support to a construction that would immunize state congressional apportionment laws which debase a citizen's right to vote from

the power of courts to protect the constitutional rights of individuals from legislative destruction, a power recognized at least since our decision in [Marbury v. Madison, 1 Cranch 137, 2 L.Ed. 60,](#) in 1803. Cf. [\\*7Gibbons v. Ogden, 9 Wheat. 1, 6 L.Ed. 23.](#) The right to vote is too important in our free society to be stripped of judicial protection by such an interpretation of Article I. This dismissal can no more be justified on the ground of 'want of equity' than on the ground of 'non-justiciability.' We therefore hold that the District Court erred in dismissing the complaint.

[FN7.](#) '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. \* \* \* U.S.Const., Art. I, s 4.

[FN8. 328 U.S., at 554, 66 S.Ct. at 1200, 90 L.Ed. 1432.](#)

## II.

[\[5\]](#) This brings us to the merits. We agree with the District Court that the 1931 Georgia apportionment grossly discriminates against voters in the Fifth Congressional District. A single Congressman represents from two to three **\*\*530** times as many Fifth District voters as are represented by each of the Congressmen from the other Georgia congressional districts. The apportionment statute thus contracts the value of some votes and expands that of others. If the Federal Constitution intends that when qualified voters elect members of Congress each vote be given as much weight as any other vote, then this statute cannot stand.

[\[6\]\[7\]](#) We hold that, construed in its historical context, the command of Art. I, s 2, that Representatives be chosen 'by the People of the several States' [\[FN9\]](#) means that as **\*8** nearly as is practicable one man's vote in a congressional election is to be worth as much as another's. [\[FN10\]](#) This rule is followed automatically, of course, when Representatives are chosen as a group on a statewide basis, as was a widespread practice in the first 50 years of our Nation's history. [\[FN11\]](#) It would be extraordinary to suggest that in such statewide elections the votes of inhabitants of some parts of a State, for example, Georgia's thinly populated

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Ninth District, could be weighted at two or three times the value of the votes of people living in more populous parts of the State, for example, the Fifth District around Atlanta. Cf. [Gray v. Sanders, 372 U.S. 368, 83 S.Ct. 801, 9 L.Ed.2d 821](#). We do not believe that the Framers of the Constitution intended to permit the same vote-diluting discrimination to be accomplished through the device of districts containing widely varied numbers of inhabitants. To say that a vote is worth more in one district than in another would not only run counter to our fundamental ideas of democratic government, it would cast aside the principle of a House of Representatives elected 'by the People,' a principle tenaciously fought for and established at the Constitutional Convention. The history of the Constitution, particularly that part of it relating to the adoption of Art. I, s 2, reveals that those who framed the Constitution \*9 meant that, no matter what the mechanics of an election, whether statewide or by districts, it was population which was to be the basis of the House of Representatives.

[FN9](#). 'The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

'Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative \* \* \*.' U.S.Const. Art. I, s 2.

The provisions for apportioning Representatives and direct taxes have been amended by the Fourteenth and Sixteenth Amendments, respectively.

[FN10](#). We do not reach the arguments that the Georgia statute violates the Due Process, Equal Protection and Privileges and Immunities Clauses of the Fourteenth Amendment.

[FN11](#). As late as 1842, seven States still conducted congressional elections at large. See Paschal, 'The House of Representatives: 'Grand Depository of the Democratic Principle?'' 17 Law & Contemp. Prob. 276, 281 (1952).

During the Revolutionary War the rebelling colonies were loosely allied in the Continental Congress, a body with authority to do little more than pass resolutions and issue requests for men and supplies. Before the war ended the Congress had proposed and secured the ratification by the States of a somewhat closer association under the Articles of Confederation. Though the Articles established a central government for the United \*\*531 States, as the former colonies were even then called, the States retained most of their sovereignty, like independent nations bound together only by treaties. There were no separate judicial or executive branches: only a Congress consisting of a single house. Like the members of an ancient Greek league, each State, without regard to size or population, was given only one vote in that house. It soon became clear that the Confederation was without adequate power to collect needed revenues or to enforce the rules its Congress adopted. Farsighted men felt that a closer union was necessary if the States were to be saved from foreign and domestic dangers.

The result was the Constitutional Convention of 1787, called for 'the sole and express purpose of revising the Articles of Confederation \* \* \*' [FN12](#). When the Convention \*10 met in May, this modest purpose was soon abandoned for the greater challenge of creating a new and closer form of government than was possible under the Confederation. Soon after the Convention assembled, Edmund Randolph of Virginia presented a plan not merely to amend the Articles of Confederation but to create an entirely new National Government with a National Executive, National Judiciary, and a National Legislature of two Houses, one house to be elected by 'the people,' the second house to be elected by the first. [FN13](#)

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[FN12.](#) 3 The Records of the Federal Convention of 1787 (Farrand ed. 1911) 14 (hereafter cited as 'Farrand').

James Madison, who took careful and complete notes during the Convention, believed that in interpreting the Constitution later generations should consider the history of its adoption:

'Such were the defects, the deformities, the diseases and the ominous prospects, for which the Convention were to provide a remedy, and which ought never to be overlooked in expounding & appreciating the Constitutional Charter the remedy that was provided.' *Id.*, at 549.

[FN13.](#) 1 *id.*, at 20.

The question of how the legislature should be constituted precipitated the most bitter controversy of the Convention. One principle was uppermost in the minds of many delegates: that, no matter where he lived, each voter should have a voice equal to that of every other in electing members of Congress. In support of this principle, George Mason of Virginia

'argued strongly for an election of the larger branch by the people. It was to be the grand depository of the democratic principle of the Govt.' [FN14](#)

[FN14.](#) *Id.*, at 48.

James Madison agreed, saying 'If the power is not immediately derived from the people, in proportion to their numbers, we may make a paper confederacy, but that will be all.' [FN15](#) Repeatedly, delegates rose to make the same point: that it would be unfair, unjust, and contrary to common sense to give a small number of people as many Senators or Representatives as were allowed to much larger groups [FN16](#)--in short, as James Wilson of Pennsylvania \*11 put it, 'equal numbers of people ought to have an equal no. of representatives \* \* \*' and representatives 'of different districts ought clearly to hold the same proportion to each other, as their respective constituents hold to each other.' [FN17](#)

[FN15.](#) *Id.*, at 472.

[FN16.](#) See, e.g., *id.*, at 197--198 (Benjamin Franklin of Pennsylvania); *id.*, at 467 (Elbridge Gerry of Massachusetts); *id.*, at 286, 465--466 (Alexander Hamilton of New York); *id.*, at 489--490 (Rufus King of Massachusetts); *id.*, at 322, 446--449, 486, 527--528 (James Madison of Virginia); *id.*, at 180, 456 (Hugh Williamson of North Carolina); *id.*, at 253--254, 406, 449--450, 482--484 (James Wilson of Pennsylvania).

[FN17.](#) *Id.*, at 180.

Some delegates opposed election by the people. The sharpest objection arose out \*\*532 of the fear on the part of small States like Delaware that if population were to be the only basis of representation the populous States like Virginia would elect a large enough number of representatives to wield overwhelming power in the National Government. [FN18](#) Arguing that the Convention had no authority to depart from the plan of the Articles of Confederation which gave each State an equal vote in the National Congress, William Paterson of New Jersey said, 'If the sovereignty of the States is to be maintained, the Representatives must be drawn immediately from the States, not from the people: and we have no power to vary the idea of equal sovereignty.' [FN19](#) To this end he proposed a single legislative chamber in which each State, as in the Confederation, was to have an equal vote. [FN20](#) A number of delegates supported this plan. [FN21](#)

[FN18.](#) Luther Martin of Maryland declared 'that the States being equal cannot treat or confederate so as to give up an equality of votes without giving up their liberty: that the propositions on the table were a system of slavery for 10 States: that as Va.Masts. & Pa. have 42/90 of the votes they can do as they please without a miraculous Union of the other ten: that they will have nothing to do, but to gain over one of the ten to make them compleat masters of the rest \* \* \*.' *Id.*, at 438.

[FN19.](#) *Id.*, at 251.

[FN20.](#) 3 *id.*, at 613.

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[FN21](#). E.g., 1 *id.*, at 324 (Alexander Martin of North Carolina); *id.*, at 437--438, 439--441, 444--445, 453-455 (Luther Martin of Maryland); *id.*, at 490--492 (Gunning Bedford of Delaware).

The delegates who wanted every man's vote to count alike were sharp in their criticism of giving each State, \*12 regardless of population, the same voice in the National Legislature. Madison entreated the Convention 'to renounce a principle wch. was confessedly unjust,' [FN22](#) and Rufus King of Massachusetts 'was prepared for every event, rather than sit down under a Govt. founded in a vicious principle of representation and which must be as shortlived as it would be unjust.' [FN23](#)

[FN22](#). *Id.*, at 464.

[FN23](#). *Id.*, at 490.

The dispute came near ending the Convention without a Constitution. Both sides seemed for a time to be hopelessly obstinate. Some delegations threatened to withdraw from the Convention if they did not get their way. [FN24](#) Seeing the controversy growing sharper and emotions rising, the wise and highly respected Benjamin Franklin arose and pleaded with the delegates on both sides to 'part with some of their demands, in order that they may join in some accommodating proposition.' [FN25](#) At last those who supported representation of the people in both houses and those who supported it in neither were brought together, some expressing the fear that if they did not reconcile their differences, 'some foreign sword will probably do the work for us.' [FN26](#) The deadlock was finally broken when a majority of the States agreed to what has been called the Great Compromise, [FN27](#) based on a proposal which had been repeatedly advanced by Roger \*13 Sherman and other delegates from Connecticut. [FN28](#) It provided on the one hand that \*\*533 each State, including little Delaware and Rhode Island, was to have two Senators. As a further guarantee that these Senators would be considered state emissaries, they were to be elected by the state legislatures, Art. I, s 3, and it was specially provided in Article V that no State should ever be deprived of its equal representation in the Senate. The other side of the compromise was that, as provided in Art. I, s 2, members of the House of Representatives should

be chosen 'by the People of the several States' and should be 'apportioned among the several States \* \* \* according to their respective Numbers.' While those who wanted both houses to represent the people had yielded on the Senate, they had not yielded on the House of Representatives. William Samuel Johnson of Connecticut had summed it up well: 'in one branch the people, ought to be represented; in the other, the States.' [FN29](#)

[FN24](#). Gunning Bedford of Delaware said:

'We have been told (with a dictatorial air) that this is the last moment for a fair trial in favor of a good Government. \* \* \* The Large States dare not dissolve the confederation. If they do the small ones will find some foreign ally of more honor and good faith, who will take them by the hand and do them justice.' *Id.*, at 492.

[FN25](#). *Id.*, at 488.

[FN26](#). *Id.*, at 532 (Elbridge Gerry of Massachusetts). George Mason of Virginia urged an 'accommodation' as 'preferable to an appeal to the world by the different sides, as had been talked of by some Gentlemen.' *Id.*, at 533.

[FN27](#). See *id.*, at 551.

[FN28](#). See *id.*, at 193, 342--343 (Roger Sherman); *id.*, at 461-- 462 (William Samuel Johnson).

[FN29](#). *Id.*, at 462. (Emphasis in original.)

[8] The debates at the Convention make at least one fact abundantly clear: that when the delegates agreed that the House should represent 'people' they intended that in allocating Congressmen the number assigned to each State should be determined solely by the number of the State's inhabitants. [FN30](#) The Constitution embodied Edmund Randolph's proposal for a periodic census to ensure 'fair representation of the people,' [FN31](#) an idea endorsed by Mason as assuring that 'numbers of inhabitants' \*14 should always be the measure of representation in the House of Representatives. [FN32](#) The Convention also overwhelmingly agreed to a resolution offered by Randolph to base future apportionment squarely on numbers and to delete any reference to

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wealth. [FN33](#) And the delegates defeated a motion made by Elbridge Gerry to limit the number of Representatives from newer Western States so that it would never exceed the number from the original States. [FN34](#)

[FN30](#). While 'free Persons' and those 'bound to Service for a Term of Years' were counted in determining representation, Indians not taxed were not counted, and 'three fifths of all other Persons' (slaves) were included in computing the States' populations. Art. I, s 2. Also, every State was to have 'at Least one Representative.' *Ibid*.

[FN31](#). 1 Farrand, at 580.

[FN32](#). *Id.*, at 579.

[FN33](#). *Id.*, at 606. Those who thought that one branch should represent wealth were told by Roger Sherman of Connecticut that the 'number of people alone (was) the best rule for measuring wealth as well as representation; and that if the Legislature were to be governed by wealth, they would be obliged to estimate it by numbers.' *Id.*, at 582.

[FN34](#). 2 *id.*, at 3. The rejected thinking of those who supported the proposal to limit western representation is suggested by the statement of Gouverneur Morris of Pennsylvania that 'The Busy haunts of men not the remote wilderness, was the proper School of political Talents.' 1 *id.*, at 583.

It would defeat the principle solemnly embodied in the Great Compromise--equal representation in the House for equal numbers of people--for us to hold that, within the States, legislatures may draw the lines of congressional districts in such a way as to give some voters a greater voice in choosing a Congressman than others. The House of Representatives, the Convention agreed, was to represent the people as individuals, and on a basis of complete equality for each voter. The delegates were quite aware of what Madison called the 'vicious representation' in Great Britain [FN35](#) whereby 'rotten boroughs' with few inhabitants were represented in Parliament on or almost on a par with cities of greater population. Wilson urged that people must be rep-

resented as individuals, so that America would escape \*15 the evils of the English system under which one man could send two members of Parliament to represent the borough of Old Sarum while London's \*\*534 million people sent but four. [FN36](#) The delegates referred to rotten borough apportionments in some of the state legislatures as the kind of objectionable governmental action that the Constitution should not tolerate in the election of congressional representatives. [FN37](#)

[FN35](#). *Id.*, at 464.

[FN36](#). *Id.*, at 457. 'Rotten boroughs' have long since disappeared in Great Britain. Today permanent parliamentary Boundary Commissions recommend periodic changes in the size of constituencies, as population shifts. For the statutory standards under which these commissions operate, see House of Commons (Redistribution of Seats) Acts of 1949, 12 & 13 Geo. 6, c. 66, Second Schedule, and of 1958, 6 & 7 Eliz. 2, c. 26, Schedule.

[FN37](#). 2 *id.*, at 241.

Madison in *The Federalist* described the system of division of States into congressional districts, the method which he and others [FN38](#) assumed States probably would adopt: 'The city of Philadelphia is supposed to contain between fifty and sixty thousand souls. It will therefore form nearly two districts for the choice of Federal Representatives.' [FN39](#) '(N)umbers,' he said, not only are a suitable way to represent wealth but in any event 'are the only proper scale of representation.' [FN40](#) In the state conventions, speakers urging ratification of the Constitution emphasized the theme of equal representation in the House which had permeated the debates in Philadelphia. \*16 [FN41](#) Charles Cotesworth Pinckney told the South Carolina Convention, 'the House of Representatives will be elected immediately by the people, and represent them and their personal rights individually \* \* \*.' [FN42](#) Speakers at the ratifying conventions emphasized that the House of Representatives was meant to be free of the malapportionment then existing in some of the State legislatures--such as those of Connecticut, Rhode Island, and South Carolina--and argued that the power given Congress in Art. I, s 4, [FN43](#) was meant to be used to vin-

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dicating the people's right to equality of representation in the House. [\[FN44\]](#) Congress' power, said John Steele at the North Carolina convention, was not to be used to allow Congress to create rotten boroughs; in answer to another delegate's suggestion that Congress might use its power to favor people living near the seacoast, Steele said that Congress 'most probably' would 'lay the state off into districts,' and if it made laws 'inconsistent with the Constitution, independent judges will not uphold them, nor will the people obey them.' [\[FN45\]](#)

[\[FN38\]](#). See, e.g., 2 Works of Alexander Hamilton (Lodge ed. 1904) 25 (statement to New York ratifying convention).

[\[FN39\]](#). The Federalist, No. 57 (Cooke ed. 1961), at 389.

[\[FN40\]](#). Id., No. 54, at 368. There has been some question about the authorship of Numbers 54 and 57, see The Federalist (Lodge ed. 1908) xxiii-xxxv, but it is now generally believed that Madison was the author, see e.g., The Federalist (Cooke ed. 1961) xxvii; The Federalist (Van Doren ed. 1945) vi--vii; Brant, Settling the Authorship of The Federalist, 67 Am.Hist.Rev. 71 (1961).

[\[FN41\]](#). See, e.g., 2 The Debates in the Several State Conventions on the Adoption of the Federal Constitution (2d Elliot ed. 1836) 11 (Fisher Ames, in the Massachusetts Convention) (hereafter cited as 'Elliot'); id., at 202 (Oliver Wolcott, Connecticut); 4 id., at 21 (William Richardson Davie, North Carolina); id., at 257 (Charles Pinckney, South Carolina).

[\[FN42\]](#). Id., at 304.

[\[FN43\]](#). '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 choosing Senators. \* \* \*' U.S.C.onst. Art. I, s 4.

[\[FN44\]](#). See 2 Elliot, at 49 (Francis Dana, in the

Massachusetts Convention); id., at 50--51 (Rufus King, Massachusetts); 3 id., at 367 (James Madison, Virginia).

[\[FN45\]](#). 4 Id., at 71.

\*17 Soon after the Constitution was adopted, James Wilson of Pennsylvania, by then an Associate Justice of this Court, \*\*535 gave a series of lectures at Philadelphia in which, drawing on his experience as one of the most active members of the Constitutional Convention, he said:

'(A)ll elections ought to be equal. Elections are equal, when a given number of citizens, in one part of the state, choose as many representatives, as are chosen by the same number of citizens, in any other part of the state. In this manner, the proportion of the representatives and of the constituents will remain invariably the same.' [\[FN46\]](#)

[\[FN46\]](#). 2 The Works of James Wilson (Andrews ed. 1896) 15.

[\[9\]\[10\]\[11\]](#) It is in the light of such history that we must construe Art. I, s 2, of the Constitution, which, carrying out the ideas of Madison and those of like views, provides that Representatives shall be chosen 'by the People of the several States' and shall be 'apportioned among the several States \* \* \* according to their respective Numbers.' It is not surprising that our Court has held that this Article gives persons qualified to vote a constitutional right to vote and to have their votes counted. [United States v. Mosley, 238 U.S. 383, 35 S.Ct. 904, 59 L.Ed. 1355](#); Ex parte [Yarbrough, 110 U.S. 651, 4 S.Ct. 152, 28 L.Ed. 274](#). Not only can this right to vote not be denied outright, it cannot, consistently with Article I, be destroyed by alteration of ballots, see [United States v. Classic, 313 U.S. 299, 61 S.Ct. 1031, 85 L.Ed. 1368](#), or diluted by stuffing of the ballot box, see [United States v. Saylor, 322 U.S. 385, 64 S.Ct. 1101, 88 L.Ed. 1341](#). No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges \*18 this right. In urging the people to adopt the Constitution, Madison said in No. 57 of The Federalist:

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'Who are to be the electors of the Federal Representatives? Not the rich more than the poor; not the learned more than the ignorant; not the haughty heirs of distinguished names, more than the humble sons of obscure and unpropitious fortune. The electors are to be the great body of the people of the United States. \* \* \*' [FN47]

[FN47]. The Federalist, No. 57 (Cooke ed. 1961), at 385.

Readers surely could have fairly taken this to mean, 'one person, one vote.' Cf. [Gray v. Sanders, 372 U.S. 368, 381, 83 S.Ct. 801, 809, 9 L.Ed.2d 821.](#)

[12] While it may not be possible to draw congressional districts with mathematical precision, that is no excuse for ignoring our Constitution's plain objective of making equal representation for equal numbers of people the fundamental goal for the House of Representatives. That is the high standard of justice and common sense which the Founders set for us.

Reversed and remanded.

Mr. Justice CLARK, concurring in part and dissenting in part.

Unfortunately I can join neither the opinion of the Court nor the dissent of my Brother HARLAN. It is true that the opening sentence of Art. I, s 2, of the Constitution provides that Representatives are to be chosen 'by the People of the several States \* \* \*.' However, in my view, Brother HARLAN has clearly demonstrated that both the historical background and language preclude a finding that Art. I, s 2, lays down the ipse dixit 'one person, one vote' in congressional elections.

On the other hand, I agree with the majority that congressional districting is subject to judicial scrutiny. This \*19 Court has so held ever since \*\*536 [Smiley v. Holm, 285 U.S. 355, 52 S.Ct. 397, 76 L.Ed. 795 \(1932\)](#), which is buttressed by two companion cases, [Koenig v. Flynn, 285 U.S. 375, 52 S.Ct. 403, 76 L.Ed. 805 \(1932\)](#), and [Carroll v. Becker, 285 U.S. 380, 52 S.Ct. 402, 76 L.Ed. 807 \(1932\)](#). A majority of the Court in [Colegrove v. Green](#) felt, upon the authority of [Smiley](#), that the complaint presented a justiciable controversy not reserved exclusively to Congress.

[Colegrove v. Green, 328 U.S. 549, 564, and 568, n. 3, 66 S.Ct. 1198, 1208, 1209, 90 L.Ed. 1432 \(1946\)](#). Again in [Baker v. Carr, 369 U.S. 186, 232, 82 S.Ct. 691, 718, 7 L.Ed.2d 663 \(1962\)](#), the opinion of the Court recognized that [Smiley](#) 'settled the issue in favor of justiciability of questions of congressional redistricting.' I therefore cannot agree with Brother HARLAN that the supervisory power granted to Congress under Art. I, s 4, is the exclusive remedy.

I would examine the Georgia congressional districts against the requirements of the Equal Protection Clause of the Fourteenth Amendment. As my Brother BLACK said in his dissent in [Colegrove v. Green](#), supra, the 'equal protection clause of the Fourteenth Amendment forbids \* \* \* discrimination. It does not permit the states to pick out certain qualified citizens or groups of citizens and deny them the right to vote at all. \* \* \* No one would deny that the equal protection clause would also prohibit a law that would expressly give certain citizens a half-vote and others a full vote. \* \* \* Such discriminatory legislation seems to me exactly the kind that the equal protection clause was intended to prohibit.' [328 U.S. at 569, 66 S.Ct. at 1210, 90 L.Ed. 1432.](#)

The trial court, however, did not pass upon the merits of the case, although it does appear that it did make a finding that the Fifth District of Georgia was 'grossly out of balance' with other congressional districts of the State. Instead of proceeding on the merits, the court dismissed the case for lack of equity. I believe that the court erred in so doing. In my view we should therefore vacate this judgment and remand the case for a hearing \*20 on the merits. At that hearing the court should apply the standards laid down in [Baker v. Carr](#), supra.

I would enter an additional caveat. The General Assembly of the Georgia Legislature has been recently reapportioned [FN\*] as a result of the order of the three-judge District Court in [Toombs v. Fortson, 205 F.Supp. 248 \(1962\)](#). In addition, the Assembly has created a Joint Congressional Redistricting Study Committee which has been working on the problem of congressional redistricting for several months. The General Assembly is currently in session. If on remand

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the trial court is of the opinion that there is likelihood of the General Assembly's, reapportioning the State in an appropriate manner, I believe that coercive relief should be deferred until after the General Assembly has had such an opportunity.

[FN\\*](#) Georgia Laws, Sept. 1--Oct. 1962, Extra. Sess., pp. 7--31.

Mr. Justice HARLAN, dissenting.

I had not expected to witness the day when the Supreme Court of the United States would render a decision which casts grave doubt on the constitutionality of the composition of the House of Representatives. It is not an exaggeration to say that such is the effect of today's decision. The Court's holding that the Constitution requires States to select Representatives either by elections at large or by elections in districts composed 'as nearly as is practicable' of equal population places in jeopardy the seats of almost all the members of the present House of Representatives.

In the last congressional election, in 1962, Representatives from 42 States were elected from congressional districts. [\[FN1\]](#) In all but five of those States, the difference between **\*21** the populations of the **\*\*537** largest and smallest district exceeded 100,000 persons. [\[FN2\]](#) A difference of this magnitude in the size of districts the average population of which in each State is less than 500,000 [\[FN3\]](#) is presumably not equality among districts 'as nearly as is practicable,' although the Court does not reveal its definition of that phrase. [\[FN4\]](#) Thus, today's decision impugns the validity of the election of 398 Representatives from 37 States, leaving a 'constitutional' House of 37 members now sitting. [\[FN5\]](#)

[FN1.](#) Representatives were elected at large in Alabama (8), Alaska (1), Delaware (1), Hawaii (2), Nevada (1), New Mexico (2), Vermont (1), and Wyoming (1). In addition, Connecticut, Maryland, Michigan, Ohio, and Texas each elected one of their Representatives at large.

[FN2.](#) The five States are Iowa, Maine, New Hampshire, North Dakota, and Rhode Island. Together, they elect 15 Representatives.

The populations of the largest and smallest districts in each State and the difference between them are contained in an Appendix to this opinion.

[FN3.](#) The only State in which the average population per district is greater than 500,000 is Connecticut, where the average population per district is 507,047 (one Representative being elected at large). The difference between the largest and smallest districts in Connecticut is, however, 370,613.

[FN4.](#) The Court's 'as nearly as is practicable' formula sweeps a host of questions under the rug. How great a difference between the populations of various districts within a State is tolerable? Is the standard an absolute or relative one, and if the latter to what is the difference in population to be related? Does the number of districts within the State have any relevance? Is the number of voters or the number of inhabitants controlling? Is the relevant statistic the greatest disparity between any two districts in the State or the average departure from the average population per district, or a little of both? May the State consider factors such as area or natural boundaries (rivers, mountain ranges) which are plainly relevant to the practicability of effective representation?

There is an obvious lack of criteria for answering questions such as these, which points up the impropriety of the Court's whole-hearted but heavy-footed entrance into the political arena.

[FN5.](#) The 37 'constitutional' Representatives are those coming from the eight States which elected their Representatives at large (plus one each elected at large in Connecticut, Maryland, Michigan, Ohio, and Texas) and those coming from States in which the difference between the populations of the largest and smallest districts was less than 100,000. See notes 1 and 2, *supra*. Since the difference between the largest and smallest districts in Iowa is 89,250, and the average population per district in Iowa is only 393,934, Iowa's 7 Representatives might well lose their seats as well. This would

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leave a House of Representatives composed of the 22 Representatives elected at large plus eight elected in congressional districts.

These conclusions presume that all the Representatives from a State in which any part of the congressional districting is found invalid would be affected. Some of them, of course, would ordinarily come from districts the populations of which were about that which would result from an apportionment based solely on population. But a court cannot erase only the the districts which do not conform to the standard announced today, since invalidation of those districts would require that the lines of all the districts within the State be redrawn. In the absence of a reapportionment, all the Representatives from a State found to have violated the standard would presumably have to be elected at large.

**\*22** Only a demonstration which could not be avoided would justify this Court in rendering a decision the effect of which, inescapably as I see it, is to declare constitutionally defective the very composition of a coordinate branch of the Federal Government. The Court's opinion not only fails to make such a demonstration, it is unsound logically on its face and demonstrably unsound historically.

#### I.

Before coming to grips with the reasoning that carries such extraordinary consequences, it is important to have firmly in mind the provisions of Article I **\*\*538** of the Constitution which control this case:

'Section 2. The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

**\*23** 'Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall

be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative \* \* \*.

'Section 4. 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.

'Section 5. Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members \* \* \*.'

As will be shown, these constitutional provisions and their 'historical context,' ante, p. 530, establish:

1. that congressional Representatives are to be apportioned among the several States largely, but not entirely, according to population;
2. that the States have plenary power to select their allotted Representatives in accordance with any method of popular election they please, subject only to the supervisory power of Congress; and
3. that the supervisory power of Congress is exclusive.

**\*24** In short, in the absence of legislation providing for equal districts by the Georgia Legislature or by Congress, these appellants have no right to the judicial relief which they seek. It goes without saying that it is beyond the province of this Court to decide whether equally populated districts is the preferable method for electing Representatives, whether state legislatures would have acted more fairly or wisely had they adopted such a method, or whether Congress has been derelict in not requiring state legislatures to follow that course. Once it is clear that there is no constitutional right at stake, that ends the case.

#### II.

Disclaiming all reliance on other provisions of the Constitution, in particular those of the Fourteenth Amendment on which the appellants relied below and in this Court, the Court holds that the provision in Art, I, s 2, for election of Representatives 'by the People' means that congressional districts are to be 'as nearly as is practicable' equal in population, ante, p. 530. Stripped of rhetoric and a 'historical

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context,' ante, p. 530, which bears little resemblance to the evidence found in the pages of history, see *infra*, pp. 541--547, the Court's opinion supports its holding only with the bland assertion that 'the principle of a House of Representatives elected 'by the People" would be 'cast aside' if 'a vote is worth more in one district than in another,' ante p. 530, i.e., if congressional districts within a State, each electing a single Representative, are not equal in population. The \*\*539 fact is, however, that Georgia's 10 Representatives are elected 'by the People' of Georgia, just as Representatives from other States are elected 'by the People of the several States.' This is all that the Constitution requires. [FN6]

[FN6. Since I believe that the Constitution expressly provides that state legislatures and the Congress shall have exclusive jurisdiction over problems of congressional apportionment of the kind involved in this case, there is no occasion for me to consider whether, in the absence of such provision, other provisions of the Constitution, relied on by the appellants, would confer on them the rights which they assert.

\*25 Although the Court finds necessity for its artificial construction of Article I in the undoubted importance of the right to vote, that right is not involved in this case. All of the appellants do vote. The Court's talk about 'debasement' and 'dilution' of the vote is a model of circular reasoning, in which the premises of the argument feed on the conclusion. Moreover, by focusing exclusively on numbers in disregard of the area and shape of a congressional district as well as party affiliations within the district, the Court deals in abstractions which will be recognized even by the politically unsophisticated to have little relevance to the realities of political life.

In any event, the very sentence of Art. I, s 2, on which the Court exclusively relies confers the right to vote for Representatives only on those whom the State has found qualified to vote for members of 'the most numerous Branch of the State Legislature.' *Supra*, p. 538. So far as Article I is concerned, it is within the State's power to confer that right only on persons of wealth or of a particular sex or, if the State chose, living in specified areas of the State. [FN7] Were Georgia to find the residents of the \*26 Fifth District un-

qualified to vote for Representatives to the State House of Representatives, they could not vote for Representatives to Congress, according to the express words of Art. I, s 2. Other provisions of the Constitution would, of course, be relevant, but, so far as Art. I, s 2, is concerned, the disqualification would be within Georgia's power. How can it be, then, that this very same sentence prevents Georgia from apportioning its Representatives as it chooses? The truth is that it does not.

[FN7. Although it was held in *Ex Parte Yarbrough*, 110 U.S. 651, 4 S.Ct. 152, 28 L.Ed. 274, and subsequent cases, that the right to vote for a member of Congress depends on the Constitution, the opinion noted that the legislatures of the States prescribe the qualifications for electors of the legislatures and thereby for electors of the House of Representatives. 110 U.S., at 663, 4 S.Ct. at p. 158, 28 L.Ed. 274. See ante, p. 535, and *infra*, pp. 549--550.

The States which ratified the Constitution exercised their power. A property or taxpaying qualification was in effect almost everywhere. See, e.g., the New York Constitution of 1777, Art. VII, which restricted the vote to freeholders 'possessing a freehold of the value of twenty pounds, \* \* \* or (who) have rented a tenement \* \* \* of the yearly value of forty shillings, and been rated and actually paid taxes to this State.' The constitutional and statutory qualifications for electors in the various States are set out in tabular form in 1 Thorpe, *A Constitutional History of the American People 1776--1850* (1898), 93--96. The progressive elimination of the property qualification is described in Sait, *American Parties and Elections* (Penniman ed., 1952), 16--17. At the time of the Revolution, 'no serious inroads had yet been made upon the privileges of property, which, indeed, maintained in most states a second line of defense in the form of high personal-property qualifications required for membership in the legislature.' *Id.*, at 16 (footnote omitted). Women were not allowed to vote. Thorpe, *op. cit.*, *supra*, 93--96. See generally Sait, *op. cit.*, *supra*, 49--54. New Jersey apparently

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allowed women, as 'inhabitants,' to vote until 1807. See Thorpe, *op. cit.*, *supra*, 93. Compare N.J.Const.1776, Art. XIII, with N.J.Const.1844, Art. II, 1.

The Court purports to find support for its position in the third paragraph of Art. I, s 2, which provides for the apportionment **\*\*540** of Representatives among the States. The appearance of support in that section derives from the Court's confusion of two issues: direct election of Representatives within the States and the apportionment of Representatives among the States. Those issues are distinct, and were separately treated in the Constitution. The fallacy of the Court's reasoning in this regard is illustrated by its slide, obscured by intervening discussion (see *ante*, p. 533), from the intention of the delegates at the Philadelphia Convention 'that in allocating Congressmen the number assigned to each State should be determined solely by the number of the State's inhabitants,' *ante*, p. 533, to a 'principle solemnly embodied in the Great Compromise--equal representation in the House for equal numbers of people,' *ante*, p. 533. The delegates did have the former intention and made clear **\*27** provision for it. [\[FN8\]](#) Although many, perhaps most, of them also believed generally--but assuredly not in the precise, formalistic way of the majority of the Court [\[FN9\]](#)--that within the States representation should be based on populations, they did not surreptitiously slip their belief into the Constitution in the phrase 'by the People,' to be discovered 175 years later like a Shakespearean anagram.

[\[FN8\]](#). Even that is not strictly true unless the word 'solely' is deleted. The 'three-fifths compromise' was a departure from the principle of representation according to the number of inhabitants of a State. Cf. The Federalist, No. 54, discussed *infra*, pp. 546--547. A more obvious departure was the provision that each State shall have a Representative regardless of its population. See *infra*, pp. 540--541.

[\[FN9\]](#). The fact that the delegates were able to agree on a Senate composed entirely without regard to population and on the departures from a population-based House, mentioned in note 8, *supra*, indicates that they recognized the possibility that al-

ternative principles combined with political reality might dictate conclusions inconsistent with an abstract principle of absolute numerical equality.

On the apportionment of the state legislatures at the time of the Constitutional Convention, see Luce, *Legislative Principles* (1930), 331-- 364; Hacker, *Congressional Districting* (1963), 5.

Far from supporting the Court, the apportionment of Representatives among the States shows how blindly the Court has marched to its decision. Representatives were to be apportioned among the States on the basis of free population plus three-fifths of the slave population. Since no slave voted, the inclusion of three-fifths of their number in the basis of apportionment gave the favored States representation far in excess of their voting population. If, then, slaves were intended to be without representation, Article I did exactly what the Court now says it prohibited: it 'weighted' the vote of voters in the slave States. Alternatively, it might have been thought that Representatives elected by free men of a State would speak also for the slaves. But since the slaves added to the representation only of their own State, Representatives **\*28** from the slave States could have been thought to speak only for the slaves of their own States, indicating both that the Convention believed it possible for a Representative elected by one group to speak for another nonvoting group and that Representatives were in large degree still thought of as speaking for the whole population of a State. [\[FN10\]](#)

[\[FN10\]](#). It is surely beyond debate that the Constitution did not require the slave States to apportion their Representatives according to the dispersion of slaves within their borders. The above implications of the three-fifths compromise were recognized by Madison. See The Federalist, No. 54, discussed *infra*, pp. 546--547.

Luce points to the 'quite arbitrary grant of representation proportionate to three fifths of the number of slaves' as evidence that even in the House 'the representation of men as men' was not intended. He states: 'There can be no shadow of question that populations were accepted as a measure of material interests--landed, agricultural, industrial, commer-

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cial, in short, property.' Legislative Principles (1930), 356--357.

There is a further basis for demonstrating the hollowness of the Court's assertion **\*\*541** that Article I requires 'one man's vote in a congressional election \* \* \* to be worth as much as another's,' ante, p. 530. Nothing that the Court does today will disturb the fact that although in 1960 the population of an average congressional district was 410,481, [\[FN11\]](#) the States of Alaska, Nevada, and Wyoming **\*29** each have a Representative in Congress, although their respective populations are 226,167, 285,278, and 330,066. [\[FN12\]](#) In entire disregard of population, Art. I, s 2, guarantees each of these States and every other State 'at Least one Representative.' It is whimsical to assert in the face of this guarantee that an absolute principle of 'equal representation in the House for equal numbers of people' is 'solemnly embodied' in Article I. All that there is is a provision which bases representation in the House, generally but not entirely, on the population of the States. The provision for representation of each State in the House of Representatives is not a mere exception to the principle framed by the majority; it shows that no such principle is to be found.

[FN11.](#) U.S. Bureau of the Census, Census of Population: 1960 (hereafter, Census), xiv. The figure is obtained by dividing the population base (which excludes the population of the District of Columbia, the population of the Territories, and the number of Indians not taxed) by the number of Representatives. In 1960, the population base was 178,559,217, and the number of Representatives was 435.

[FN12.](#) Census, 1--16.

Finally in this array of hurdles to its decision which the Court surmounts only by knocking them down is s 4 of Art. I which states simply:

'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.' (Emphasis added.)

The delegates were well aware of the problem of 'rotten boroughs,' as material cited by the Court, ante, pp. 533--534, and hereafter makes plain. It cannot be supposed that delegates to the Convention would have labored to establish a principle of equal representation only to bury it, one would have thought beyond discovery, in s 2, and omit all mention of it from s 4, which deals explicitly with the conduct of elections. Section 4 states without qualification that the state legislatures shall prescribe regulations for the conduct of elections for Representatives and, equally without qualification, that Congress may make or **\*30** alter such regulations. There is nothing to indicate any limitation whatsoever on this grant of plenary initial and supervisory power. The Court's holding is, of course, derogatory not only of the power of the state legislatures but also of the power of Congress, both theoretically and as they have actually exercised their power. See infra, pp. 547--549. [\[FN13\]](#) It freezes upon both, for no reason other than that it seems wise to the majority of the present Court, a particular political theory for the selection of Representatives.

[FN13.](#) Section 5 of Article I, which provides that 'Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members,' also points away from the Court's conclusion. This provision reinforces the evident constitutional scheme of leaving to the Congress the protection of federal interests involved in the selection of members of the Congress.

### III.

There is dubious propriety in turning to the 'historical context' of constitutional provisions which speak so consistently and plainly. But, as one might expect when the Constitution itself is free from ambiguity, the surrounding history makes what is already clear even clearer.

**\*\*542** As the Court repeatedly emphasizes, delegates to the Philadelphia Convention frequently expressed their view that representation should be based on population. There were also, however, many statements favoring limited monarchy and property qualifications for suffrage and expressions of disapproval for unrestricted democracy. [\[FN14\]](#) Such expressions prove as little on one side of this case as they do on the other. Whatever the dominant political philo-

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sophy at the Convention, one thing seems clear: it is in the last degree unlikely that most or even many of the delegates would have subscribed to the \*31 principle of 'one person, one vote,' ante, p. 535. [FN15] Moreover, the statements approving population-based representation were focused on the problem of how representation should be apportioned among the States in the House of Representatives. The Great Compromise concerned representation of the States in the Congress. In all of the discussion surrounding the basis of representation of the House and all of the discussion whether Representatives should be elected by the legislatures or the people of the States, there is nothing which suggests \*32 even remotely that the delegates had in mind the problem of districting within a State. [FN16]

[FN14. I Farrand, Records of the Federal Convention (1911) (hereafter Farrand), 48, 86--87, 134--136, 288--289, 299, 533, 534; II Farrand 202.

[FN15. 'The assemblage at the Philadelphia Convention was by no means committed to popular government, and few of the delegates had sympathy for the habits or institutions of democracy. Indeed, most of them interpreted democracy as mob rule and assumed that equality of representation would permit the spokesmen for the common man to outvote the beleaguered deputies of the uncommon man.' Hacker, Congressional Districting (1963), 7--8. See Luce, Legislative Principles (1930), 356--357. With respect to apportionment of the House, Luce states: 'Property was the basis, not humanity.' Id., at 357.

Contrary to the Court's statement, ante, p. 535, no reader of The Federalist 'could have fairly taken \* \* \* (it) to mean' that the Constitutional Convention had adopted a principle of 'one person, one vote' in contravention of the qualifications for electors which the States imposed. In No. 54, Madison said: 'It is a fundamental principle of the proposed Constitution, that as the aggregate number of representatives allotted to the several States, is to be determined by a federal rule founded on the aggregate number of inhabitants, so the right of choosing this allotted number in each State is to be exercised by

such part of the inhabitants, as the State itself may designate. \* \* \* In every State, a certain proportion of inhabitants are deprived of this right by the Constitution of the State, who will be included in the census by which the Federal Constitution apportions the representatives.' (Cooke ed. 1961) 369. (Italics added.) The passage from which the Court quotes, ante, p. 535, concludes with the following, overlooked by the Court: 'They (the electors) are to be the same who exercise the right in every State of electing the correspondent branch of the Legislature of the State.' Id., at 385.

[FN16. References to Old Sarum (ante, p. 533), for example, occurred during the debate on the method of apportionment of Representatives among the States. I Farrand 449--450, 457.

The subject of districting within the States is discussed explicitly with reference to the provisions of Art. I, s 4, which the Court so pointedly neglects. The Court states: 'The delegates referred to rotten borough apportionments in some of the state legislatures as the kind of objectionable governmental action that the Constitution should not tolerate in the election of congressional representatives.' Ante, p. 534. The remarks of Madison cited by the Court are as follows:

'The necessity of a Genl. Govt. supposes that the State Legislatures will sometimes fail or refuse to consult the common interest at the expense of their local conveniency or prejudices. The policy of referring the appointment of the House of \*\*543 Representatives to the people and not to the Legislatures of the States, supposes that the result will be somewhat influenced by the mode, (sic) This view of the question seems to decide that the Legislatures of the States ought not to have the uncontroled right of regulating the times places & manner of holding elections. These were words of great latitude. It was impossible to foresee all the abuses that might be made of the discretionary power. Whether the electors should vote by ballot or viva voce, should assemble at this place or that place; should be divided into districts or all meet at one place, shd all vote for all the representatives; or all in a district vote for a number allotted to the district; these & many other points would depend on the Legislatures. (sic) and

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might materially affect the appointments. \*33 Whenever the State Legislatures had a favorite measure to carry, they would take care so to mould their regulations as to favor the candidates they wished to succeed. Besides, the inequality of the Representation in the Legislatures of particular States, would produce a like inequality in their representation in the Natl. Legislature, as it was presumable that the Counties having the power in the former case would secure it to themselves in the latter. What danger could there be in giving a controuling power to the Natl. Legislature?' [FN17] (Emphasis added.)

[FN17]. II Farrand 240--241.

These remarks of Madison were in response to a proposal to strike out the provision for congressional supervisory power over the regulation of elections in Art. I, s 4. Supported by others at the Convention, [FN18] and not contradicted in any respect, they indicate as clearly as may be that the Convention understood the state legislatures to have plenary power over the conduct of elections for Representatives, including the power to district well or badly, subject only to the supervisory power of Congress. How, then, can the Court hold that Art. I, s 2, prevents the state legislatures from districting as they choose? If the Court were correct, Madison's remarks would have been pointless. One would expect, at the very least, some reference to Art. I, s 2, as a limiting factor on the States. This is the 'historical context' which the Convention debates provide.

[FN18]. Ibid.

Materials supplementary to the debates are as unequivocal. In the ratifying conventions, there was no suggestion that the provisions of Art. I, s 2, restricted the power of the States to prescribe the conduct of elections conferred on them by Art. I, s 4. None of the Court's references \*34 to the ratification debate supports the view that the provision for election of Representatives 'by the People' was intended to have any application to the apportionment of Representatives within the States; in each instance, the cited passage merely repeats what the Constitution itself provides: that Representatives were to be elected by the people of the States. [FN19]

[FN19]. See the materials cited in notes 41--42, 44--45 of the Court's opinion, ante, p. 534. Ames' remark at the Massachusetts convention is typical: 'The representatives are to represent the people.' II Elliot's Debates on the Federal Constitution (2d ed. 1836) (hereafter Elliot's Debates), 11. In the South Carolina Convention, Pinckney stated the the House would 'be so chosen as to represent in due proportion the people of the Union \* \* \*.' IV Elliot's Debates 257. But he had in mind only that other clear provision of the Constitution that representation would be apportioned among the States according to populations. None of his remarks bears on apportionment within the States. Id., at 256--257.

In sharp contrast to this unanimous silence on the issue of this case when Art. I, s 2, was being discussed, there are repeated references to apportionment \*\*544 and related problems affecting the States' selection of Representatives in connection with Art. I, s 4. The debates in the ratifying conventions, as clearly as Madison's statement at the Philadelphia Convention, supra, pp. 542--543, indicate that under s 4, the state legislatures, subject only to the ultimate control of Congress, could district as they chose.

At the Massachusetts convention, Judge Dana approved s 4 because it gave Congress power to prevent a state legislature from copying Great Britain, where 'a borough of but two or three cottages has a right to send two representatives to Parliament, while Birmingham, a large and populous manufacturing town, lately sprung up, cannot send one.' [FN20] He noted that the Rhode Island Legislature was 'about adopting' a plan which would \*35 'Deprive the towns of Newport and Providence of their weight.' [FN21] Mr. King noted the situation in Connecticut, where 'Hartford, one of their largest towns, sends no more delegates than one of their smallest corporations,' and in South Carolina: 'The back parts of Carolina have increased greatly since the adoption of their constitution, and have frequently attempted an alteration of this unequal mode of representation but the members from Charleston, having the balance so much in their favor, will not consent to an alteration, and we see that the delegates from Carolina in Congress have always been chosen by the deleg-

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ates of that city.' [FN22] King stated that the power of Congress under s 4 was necessary to 'control in this case'; otherwise, he said, 'The representatives \* \* \* from that state (South Carolina), will not be chosen by the people, but will be the representatives of a faction of that state.' [FN23]

[FN20. II Elliot's Debates 49.

[FN21. Ibid.

[FN22. Id., at 50--51.

[FN23. Id., at 51.

Mr. Parsons was as explicit.

'Mr. PARSONS contended for vesting in Congress the powers contained in the 4th section (of Art. I), not only as those powers were necessary for preserving the union, but also for securing to the people their equal rights of election. \* \* \* (State legislatures) might make an unequal and partial division of the states into districts for the election of representatives, or they might even disqualify one third of the electors. Without these powers in Congress, the people can have no remedy; but the 4th section provides a remedy, a controlling power in a legislature composed of senators and representatives of twelve states, without the influence of our commotions and factions, who will hear impartially, and preserve and restore \*36 to the people their equal and sacred rights of election. Perhaps it then will be objected, that from the supposed opposition of interests in the federal legislature, they may never agree upon any regulations; but regulations necessary for the interests of the people can never be opposed to the interests of either of the branches of the federal legislature; because that the interests of the people require that the mutual powers of that legislature should be preserved unimpaired, in order to balance the government. Indeed, if the Congress could never agree on any regulations, then certainly no objection to the 4th section can remain; for the regulations introduced by the state legislatures will be the governing rule of elections, until Congress can agree upon alterations.' [FN24] (Emphasis added.)

[FN24. Id., at 26--27.

In the New York convention, during the discussion of s 4,

Mr. Jones objected to congressional power to regulate elections because such power 'might be so construed as to deprive the states of an \*\*545 essential right, which, in the true design of the Constitution, was to be reserved to them.' [FN25] He proposed a resolution explaining that Congress had such power only if a state legislature neglected or refused or was unable to regulate elections itself. [FN26] Mr. Smith proposed to add to the resolution '\* \* \* that each state shall be divided into as many districts as the representatives it is entitled to, and that each representative shall be chosen by a majority of votes.' [FN27] He stated that his proposal was designed to prevent elections at large, which might result in all the representatives being 'taken from a small part of the state.' [FN28] \*37 He explained further that his proposal was not intended to impose a requirement on the other States but 'to enable the states to act their discretion, without the control of Congress.' [FN29] After further discussion of districting, the proposed resolution was modified to read as follows:

[FN25. Id., at 325.

[FN26. Id., at 325--326.

[FN27. Id., at 327.

[FN28. Ibid.

[FN29. Id., at 328.

'(Resolved) \* \* \* that nothing in this Constitution shall be construed to prevent the legislature of any state to pass laws, from time to time, to divide such state into as many convenient districts as the state shall be entitled to elect representatives for Congress, nor to prevent such legislature from making provision, that the electors in each district shall choose a citizen of the United States, who shall have been an inhabitant of the district, for the term of one year immediately preceding the time of his election, for one of the representatives of such state.' [FN30]

[FN30. Id., at 329.

Despite this careful, advertent attention to the problem of congressional districting, Art. I, s 2, was never mentioned. Equally significant is the fact that the proposed resolution

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expressly empowering the States to establish congressional districts contains no mention of a requirement that the districts be equal in population.

In the Virginia Convention, during the discussion of s 4, Madison again stated unequivocally that he looked solely to that section to prevent unequal districting:

\* \* \* (I)t was thought that the regulation of time, place, and manner, of electing the representatives, should be uniform throughout the continent. Some states might regulate the elections on the principles of equality, and others might regulate them otherwise. This diversity would be obviously unjust. Elections are regulated now unequally in some states, particularly South Carolina, with respect to Charleston, \*38 which is represented by thirty members. Should the people of any state by any means be deprived of the right of suffrage, it was judged proper that it should be remedied by the general government. It was found impossible to fix the time, place, and manner, of the election of representatives, in the Constitution. It was found necessary to leave the regulation of these, in the first place, to the state governments, as being best acquainted with the situation of the people, subject to the control of the general government, in order to enable it to produce uniformity, and prevent its own dissolution. And Considering the state governments and general government as distinct bodies, acting in different and independent capacities for the people, it was thought the particular regulations should be submitted to the former, and the general regulations to the latter. Were they exclusively \*\*546 under the control of the state governments, the general government might easily be dissolved. But if they be regulated properly by the state legislatures, the congressional control will very probably never be exercised. The power appears to me satisfactory, and as unlikely to be abused as any part of the Constitution.' [FN31] (Emphasis added.)

[FN31]. III Elliot's Debates 367.

Despite the apparent fear that s 4 would be abused, no one suggested that it could safely be deleted because s 2 made it unnecessary.

In the North Carolina convention, again during discussion of s 4, Mr. Steele pointed out that the state legislatures had

the initial power to regulate elections, and that the North Carolina legislature would regulate the first election at least 'as they think proper.' [FN32] Responding \*39 to the suggestion that the Congress would favor the seacoast, he asserted that the courts would not uphold nor the people obey 'laws inconsistent with the Constitution.' [FN33] (The particular possibilities that Steele had in mind were apparently that Congress might attempt to prescribe the qualifications for electors or 'to make the place of elections inconvenient.' [FN34]) Steele was concerned with the danger of congressional usurpation, under the authority of s 4, of power belonging to the States. Section 2 was not mentioned.

[FN32]. IV Elliot's Debates 71.

[FN33]. Ibid.

[FN34]. Ibid.

In the Pennsylvania convention, James Wilson described Art. I, s 4, as placing 'into the hands of the state legislatures' the power to regulate elections, but retaining for Congress 'self-preserving power' to make regulations lest 'the general government \* \* \* lie prostrate at the mercy of the legislatures of the several states.' [FN35] Without such power, Wilson stated, the state governments might 'make improper regulations' or 'make no regulations at all.' [FN36] Section 2 was not mentioned.

[FN35]. Elliot's Debates 440--441.

[FN36]. Id., at 441.

Neither of the numbers of The Federalist from which the Court quotes, ante, pp. 534, 535 fairly supports its holding. In No. 57, Madison merely stated his assumption that Philadelphia's population would entitle it to two Representatives in answering the argument that congressional constituencies would be too large for good government. [FN37] In No. 54, he discussed the inclusion of slaves in the basis of apportionment. He said: 'It is agreed on all sides, that numbers are the best scale of wealth and taxation, as they are the only proper scale of representation.' [FN38] This statement was offered simply to show that the slave \*40 population could not reasonably be included in the basis of apportionment of direct taxes and excluded from the basis of apportionment

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of representation. Further on in the same number of the Federalist, Madison pointed out the fundamental cleavage which Article I made between apportionment of Representatives among the States and the selection of Representatives within each State:

[FN37](#). The Federalist, No. 57 (Cooke ed. 1961), 389.

[FN38](#). *Id.*, at 368.

'It is a fundamental principle of the proposed Constitution, that as the aggregate number of representatives allotted to the several States, is to be determined by a federal rule founded on the aggregate number of inhabitants, so the right of choosing this allotted number in each State is to be exercised by such part of the inhabitants, as the State itself may designate. The qualifications on which the right of suffrage depend, are not perhaps the same in any two \*547 States. In some of the States the difference is very material. In every State, a certain proportion of inhabitants are deprived of this right by the Constitution of the State, who will be included in the census by which the Federal Constitution apportions the representatives. In this point of view, the southern States might retort the complaint, by insisting, that the principle laid down by the Convention required that no regard should be had to the policy of particular States towards their own inhabitants; and consequently, that the slaves as inhabitants should have been admitted into the census according to their full number, in like manner with other inhabitants, who by the policy of other States, are not admitted to all the rights of citizens.' [FN39](#)

[FN39](#). *Id.*, at 369.

In the Federalist, No. 59, Hamilton discussed the provision of s 4 for regulation of elections. He justified Congress' power with the 'plain proposition, that every \*41 government ought to contain in itself the means of its own preservation.' [FN40](#) Further on, he said:

[FN40](#). *Id.*, at 398.

'It will not be alledged that an election law could have been framed and inserted into the Constitution, which

would have been always applicable to every probable change in the situation of the country; and it will therefore not be denied that a discretionary power over elections ought to exist somewhere. It will, I presume, be as readily conceded, that there were only three ways, in which this power could have been reasonably modified and disposed, that it must either have been lodged wholly in the National Legislature, or wholly in the State Legislatures, or primarily in the latter, and ultimately in the former. The last mode has with reason been preferred by the Convention. They have submitted the regulation of elections for the Federal Government in the first instance to the local administrations; which in ordinary cases, and when no improper views prevail, may be both more convenient and more satisfactory; but they have reserved to the national authority a right to interpose, whenever extraordinary circumstances might render that interposition necessary to its safety.' [FN41](#) (Emphasis added.)

[FN41](#). *Id.*, at 398--399.

Thus, in the number of the Federalist which does discuss the regulation of elections, the view is unequivocally stated that the state legislatures have plenary power over the conduct of congressional elections subject only to such regulations as Congress itself might provide.

The upshot of all this is that the language of Art. I, ss 2 and 4, the surrounding text, and the relevant history \*42 are all in strong and consistent direct contradiction of the Court's holding. The constitutional scheme vests in the States plenary power to regulate the conduct of elections for Representatives, and, in order to protect the Federal Government, provides for congressional supervision of the States' exercise of their power. Within this scheme, the appellants do not have the right which they assert, in the absence of provision for equal districts by the Georgia Legislature or the Congress. The constitutional right which the Court creates is manufactured out of whole cloth.

#### IV.

The unstated premise of the Court's conclusion quite obviously is that the Congress has not dealt, and the Court believes it will not deal, with the problem of congressional apportionment in accordance with what the Court believes to

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**\*\*548** be sound political principles. Laying aside for the moment the validity of such a consideration as a factor in constitutional interpretation, it becomes relevant to examine the history of congressional action under Art. I, s 4. This history reveals that the Court is not simply undertaking to exercise a power which the Constitution reserves to the Congress; it is also overruling congressional judgment.

Congress exercised its power to regulate elections for the House of Representatives for the first time in 1842, when it provided that Representatives from States 'entitled to more than one Representative' should be elected by districts of contiguous territory, 'no one district electing more than one Representative.' [FN42] The requirement was later dropped, [FN43] and reinstated. [FN44] In 1872, Congress required that Representatives 'be elected by districts composed of contiguous territory, and containing as **\*43** nearly as practicable an equal number of inhabitants, \* \* \* no one district electing more than one Representative.' [FN45] This provision for equal districts which the Court exactly duplicates in effect, was carried forward in each subsequent apportionment statute through 1911. [FN46] There was no reapportionment following the 1920 census. The provision for equally populated districts was dropped in 1929, [FN47] and has not been revived, although the 1929 provisions for apportionment have twice been amended and, in 1941, were made generally applicable to subsequent censuses and apportionments. [FN48]

[FN42]. Act of June 25, 1842, s 2, 5 Stat. 491.

[FN43]. Act of May 23, 1850, 9 Stat. 428.

[FN44]. Act of July 14, 1862, 12 Stat. 572.

[FN45]. Act of Feb. 2, 1872, s 2, 17 Stat. 28.

[FN46]. Act of Feb. 25, 1882, s 3, 22 Stat. 5, 6; Act of Feb. 7, 1891, s 3, 26 Stat. 735; Act of Jan. 16, 1901, s 3, 31 Stat. 733, 734; Act of Aug. 8, 1911, s 3, 37 Stat. 13, 14.

[FN47]. Act of June 18, 1929, 46 Stat. 21.

[FN48]. Act of Apr. 25, 1940, 54 Stat. 162; Act of Nov. 15, 1941, 55 Stat. 761.

The legislative history of the 1929 Act is carefully reviewed in [Wood v. Broom](#), 287 U.S. 1, 53 S.Ct. 1, 77 L.Ed. 131. As there stated:

'It was manifestly the intention of the Congress not to re-enact the provision as to compactness, contiguity, and equality in population with respect to the districts to be created pursuant to the reapportionment under the act of 1929.

'This appears from the terms of the act, and its legislative history shows that the omission was deliberate. The question was up, and considered.' [287 U.S.](#), at 7, [53 S.Ct.](#) at 2.

Although there is little discussion of the reasons for omitting the requirement of equally populated districts, the fact that such a provision was included in the bill as it was presented to the House, [FN49] and was deleted by the House after debate and notice of intention to do so, [FN50] **\*44** leaves no doubt that the omission was deliberate. The likely explanation for the omission is suggested by a remark on the floor of the House that 'the States ought to have their own way of making up their apportionment when they know the number of Congressmen they are going to have.' [FN51]

[FN49]. H.R. 11725, 70th Cong., 1st Sess., introduced on Mar. 3, 1928, 69 Cong.Rec. 4054.

[FN50]. 70 Cong.Rec. 1499, 1584, 1602, 1604.

[FN51]. 70 Cong.Rec. 1499 (remarks of Mr. Dickinson). The Congressional Record reports that this statement was followed by applause. At another point in the debates, Representative Lozier stated that Congress lacked 'power to determine in what manner the several States exercise their sovereign rights in selecting their Representatives in Congress \* \* \*.' 70 Cong.Rec. 1496. See also the remarks of Mr. Graham. Ibid.

Debates over apportionment in subsequent Congresses are generally unhelpful **\*\*549** to explain the continued rejection of such a requirement; there are some intimations that the feeling that districting was a matter exclusively for the States persisted. [FN52] Bills which would have imposed on the States a requirement of equally or nearly equally populated districts were regularly introduced in the House.

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[FN53] None of them became law.

[FN52] See, e.g., 85 Cong.Rec. 4368 (remarks of Mr. Rankin), 4369 (remarks of Mr. McLeod), 4371 (remarks of Mr. McLeod); 87 Cong.Rec. 1081 (remarks of Mr. Moser).

[FN53] H.R. 4820, 76th Cong., 1st Sess.; H.R. 5099, 76th Cong., 1st Sess.; H.R. 2648, 82d Cong., 1st Sess.; H.R. 6428, 83d Cong., 1st Sess.; H.R. 111, 85th Cong., 1st Sess.; H.R. 814, 85th Cong., 1st Sess.; H.R. 8266, 86th Cong., 1st Sess.; H.R. 73, 86th Cong., 1st Sess.; H.R. 575, 86th Cong., 1st Sess.; H.R. 841; 87th Cong., 1st Sess.

Typical of recent proposed legislation is H.R. 841, 87th Cong., 1st Sess., which amends [2 U.S.C. s 2a](#) to provide:

'(c) Each State entitled to more than one Representative in Congress under the apportionment provided in subsection (a) of this section, shall establish for each Representative a district composed of contiguous and compact territory, and the number of inhabitants contained within any district so established shall not vary more than 10 per centum from the number obtained by dividing the total population of such States, as established in the last decennial census, by the number of Representatives apportioned to such State under the provisions of subsection (a) of this section.

'(d) Any Representative elected to the Congress from a district which does not conform to the requirements set forth in subsection (c) of this section shall be denied his seat in the House of Representatives and the Clerk of the House shall refuse his credentials.'

Similar bills introduced in the current Congress are H.R. 1128, H.R. 2836, H.R. 4340, and H.R. 7343, 88th Cong., 1st Sess.

\*45 For a period of about 50 years, therefore, Congress, by repeated legislative act, imposed on the States the requirement that congressional districts be equal in population. (This, of course, is the very requirement which the Court now declares to have been constitutionally required of the States all along without implementing legislation.) Sub-

sequently, after giving express attention to the problem, Congress eliminated that requirement, with the intention of permitting the States to find their own solutions. Since then, despite repeated efforts to obtain congressional action again, Congress has continued to leave the problem and its solution to the States. It cannot be contended, therefore, that the Court's decision today fills a gap left by the Congress. On the contrary, the Court substitutes its own judgment for that of the Congress.

## V.

The extent to which the Court departs from accepted principles of adjudication is further evidenced by the irrelevance to today's issue of the cases on which the Court relies.

Ex parte [Yarbrough](#), [110 U.S. 651](#), [4 S.Ct. 152](#), [28 L.Ed. 274](#), was a habeas corpus proceeding in which the Court sustained the validity of a conviction of a group of persons charged with violating federal statutes [FN54] which made it a crime to conspire to deprive a citizen of his federal rights, and in particular the right to vote. The issue before the Court was whether or not the Congress had power to pass laws protecting \*46 the right to vote for a member of Congress from fraud and violence; the Court relied expressly on Art. I, s 4, in sustaining this power. [Id.](#), [110 U.S. at 660](#), [4 S.Ct. at 156](#). Only in this context, in order to establish that the right to vote in a congressional election was a right protected by federal law, did the Court hold that the right was dependent on the Constitution and not on the law of the States. Indeed, the Court recognized that the Constitution 'adopts the qualification' furnished by the States 'as the qualification of its own electors for members of Congress.' \*\*550 [Id.](#), [110 U.S. at 663](#), [4 S.Ct. at 158](#), [28 L.Ed. 274](#). Each of the other three cases cited by the Court, ante, p. 535, similarly involved acts which were prosecuted as violations of federal statutes. The acts in question were filing false election returns, [United States v. Mosley](#), [238 U.S. 383](#), [35 S.Ct. 904](#), [59 L.Ed. 1355](#), alteration of ballots and false certification of votes, [United States v. Classic](#), [313 U.S. 299](#), [61 S.Ct. 1031](#), [85 L.Ed. 1368](#), and stuffing the ballot box, [United States v. Saylor](#), [322 U.S. 385](#), [64 S.Ct. 1101](#), [88 L.Ed. 1341](#). None of those cases has the slightest bearing on the present situation. [FN55]

[FN54] R.S. s 5508; R.S. s 5520.

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[FN55. Smiley v. Holm, 285 U.S. 355, 52 S.Ct. 397, 76 L.Ed. 795](#), and its two companion cases, [Koenig v. Flynn, 285 U.S. 375, 52 S.Ct. 403, 76 L.Ed. 805; Carroll v. Becker, 285 U.S. 380, 52 S.Ct. 402, 76 L.Ed. 807](#), on which my Brother CLARK relies in his separate opinion, ante pp. 535--536, are equally irrelevant. *Smiley v. Holm* presented two questions: the first, answered in the negative, was whether the provision in Art. I, s 4, which empowered the 'Legislature' of a State to prescribe the regulations for congressional elections meant that a State could not by law provide for a Governor's veto over such regulations as had been prescribed by the legislature. The second question, which concerned two congressional apportionment measures, was whether the Act of June 18, 1929, 46 Stat. 21, had repealed certain provisions of the Act of Aug. 8, 1911, 37 Stat. 13. In answering this question, the Court was concerned to carry out the intention of Congress in enacting the 1929 Act. See [id.](#), [285 U.S. at 374, 52 S.Ct. at 402, 76 L.Ed. 795](#). Quite obviously, therefore, *Smiley v. Holm* does not stand for the proposition which my Brother CLARK derives from it. There was not the slightest intimation in that case the Congress' power to prescribe regulations for elections was subject to judicial scrutiny, ante, p. 535, such that this Court could itself prescribe regulations for congressional elections in disregard and even in contradiction of congressional purpose. The companion cases to *Smiley v. Holm* presented no different issues and were decided wholly on the basis of the decision in that case.

\*47 The Court gives scant attention, and that not on the merits, to [Colegrove v. Green, 328 U.S. 549, 66 S.Ct. 1198, 90 L.Ed. 1432](#), which is directly in point; the Court there affirmed dismissal of a complaint alleging that 'by reason of subsequent changes in population the Congressional districts for the election of Representatives in the Congress created by the Illinois Laws of 1901 \* \* \* lacked compactness of territory and approximate equality of population.' [Id.](#), [328 U.S. at 550--551, 66 S.Ct. at 1198](#). Leaving to another day the question of what [Baker v. Carr, 369 U.S. 186, 82 S.Ct.](#)

[691, 7 L.Ed.2d 663](#), did actually decide, it can hardly be maintained on the authority of *Baker* or anything else, that the Court does not today invalidate Mr. Justice Frankfurter's eminently correct statement in *Colegrove* that 'the Constitution has conferred upon Congress exclusive authority to secure fair representation by the States in the popular House \* \* \*. If Congress failed in exercising its powers, whereby standards of fairness are offended, the remedy ultimately lies with the people.' [328 U.S., at 554, 66 S.Ct. at 1200, 90 L.Ed. 1432](#). The problem was described by Mr. Justice Frankfurter as '(a)n aspect of government from which the judiciary, in view of what is involved, has been excluded by the clear intention of the Constitution \* \* \*.' *Ibid.* Mr. Justice Frankfurter did not, of course, speak for a majority of the Court in *Colegrove*; but refusal for that reason to give the opinion precedential effect does not justify refusal to give appropriate attention to the views there expressed. [\[FN56\]](#)

[FN56.](#) The Court relies in part on *Baker v. Carr*, supra, to immunize its present decision from the force of *Colegrove*. But nothing in *Baker* is contradictory to the view that, political question and other objections to 'justiciability' aside, the Constitution vests exclusive authority to deal with the problem of this case in the state legislatures and the Congress.

**\*\*551 \*48 VI.**

Today's decision has portents for our society and the Court itself which should be recognized. This is not a case in which the Court vindicates the kind of individual rights that are assured by the Due Process Clause of the Fourteenth Amendment, whose 'vague contours,' [Rochin v. People of California, 342 U.S. 165, 170, 72 S.Ct. 205, 208, 96 L.Ed. 183](#), of course leave much room for constitutional developments necessitated by changing conditions in a dynamic society. Nor is this a case in which an emergent set of facts requires the Court to frame new principles to protect recognized constitutional rights. The claim for judicial relief in this case strikes at one of the fundamental doctrines of our system of government, the separation of powers. In upholding that claim, the Court attempts to effect reforms in a field which the Constitution, as plainly as can be, has committed

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exclusively to the political process.

This Court, no less than all other branches of the Government, is bound by the Constitution. The Constitution does not confer on the Court blanket authority to step into every situation where the political branch may be thought to have fallen short. The stability of this institution ultimately depends not only upon its being alert to keep the other branches of government within constitutional bounds but equally upon recognition of the limitations on the Court's own functions in the constitutional system.

What is done today saps the political process. The promise of judicial intervention in matters of this sort cannot but encourage popular inertia in efforts for political reform through the political process, with the inevitable result that the process is itself weakened. By yielding to the demand for a judicial remedy in this instance, the Court in my view does a disservice both to itself and to the broader values of our system of government.

**\*49** Believing that the complaint fails to disclose a constitutional claim, I would affirm the judgment below dismissing the complaint.

APPENDIX TO OPINION OF MR. JUSTICE HARLAN.

[\[FN\\*\]](#)

Difference			
Between			
State and			
Largest and			
Number		Largest	
Smallest	Smallest		
Representatives	[FN**]	District	Dis-
trict	Districts		
Alabama (8)	.....	.....	.....
.....	.....	.....	.....
Alaska (1)	.....	.....	.....
.....	.....	.....	.....
Arizona (3)	.....	663,510	.....
198,236	465,274		
Arkansas (4)	.....	575,385	.....
332,844	242,541		
California (38)	.....	588,933	.....

301,872	287,061		
Colorado (4)	.....	653,954	.....
195,551	458,403		
Connecticut (6)	.....	689,555	.....
318,942	370,613		
Delaware (1)	.....	.....	.....
.....	.....		
Florida (12)	.....	660,345	.....
237,235	423,110		
Georgia (10)	.....	823,680	.....
272,154	551,526		
Hawaii (2)	.....	.....	.....
.....	.....		
Idaho (2)	.....	409,949	.....
257,242	152,707		
Illinois (24)	.....	552,582	.....
278,703	273,879		
Indiana (11)	.....	697,567	.....
290,596	406,971		
Iowa (7)	.....	442,406	.....
353,156	89,250		
Kansas (5)	.....	539,592	.....
373,583	166,009		
Kentucky (7)	.....	610,947	.....
350,839	260,108		
Louisiana (8)	.....	536,029	.....
263,850	272,179		
Maine (2)	.....	505,465	.....
463,800	41,665		
Maryland (8)	.....	711,045	.....
243,570	467,475		
Massachusetts (12)	.....	478,962	.....
376,336	102,626		
Michigan (19)	.....	802,994	.....
177,431	625,563		
Minnesota (8)	.....	482,872	.....
375,475	107,397		
Mississippi (5)	.....	608,441	.....
295,072	313,369		
Missouri (10)	.....	506,854	.....
378,499	128,355		
Montana (2)	.....	400,573	.....
274,194	126,379		
Nebraska (3)	.....	530,507	.....

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404,695	125,812	
Nevada (1) .....	.....	
New Hampshire (2) .....	331,818	
275,103	56,715	
New Jersey (15) .....	585,586	
255,165	330,421	
New Mexico (2) .....	.....	
New York (41) .....	471,001	
350,186	120,815	
North Carolina (11) .....	491,461	
277,861	213,600	
North Dakota (2) .....	333,290	
299,156	34,134	
Ohio (24) .....	726,156	
236,288	489,868	
Oklahoma (6) .....	552,863	
227,692	325,171	
Oregon (4) .....	522,813	
265,164	257,649	
Pennsylvania (27) .....	553,154	
303,026	250,128	
Rhode Idland (2) .....	459,706	
399,782	59,924	
South Carolina (6) .....	531,555	
302,235	229,320	
South Dakota (2) .....	497,669	
182,845	314,824	
Tennessee (9) .....	627,019	
223,387	403,632	
Texas (23) .....	951,527	
216,371	735,156	
Utah (2) .....	572,654	
317,973	254,681	
Vermont (1) .....	.....	
.....	.....	
Virginia (10) .....	539,618	
312,890	226,728	
Washington (7) .....	510,512	
342,540	167,972	
West Virginia (5) .....	422,046	
303,098	118,948	
Wisconsin (10) .....	530,316	

236,870	293,446
Wyoming (1) .....	.....
.....	.....

FN\*\* 435 in all.

[FN\\*](#) The populations of the districts are based on the 1960 Census. The districts are those used in the election of the current 88th Congress. The populations of the districts are available in the biographical section of the Congressional Directory, 88th Cong., 2d Sess.

**\*\*552 \*50** Mr. Justice STEWART.

I think it is established that 'this Court has power to afford relief in a case of this type as against the objection that the issues are not justiciable,' [\[FN\\*\]](#) and I cannot subscribe to any possible implication **\*\*553** to the contrary which **\*51** may lurk in Mr. Justice HARLAN'S dissenting opinion. With this single qualification I join the dissent because I think Mr. Justice HARLAN has unanswerably demonstrated that Art, I, s 2, of the Constitution gives no mandate to this Court or to any court to ordain that congressional districts within each State must be equal in population.

[FN\\*](#) The quotation is from Mr. Justice Rutledge's concurring opinion in [Colegrove v. Green, 328 U.S., at 565, 66 S.Ct. at 1208, 90 L.Ed. 1432.](#)

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#### Briefs and Other Related Documents ([Back to top](#))

- [1963 WL 105669](#) (Appellate Brief) Brief for the Appellees. (Oct. 19, 1963)
- [1963 WL 105668](#) (Appellate Brief) Brief for the United States as Amicus Curiae (Sep. 23, 1963)
- [1963 WL 105667](#) (Appellate Brief) Brief for the Appellants. (Sep. 9, 1963)

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 (Cite as: 608 So.2d 1187)



Supreme Court of Mississippi.  
 Hershel **WILBOURN**  
 v.  
 Peggy **HOBSON**.  
 No. 92-CA-0325.

July 29, 1992.  
 Rehearing Denied Dec. 3, 1992.

Loser of contest for seat on county board of supervisors filed election contest challenging invalidation of 27 uninitialed affidavit ballots and 6 affidavit ballots which were opened after polls had closed. The First Judicial Circuit Court, Hinds County, [James E. Graves, Jr.](#), J., granted summary judgment to challenger declaring her winner. Defendant appealed. The Supreme Court, [McRae](#), J., held that: (1) affidavit ballots were not illegal and void because they were uninitialed, and (2) affidavit ballots were not void because they were opened by poll workers after polls were closed.

Affirmed.

[Sullivan](#), J., concurred in part I, but dissented as to part II.

Robertson, J., concurred and filed separate written opinion, joined by [Prather](#) and [Banks](#), JJ.

Roy Noble Lee, C.J., dissented and filed opinion, joined by [Hawkins](#), P.J., and [Dan M. Lee](#), P.J.

[Sullivan](#), J., joined part II of Roy Noble Lee's dissenting opinion.

[Hawkins](#), P.J., dissented and filed opinion joined by Roy Noble Lee, C.J., and [Dan M. Lee](#), P.J.

#### West Headnotes

#### **[1] Stipulations** 14(10) [363k14\(10\) Most Cited Cases](#)

Stipulated fact is one which both parties agree is true; where parties file and gain court approval of formal stipulation agreement, factual issues addressed in agreement are forever settled and excluded from controversy, and neither party can later change position.

#### **[2] Stipulations** 17(3) [363k17\(3\) Most Cited Cases](#)

Factual stipulations set boundaries beyond which court cannot stray.

#### **[3] Elections** 216 [144k216 Most Cited Cases](#)

#### **[3] Statutes** 223.4 [361k223.4 Most Cited Cases](#)

Specific statute establishing procedure for managing affidavit ballots which did not require initialing of ballots controlled over general statute prescribing procedure for handling paper ballots which did require initialing; thus, 28 affidavit ballots which were not initialed by initialing manager were legal and could be counted.

#### **[4] Elections** 227(8) [144k227\(8\) Most Cited Cases](#)

Even if statute required initialing of affidavit ballots, initialing provision would be directory and there would be no reason to invalidate affidavit ballots based on lack of initials. [Code 1972, §§ 23-15-541, 23-15-573](#).

#### **[5] Elections** 227(8) [144k227\(8\) Most Cited Cases](#)

Affidavit ballots opened by poll workers at one precinct after polls were closed were not void from being counted, despite technical irregularity, where parties and attorneys stipulated that there was no evidence to challenge integrity of disputed ballots and technical irregularity occurred long after votes were cast. [Code 1972, § 23-15-573](#).

\*1187 [Natie P. Caraway](#), Olen M. Bailey, Jr., Wise Carter Child & Caraway, [Michael S. Allred](#), Allred & Donaldson, Jackson, for appellant.

Tyree Irving, Greenwood, [John L. Walker, Jr.](#), Walker Walker & Green, Jackson, for appellee.

En Banc.

[McRAE](#), Justice, for the Court:

In this appeal from an order entered by the Hinds County Circuit Court on April 3, 1992, we are asked to put to rest the issues raised in the hotly contested November 5, 1991, election for the District 3 seat on the Hinds County Board of

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Supervisors. The Circuit Court granted summary judgment to the appellee, Peggy Hobson, on the legality \*1188 of twenty-seven (27) uninitialed affidavit ballots and six (6) affidavit ballots opened by poll workers. Adding these ballots to the totals certified by the Hinds County Election Commission, the Circuit Court declared Hobson the victor in the election by two votes. Limited by the narrow issues raised by the appellant and by the stipulation of facts agreed upon by Wilbourn, Hobson, and their attorneys, we affirm the decision of the Circuit Court.

#### FACTS

By a narrow margin, the Hinds County Election Commission certified Hershel Wilbourn as the winner of a seat on the Board of Supervisors in the November 5, 1991, general election. In the legal battles which followed, attention focused on the legality of certain affidavit ballots, those which are issued to individuals whose names do not appear on the pollbooks but who aver in writing that they are eligible to vote in that precinct. The more than ten thousand votes which were cast electronically are not at issue.

Peggy Hobson filed an election contest in the Hinds County Circuit Court pursuant to [Miss.Code Ann. § 23-15-951 \(1972\)](#). See *In re Wilbourn*, 590 So.2d 1381 (Miss.1991). Over a period of just seven months, there ensued a complicated history of legal maneuvering through mine fields set by each party for the other in the chancery court, in the circuit court, and, ultimately, up to this Court by means of petitions for interlocutory appeals and extraordinary relief. We do not address these myriad manipulations; rather, we look only at the appeal raised directly from the Circuit Court decision.

Both parties filed motions for summary judgment and stipulated that Judge Graves could hear the case as a jury. They waived any technical errors involving the summary judgment. In support of their motions, the parties filed a joint Stipulation of Facts. In pertinent part, Wilbourn and Hobson stipulated or agreed that the following facts were true:

--The Hinds County Election Commission certified Hershel Wilbourn the winner of the District 3 Supervisors election by these vote totals: Hobson, 5,321 and Wilbourn, 5,352.

--Not included in that certification were the following:

(a) 27 uninitialed affidavit ballots for Hobson;

(b) 1 uninitialed affidavit ballot for Wilbourn;

(c) 1 curbside ballot for Hobson;

(d) 6 affidavit ballots for Hobson opened by the poll workers.

--The curbside ballot, (c) above, is legal and should be added to Hobson's total.

--There is no question as to the integrity of the ballots set forth in (a), (b), and (d) above. The legality of the ballots set forth in (a), (b), and (d) above is unquestioned as to everything except that 28 ballots, set forth in (a) and (b) above, were not initialed on the back, and the envelopes containing the six ballots set forth in (d) above, were opened by the poll workers at the close of the polls and the ballots counted by the poll workers who then returned the ballots to their envelopes and delivered them, along with their other election materials, to the Hinds County Election Commission.

--All persons who cast the 6 affidavit ballots, (d) above, were qualified voters of Hinds County Supervisor District 3, a fact verified by the Hinds County Election Commission upon their delivery to them.

--If the ballots set forth in (a), (b), and (d) are declared legal, they should be added to the appropriate party's vote total.

--Based upon this stipulation, if Plaintiff's motion for summary judgment is granted, the ruling would be dispositive of the case and would be a final, appealable judgment pursuant to [MRCP 54](#).

--The parties waive any objection to the court and not the jury declaring a winner in this election contest based upon the court's ruling on the motions for summary judgment.

--This stipulation is in support of both the defendant's and plaintiff's motions for partial summary judgment, which are \*1189 to be treated as motions for summary judgment rather than for partial summary judgment.

The Circuit Court found that the twenty-seven uninitialed affidavit ballots were valid pursuant to [Miss.Code Ann. § 23-15-573 \(Supp.1990\)](#), which deals specifically with the casting of affidavit ballots. The statute is silent as to any requirement that such ballots be initialed. The Circuit Court further found that [Miss.Code Ann. § 23-15-541 \(Supp.1990\)](#), which requires generally that paper ballots must be initialed by an "initialing manager" or "alternative

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initialing manager," was not applicable to affidavit ballots. In so determining, he applied the rule of statutory construction that a specific statute such as [§ 23-15-573](#) controls over a general statute.

The Circuit Court further determined that because the integrity of the six ballots, which had been opened by poll workers in an open forum after the polls had closed, and returned to their envelopes prior to being delivered to the Election Commission, was uncontroverted pursuant to the Stipulation, that to declare them illegal because of the poll workers' actions would result in an unwarranted and unreasonable disenfranchisement of the six voters. On the basis of the Stipulation, the Circuit Court also found that the lone curbside ballot was legal.

Based on its determinations, the Circuit Court tallied the twenty-seven (27) uninitialed affidavit ballots, the six (6) affidavit ballots which had been opened by the poll workers, and one (1) curbside ballot with the 5,321 votes for Hobson which had been certified by the Election Commission. This gave her a total of 5,355 votes. One (1) uninitialed affidavit was added to Wilbourn's 5,352 certified votes, giving him a total of 5,353.

Hobson thus was declared the winner of the contested seat by two votes. The Circuit Court ordered the Clerk of the Court to issue a Certificate of Election to Hobson pursuant to [Miss.Code Ann. § 23-15-951 \(Supp.1990\)](#). She was sworn in as Supervisor for Hinds County, District 3 on April 3, 1992.

#### DISCUSSION

At the outset, we emphasize that the parties have laid before us two very narrow issues. The case is (and can only be) decided on those two points alone. Wilbourn and Hobson have stipulated virtually all the relevant facts. A synopsis of their stipulations includes the following:

- (1) the Hinds County Election Commission certified Hershel Wilbourn the winner of the November 5, 1991, election;
- (2) the vote totals certified by the Hinds County Election Commission did not include the contested affidavit ballots;
- (3) the contested affidavit ballots, if declared legal, should

be added to the parties' respective vote totals;

(4) there is no evidence questioning the integrity of the contested ballots; and

(5) the ballots are legal in every respect apart from the two issues addressed on this appeal.

[1][2] A stipulated fact is one which both parties agree is true. Where the parties file and gain court approval of a formal stipulation agreement as Wilbourn and Hobson have done, the factual issues addressed in the agreement are forever settled and excluded from controversy. Neither party can later change positions. [Johnston v. Stinson, 434 So.2d 715 \(Miss.1983\)](#); [Vance v. Vance, 216 Miss. 816, 63 So.2d 214 \(1953\)](#); [Stone v. Reichman-Crosby Co., 43 So.2d 184 \(Miss.1949\)](#). Furthermore, factual stipulations set boundaries beyond which this Court cannot stray. As stated in *Corpus Juris Secundum*:

In the absence of grounds which will authorize a party to a stipulation to rescind or withdraw from it, ... the courts, both trial and appellate, ... are bound by stipulations in respect of matters which may validly be made the subject matter of stipulations. Courts are bound to enforce stipulations which parties may validly make, where they are not unreasonable or against good morals or sound public policy. Ordinarily they have no power to ... go beyond the terms [of such stipulations] ... or to make findings \*1190 contrary to the terms of a stipulation, or render a judgment not authorized by its terms.

[83 C.J.S. Stipulations § 17 \(1953\)](#); see also [Roberts v. Robertson, 232 Miss. 796, 100 So.2d 586 \(1958\)](#) (court cannot look behind stipulation of parties). In reviewing this case, we are thus constrained to abide by Wilbourn's and Hobson's stipulations of fact. We must assume that the contested ballots are not tainted by fraud or malfeasance of any kind; we must assume that the ballots conform to all legal requirements outside the two specific issues raised on appeal. Stated simply, Wilbourn and his attorney have stipulated away every point of fact that might otherwise have had a bearing on our decision. We are therefore left with two sterile questions of law on which Wilbourn's claim to elected office must stand or fall. We now turn to the merits of those two issues.

I.

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#### ARE THE TWENTY-EIGHT UNINITIALED AFFIDAVIT BALLOTS ILLEGAL AND VOID?

[3] Twenty-eight affidavit ballots cast in the District 3 Supervisor election were not initialed by the initialing manager. Twenty-seven of these ballots were cast for Hobson; one was cast for Wilbourn. According to Wilbourn, the law requires that all paper ballots be initialed. Since these were not, he argues, they are void and should not be counted.

The issue turns largely on the wording of two statutes: one, a statute of general application that provides for the initialing of paper ballots; the other, a statute specifically governing affidavit ballots that does not require initialing. The general statute, [Miss.Code Ann. § 23-15-541 \(Supp.1990\)](#), is codified under the "Subarticle A. General Provisions" of our election code. It provides in relevant part:

When any person entitled to vote shall appear to vote, he shall first sign his name in a receipt book or booklet provided for that purpose and to be used at that election only and said receipt book or booklet shall be used in lieu of the list of voters who have voted formerly made by the managers or clerks; whereupon and not before, the initialing manager or, in his absence, the alternate initialing manager shall indorse his initials on the back of an official blank ballot, prepared in accordance with law, and at such place on the back of the ballot that the initials may be seen after the ballot has been marked and folded, and when so indorsed he shall deliver it to the voter, which ballot the voter shall mark in the manner provided by law, which when done the voter shall deliver the same to the initialing manager or, in his absence, to the alternate initialing manager, in the presence of the others, and the manager shall see that the ballot so delivered bears on the back thereof the genuine initials of the initialing manager, or alternate initialing manager, and if so, but not otherwise, the ballot shall be put into the ballot box; and when so done one (1) of the managers or a duly appointed clerk shall make the proper entry on the pollbook. If the voter is unable to write his name on the receipt book, a manager or clerk shall note on the back of the ballot that it was receipted for by his assistance.

[Miss.Code Ann. § 23-15-573 \(Supp.1990\)](#), codified under "Subarticle B. Affidavit Ballots and Challenged Ballots," sets out the procedure for voting by affidavit ballot:

No person whose name does not appear upon the pollbooks shall be permitted to vote in an election; but if any person offering to vote in any election whose name does not appear upon the pollbook shall make affidavit before one (1) of the managers of election in writing that he is entitled to vote, or that he has been illegally denied registration, his vote may be prepared by him and handed to the proper election officer who shall enclose the same in an envelope with the written affidavit of the voter and seal it and mark plainly upon it the name of the person offering to vote. In canvassing the returns of the election, the executive committee in primary elections, or in a general election the election commissioners, \*1191 shall examine the records and allow the ballot to be counted, or not, as shall appear to be legal.

The crucial question is whether the initialing requirement found in [§ 23-15-541](#) applies to affidavit ballots despite [§ 23-15-573](#)'s silence on the subject of initialing. We hold that it does not.

It is well settled that when construing two statutes that encompass the same subject matter, a specific statute will control over a general one. [Andrews v. Waste Control, Inc.](#), 409 So.2d 707, 713 (Miss.1982); see [Benoit v. United Companies Mortgage of Mississippi](#), 504 So.2d 196, 198 (Miss.1987); [Martin v. State](#), 501 So.2d 1124, 1127 (Miss.1987); [State ex rel. Pair v. Burroughs](#), 487 So.2d 220, 226 (Miss.1986); [Carleton v. State](#), 438 So.2d 278, 279 (Miss.1983); [Burruss v. State](#), 431 So.2d 1117, 1118 (Miss.1983); [Bence v. State](#), 240 So.2d 630, 631 (Miss.1970); [McCaffrey's Food Market, Inc. v. Mississippi Milk Comm'n](#), 227 So.2d 459, 463 (Miss.1969); [McCrorry v. State](#), 210 So.2d 877, 877 (Miss.1968); see also 1 Sutherland, *Statutory Construction* § 2022 (3d ed. 1943). There is no question in the instant case but that [§ 23-15-541](#) is of general scope while [§ 23-15-573](#) is specific. [Section 23-15-541](#) prescribes the procedure for handling paper ballots generally; [§ 23-15-573](#) establishes the procedure for managing affidavit ballots in particular. Although paper ballots, as a general rule, must be initialed, the specific statute governing affidavit ballots does not require it. The specific statute controls.

A second axiom of statutory construction holds that when

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two statutes pertain to the same subject, they must be read together in light of legislative intent. In [McCaffrey's Food Market](#), 227 So.2d at 463, we stated:

It is ... a rule of law that in its effort to construe a statute the courts must seek to ascertain the legislative intent of the statute in question as a whole, taking into consideration each provision of the statute on the entire subject.

Accord [Calhoun Cty. Bd. of Supervisors v. Grenada Bank](#), 543 So.2d 138, 144-45 (Miss.1988); [Martin](#), 501 So.2d at 1127; [Roberts v. Mississippi Republican Party](#), 465 So.2d 1050, 1052 (Miss.1985); [Allgood v. Bradford](#), 473 So.2d 402, 411 (Miss.1985); [Mississippi Public Serv. Comm'n v. Municipal Energy Agency](#), 463 So.2d 1056, 1058 (Miss.1985); [Andrews](#), 409 So.2d at 713; [Burroughs](#), 487 So.2d at 226; see also 1 Am.Jur.2d *Administrative Law* § 40 ("Statutes or statutory sections which relate to the same subject matter or are in *pari materia* must be read together to determine the mind of the legislature.").

Wilbourn argues that this rule of construction favors his position. According to him, when §§ 23-15-541 and 23-15-573 are read together, § 23-15-541 supplies the initialing requirement that § 23-15-573 omits. This argument may have some superficial appeal, but a closer scrutiny of the two statutes reveals that even when reading them together, it is clear that the legislature did not intend to impose an initialing requirement for affidavit ballots.

First, a requirement that affidavit ballots be initialed is incompatible with other provisions in § 23-15-541. Section 23-15-541 provides that when a person "entitled to vote shall appear to vote, he shall first sign his name in a receipt book; whereupon and not before, the initialing manager ... shall indorse his initials on the back of an official blank ballot." (Emphasis added). Affidavit ballots are used because the prospective voter is being challenged as to his qualifications to vote, namely, people whose names do not appear on the pollbooks and who are therefore *ineligible to sign the receipt book*. Since the initialing manager is expressly prohibited from initialing the ballot before the voter signs the receipt book, it is not logically possible for the initialing manager to comply with the law if § 23-15-573 implicitly incorporates an initialing requirement. Section 23-15-541 also provides that after the initialing manager endorses the bal-

lot, "he shall deliver it to the voter, which ballot the voter shall mark in the manner provided by law, which when done the voter shall deliver the same to the initialing manager." Section 23-15-573, on the other hand, provides that once an affidavit voter makes his written \*1192 affidavit, "his vote may be prepared by him and handed to the proper election officer." (Emphasis added). In the presence of the voter, the election officer seals the affidavit envelope and signs his/her name as manager. [See Appendix A ] The phrase "may be prepared by him" refers to the voter.

The very fact that an initialing requirement appears in § 23-15-541 and not in § 23-15-573 is itself indicative of legislative intent. There is a very good reason for exempting affidavit ballots from the initialing requirement--affidavit ballots are not so amenable to fraud as are ordinary paper ballots. It is obvious that the initialing requirement was primarily meant to avoid the practice of stuffing the ballot boxes. Initialing provides a security measure to help election officials detect and protect against counterfeit ballots. In this view, the distinction between the handling of a regular voter's (paper) ballot and that of one voting by affidavit ballot becomes crucial. Where the voter's name appears on the poll book, he is handed a ballot and may retire to the voting booth and then emerge and, if not watched carefully, slip more than one marked ballot into the box. And once his vote(s) are in the box, the chances of detection are slight. Not so with the affidavit ballot. It may well be that in secret the voter may mark or prepare two or more ballots, but if he places them in the sealed envelope required by § 23-15-573, his scheme will be found out when the envelope is opened.

Of course, even affidavit ballots were once susceptible to the unscrupulous practice called the "Tasmanian dodge." This device was described in [Allen v. Snowden](#), 441 So.2d 553 (Miss.1983). To carry out a "Tasmanian dodge,"

a blank ballot was passed to a dishonest politician who premarked it and paid a corrupt voter to take it to the poll to vote. The corrupt voter received his ballot, but put the premarked ballot in the ballot box. He then took the blank ballot he received at the poll to the dishonest politician who again premarked it and paid the second corrupt voter to vote the ballot. This process continued throughout election day.

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[Allen, 441 So.2d at 555](#). Modern election techniques have rendered the "Tasmanian dodge" impractical if not impossible in most precincts. Today, elections are by and large conducted by machine voting. Where voting machines are used, affidavit and absentee ballots are the only ones available on paper. To accomplish a "tasmanian dodge" through the use of affidavit ballots, the perpetrator would have to locate a sizable number of voters who are registered and legally entitled to vote but who, for whatever reason, do not appear in the pollbooks. Further, the perpetrator would have to persuade this limited pool of potential accomplices to participate in his scheme. The likelihood that a "tasmanian dodge" could successfully occur under these circumstances is infinitesimally small.

Since the practice of initialing ballots helps prevent the fraudulent use of ordinary paper ballots, the legislative intent behind the [§ 23-15-541](#) initialing requirement is apparent. By the same token, it is also apparent why the legislature did *not* include an initialing requirement in [§ 23-15-573](#): The anti-fraud rationale does not extend to paper ballots cast by affidavit. It is important to note that the election at issue here was conducted by machine voting. Had it not been, the parties have nevertheless stipulated that no evidence of fraud exists.

[4] If we read [§ 23-15-573](#) as requiring the initialing of affidavit ballots, there would still be no reason to invalidate the twenty-eight ballots at issue here, for the initialing provision would be directory as to that statute. We have on many occasions held that technical irregularities will not vitiate an election where there is no evidence of fraud or intentional wrong. See, e.g., [Rizzo v. Bizzell, 530 So.2d 121, 126-27 \(Miss.1988\)](#); [Fouche v. Ragland, 424 So.2d 559 \(Miss.1982\)](#); [Chinn v. Cousins, 201 Miss. 1, 8, 27 So.2d 882, 883 \(1946\)](#), admits as much:

We have had frequent occasion to appraise the effect of non-conformity with this statute. We have been alert to the \*1193 danger of rendering inefficient the machinery of nomination by a blind insistence upon absolute and ritualistic conformity with minute detail. A sane and practical relaxation indulged under circumstances where, despite trivial lapses, the voters have expressed their will by lawful ballot is not inconsistent with a rigid requirement

that such ballot be lawful.

Long ago in [Guice v. McGehee, 155 Miss. 858, 124 So. 643, 644 \(1929\)](#), we held:

In determining the effect of irregularities through mistakes of voters and election officials, all statutes limiting the voter in the exercise of his right of suffrage are construed liberally in his favor, in order to ascertain the will of the majority of the voters.

This principle is still sound. If the integrity of a ballot is unquestioned, there is no good reason to disenfranchise a voter for some technical aberration beyond his control.

In the instant case, twenty-eight people cast twenty-eight uninitialed affidavit ballots, presumably for the candidate of their choice. Despite the lack of initialing, those ballots fully reflect the will of the voters who cast them. Of course, if there had been even a hint of unseemliness associated with the ballots at issue, then even a technical irregularity might have rendered them void. We again emphasize, however, that Wilbourn has stipulated away even the possibility of impropriety. The burden of proving fraud rests on the party seeking to invalidate the ballots. Wilbourn has not only failed to meet his burden, he and his attorney have passed up the opportunity to do so. As it stands, the absence of initials on the twenty-eight contested ballots do not render the ballots invalid under our election code. Peggy Hobson is entitled to claim twenty-seven of those votes as her own.

## II.

### ARE THE SIX AFFIDAVIT BALLOTS OPENED BY POLL WORKERS VOID?

[5] We further reject Wilbourn's proposition that the six affidavit ballots opened by poll workers at one precinct were void. Again, we turn to the statute for guidance. Once the offer to vote has been placed in a sealed envelope, [Miss.Code Ann. § 23-15-573 \(1972\)](#) specifies only that:

In canvassing the returns of the election, the executive committee in primary elections, or in a general election the election commissioners, shall examine the records and allow the ballot to be counted, or not, as shall appear to be legal.

The statute clearly indicates that ballots shall be counted by the election commissioners in a general election. However, the statute is silent as to when, where and by whom the bal-

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lots may or shall be opened. Even if we were to read into the statute a requirement that election workers not open affidavit ballots at the polls, we would still need to answer the question of whether it would be merely directory and not mandatory.

Eight affidavit ballots were opened at the precinct by election officials who were sworn to fidelity and trust in holding the election. They were opened after the polls had closed and after voters had left the precinct. Those ballots were duly returned to their envelopes and delivered to the Hinds County Election Commission. They were kept separate and apart from other election materials so that the registration status of the voters could be independently verified by the Election Commission. Two of the eight affidavit ballots were found by the Election Commissioners to have been cast by unregistered voters and thus were not counted.

As with the uninitialed affidavit ballots, the parties and their attorneys stipulated that there was no question about the integrity of the ballots opened by the poll workers. It was further stipulated that the legality of the ballots was unquestioned except for the manner in which they were opened. By so stipulating, Wilbourn and his attorney have again vitiated the argument now before us. Absent evidence of fraud or intentional wrongdoing, we have held that technical irregularities will not \*1194 void the ballots cast. [Rizzo v. Bizzell](#), 530 So.2d 121, 126-127 (Miss.1988); [Fouche v. Ragland](#), 424 So.2d 559 (Miss.1982). Notwithstanding the stipulation, we find no evidence of fraud or intentional wrongdoing in the record.

We are unmoved by Wilbourn's passionate argument that the opening of the affidavit ballots by the poll workers violates the sanctity of the secret ballot. Rather, we focus our concern on the potential disenfranchisement of six voters by a procedure which violated no statute and caused no harm. In considering whether the accidental exposure of the signatures on absentee ballots would serve to invalidate those ballots, the Kentucky court wrote in [Stabile v. Osborne](#), 217 S.W.2d 980, 982, 984 (Ky.1949):

The allegation is that the election officers disregarded the rules laid down in the statute for preserving the secrecy of the ballot. But the statute does not say that this dereliction of duty shall result in disfranchisement of innocent voters.

\* \* \* \* \*

It would be a dangerous thing and put a premium upon misconduct to declare that an election officer by his dereliction in performing a duty, such as preserving the secrecy of individual ballots, may disenfranchise the electorate in part or in whole and perhaps swing an election from one candidate to another.... There is a difference where there was a deliberate destruction of the secret quality of an election during the course of holding it or other fraud or such gross misconduct that it cannot be said that the results do not reflect the free and unhampered will of the people.

We find no violation of the statute. The parties and their attorneys have stipulated that there was no evidence to challenge the integrity of the disputed ballots. We see no reason to disenfranchise innocent voters because of a technical irregularity which occurred long after their votes were cast. Accordingly, Peggy Hobson is also entitled to claim these six votes as her own.

Both Wilbourn and Hobson stipulated that there were no questions about the integrity of the twenty-seven (27) uninitialed affidavit ballots and the six (6) affidavit ballots opened by poll workers. They further agreed that except for the issues raised in this appeal, there was no question as to the legality of the affidavit ballots. In effect, Wilbourn has stipulated himself out of court. Given the constraints of our scope of review, the narrowness of the issues before us and the limitations of the stipulated facts, we affirm the decision of the circuit court.

AFFIRMED.

[PRATHER](#), ROBERTSON, [PITTMAN](#) and [BANKS](#), JJ., concur.

[SULLIVAN](#), J., concurs in part I, but dissents as to part II.

ROBERTSON, J., concurs with separate written opinion, joined by [PRATHER](#) and [BANKS](#), JJ.

ROY NOBLE LEE, C.J., dissents with separate written opinion, joined by [HAWKINS](#) and [DAN M. LEE](#), P.JJ.

[SULLIVAN](#), J., joins part II of ROY NOBLE LEE's dissent.

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HAWKINS, P.J., dissents with separate written opinion,  
 joined by ROY NOBLE LEE, C.J., and DAN M. LEE, P.J.

\*1195 APPENDIX A

**EXHIBIT "A"**

**AFFIDAVIT AND BALLOT ENVELOPE** 1241

STATE OF MISSISSIPPI  
 COUNTY OF HINDS

Primary - General - Special General Election November 5, 1991

Social Security Number of Voter 321-46-2530 Precinct 61

Name of Number Ava Marie McAdoo  
 Name of voter as Registered - (print)

This day personally appeared before the undersigned manager of the above election, Ava Marie McAdoo  
 who makes affidavit as provided by Section 23-15-573, Mississippi Code of 1972, Annotated, that he or she is entitled to vote in said election; that he or  
 she is registered to vote in Hinds County, Mississippi, in precinct 61, for at least 30 days  
 before this date; that he or she moved to precinct 61 in Hinds County not less than 30 days before this date.

(Name of ordinarily registered or voter) Ava Marie McAdoo Signature of Voter [Signature] Zip Code 39209  
 Date of Birth 8-19-52 Age 39 Precinct Address 130 Seward Dr. City Phone Number (601) 949-2041 (Co.) 54-2070  
 Former Address 1802 St. Charles, Jackson, MS 39209 City Phone Number [None] Night Phone Number [None]

AFFIRMED and Subscribed before me on this 11-5, 1991 Date  
[Signature] Manager

\*1196 ROBERTSON, Justice, concurring:

I concur in the opinion of the Court and in the reasoning thereof but would prefer we had said more. This case does present "two very narrow issues," but they are issues that ought not be unhinged from basic practical and legal values. This case did not arise in a vacuous legal form, nor should it be decided in one.

The right to vote has become the brightest star in the American constitutional firmament. It has been secured and extended in five of our last twelve amendments which are the public expression of an enduring national consensus. It is free speech, but with a bite, for it is the one form of speech where others may be made to listen despite their dissent or disinterest. Each election sees a convergence in space-time when each of us by law is as equal as we were created. By sovereign decree, no one of us at such a moment has greater power or wealth or standing in the human race than the most miserable wretch who slouches toward the polls to vote and thus to affirm, anonymously and to the world, that he can feel and fear and despair and dream, and, against the overwhelming weight of the evidence, to act as though he is more than just a behaviorally conditioned blob of billions of subatomic particles held together by the gravitational interaction and made life-like by the electromagnetic interaction. Election day is more than a ritual renewal of the social contract. It is at once the workhorse of the pragmatic, secular state and, because it works, the political pre-condition of human hope.

Formalities attend the right to vote, as they do all rights the state may enforce. The great god efficiency demands no less. And so our election code provides we must vote by 7:00 o'clock and at designated polling places and the like. All formalities have an arbitrary edge. So long as these are reasonable and fairly knowable beforehand, their enforcement enhances the right facilitated, as when we turn away the voter three minutes late or deny one who delivers his ballot at his local tavern. Election contests are about formalities. We are told today there are two such: that affidavit ballots must be initialed and that they may not be unsealed save by the elections commissioners. If I thought for a moment a fair reading of the law required initialing affidavit ballots, or that it proscribed a poll official opening the sealed affidavit ballot envelope as soon as the polls have

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closed, I would say so, and then seek in the law the most sensible sanction. Fewer people miss reasonably scheduled flights that always leave on time.

The Court's opinion well melds [Section 23-15-573](#) on affidavit ballots with the general provisions of [Section 23-15-541](#) and dispatches the first suggestion (though no resort to the myth of legislative intent is necessary or helpful). The opinion reads these statutes as best fits their combined texts and best justifies that text as a part of our democratic apparatus. There is no known reason why we would want affidavit ballots initialed.

Each of today's thirty-four "uninitialed" affidavit ballots enjoyed greater security than would an ordinary paper ballot. Placing the ballot in a single envelope, the voter seals it and acknowledges it and then delivers the envelope to the polling official, who then signs it. The ballot is from this moment isolated, identifiable and safe. If I am wrong and initialing does for the affidavit ballot something we should have done, is not a poll worker's signature on the covering envelope better than initials on the ballot inside when there is but a single ballot inside? Nothing in [Section 23-15-541](#) or any other statute says initialing is essential to the validity of an election. We have held initialing not so fundamental to the integrity of the process that we ought extend it beyond the act's command. [Hubbard v. McKey, 193 So.2d 129, 131 \(Miss.1966\)](#).

I find easier the case of the six pre-opened affidavit ballots. The Court's opinion invokes the parties' stipulation, but, if there were no stipulation, a silent record would do as well. A party challenging the integrity of a voter's ballot has the burden of persuasion and production. Wilbourn fails on this score. I would concede it better practice that the determination be \*1197 made whether the ballot is to be counted before anyone knows which candidate it favors, but the law does not require this.

Absentee ballots offer a useful practical analogy. When the polls close, absentee ballots are opened and counted--at the polling place, though the elections commissioners may later disqualify one or more. Today's six affidavit ballots were handled in the same way as all absentee ballots. After the polls close, an election official will pick up an absentee bal-

lot, break and open the seal of the envelope, and remove and inspect and count the ballot. Our case asks that we consider that a few seconds later the same official picks up a sealed affidavit ballot and repeats the process. What is important is that, from the moment the polls close, there are no legally relevant differences in the way absentee and affidavit ballots are canvassed and counted. They are subject to identical security risks, if handled like the six ballots contested here. We would appear a bit silly if we voided these functionally analogous affidavit ballots on the ground tendered.

The lack of a statute should end this point, yet there is a further dimension. We charge the voter to know the law's formalities and to meet them. When the voter does what the law requires, we should be loath to void his ballot because an election official drops the ball. To be sure, we cannot make this a universal. The ballot may have been defaced or destroyed. There may be an inference of removal and substitution. No such inference confounds these ballots which were and are perfectly legible, and they were opened by election officials sworn to fidelity and trust in holding the election. As public officials they are presumed to respect their oaths. [Hubbard v. McKey, 193 So.2d at 132](#). Today's six ballots were opened after the polls had closed and in the presence of other officials and candidate representatives, and without any hint of tampering. More to the point, they were opened after the voter had left the precinct. None of these six voters had means of anticipating today's eventuality, or of protecting himself from it.

The only harm here is six voters' rights to secret ballot have been marginally compromised. Wilbourn spends much of his brief extolling the virtues of secret ballot. Fine, well and good, but it would seem on common sense the person with standing to complain is the person who stands the risk of harm, the voter himself. We have before us today no voter complaining that his affidavit ballot was pre-opened at the polls, nor, by reason thereof, demanding his vote be voided. If enough can be squeezed from the statute to require that affidavit ballots remain sealed until they reach the elections commissioners, should we not punish the offending official, instead of the innocent voter?

This case is about formalities surrounding the right to vote. Two said-to-be formalities have been tendered and have

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vanished under strict legal scrutiny tempered with common sense. No doubt, Peggy Hobson and Hershel Wilbourn have rights at issue but none approaching in importance those of the thirty-four persons voting uninitialed affidavit ballots, six whose ballots were pre-opened after the polls closed. This case at its core tests our fidelity to the legal right of these thirty-four to vote for the candidate of their choice for Third District Supervisor in Hinds County. It would be monstrous to declare their votes void on these grounds and on this record.

[PRATHER](#) and [BANKS](#), JJ., join this opinion.

[HAWKINS](#), Presiding Justice, dissenting:

I join the dissent of Chief Justice Lee.

To hold [Miss.Code Ann. § 23-15-541](#), a general statute covering all elections, has no application to [Miss.Code Ann. § 23-15-573](#), the majority must distort a perfectly valid principle of law that where there is a *conflict* between the language of a general and a special statute covering the same subject, the language of the special statute will control. [Benoit v. United Companies Mortgage of Mississippi, Inc., 504 So.2d 196 \(Miss.1987\)](#). Before a court is authorized to look solely to the language of the \*1198 special statute, however, it must find that there is a "conflict," [Benoit, 504 So.2d at 198](#); or put otherwise, a "necessary repugnancy" between the two statutes. [82 C.J.S. Statutes § 369, pp. 839-44 \(1953\)](#). If the two statutes can be harmonized and read together, as clearly can be done with these two statutes, then both are read and construed *in pari materia*. [Mississippi Public Service Commission v. Municipal Energy of Mississippi, 463 So.2d 1056, 1058 \(Miss.1985\)](#).

It defies reason to contend, as does the majority, that these two statutes cannot be harmonized in their requirements. The majority may twist and turn as much as it pleases (Opinion, p. 1191), but there is nothing about [Miss.Code Ann. § 23-15-573](#) to prevent an election manager endorsing "his initials on the back of an official blank ballot, prepared in accordance with law," [Miss.Code Ann. § 23-15-541](#), on the ballot he hands to the person attempting to vote under [Miss.Code Ann. § 23-15-573](#). It is that simple. There is as much reason for requiring the ballot to be initialed by an

election manager under [Miss.Code Ann. § 23-15-573](#) as under [Miss.Code Ann. § 23-15- 541](#). Why should an uninitialed ballot cast by a voter whose name appears on the poll books be denied, when an uninitialed ballot cast by a person whose name does not appear thereon be counted? There is as much opportunity for fraud on the part of the person casting the vote in one instance as in the other.

The majority gives [Miss.Code Ann. § 23-15-573](#) as solitary and insulated a construction as it would if the statute were in a code chapter on the Uniform Commercial Code or criminal procedures, rather than being just one section of Ch. 495, Laws 1986, a comprehensively detailed Act covering all elections.

#### THE OTHER SIX BALLOTS

As Chief Justice Lee points out, under well-settled rules of statutory construction, it was mandatory that the election commissioners examine these affidavit ballots and decide whether or not they could be counted. No other person was authorized to do so. This official duty was not fulfilled by the commissioners because the envelopes had already been opened by some poll worker and the votes counted. Were the ballots in the envelopes the same ballots cast by the voters? We can never know; hence the reasoning behind the statute. "In canvassing the returns of the election ... the election commissioners shall examine the records and allow the ballot to be counted, or not, as shall appear to be legal." [Miss.Code Ann. § 23-15-573](#).

And how does the majority handle this mandatory requirement? It tells us that, "Even if we were to read into the statute a requirement that election workers not open affidavit ballots at the polls [how can it be read in any other way?], we would be wont to answer the question of whether it would be merely directory and not mandatory." (Opinion, p. 1193) As I gather from the majority, it is saying that even if the statute does have such a mandatory requirement, this Court can consider it "merely directory."

The other argument in the concurring opinion that the votes should be upheld because of the "sanctity of the ballot," and that since no fraud was shown, we can forget that the voting laws were ignored is to be pleasantly deluded. As Chief Justice Lee states, it was precisely because the Legislature

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wanted to preserve the sanctity of the ballot that it enacted certain procedures to be followed. These procedures over the years have proved wise safeguards. If we ignore them, we will have no sanctified ballot.

ROY NOBLE LEE, C.J., and [DAN M. LEE](#), P.J., join this opinion.

ROY NOBLE LEE, Chief Justice, dissenting:

Today's majority relies almost exclusively upon the Stipulation entered into by the parties in the circuit court, particularly the stipulation that "there is no question as to the integrity of the affidavit ballots at issue," or to their "legality as to everything except that" these 28 affidavit ballots were uninitialed and these 6 affidavit ballots were opened by the poll workers and counted \*1199 before the Election Commission could determine that these voters were qualified to vote in this election. Reliance upon this stipulation is misplaced.

Statutory requirements concerning the conduct of elections must be mandatory where these requirements are designed to provide the legal procedures and the legal instrument--the ballot--through which voters express their will. Deviation from legal procedures and the legal ballot results in no legal expression of a voter's will. Thus, it matters not whether there was evidence of fraud beyond the deviation from the statutory requirements. The deviations, uninitialed affidavit ballots and affidavit ballots opened and counted at the polls, put the voters' expressions of their choices outside the process which our Legislature has declared to be the legal process for casting votes.

Embracing this Stipulation, the majority next describes the issues presented on this appeal as "two sterile questions of law." These "sterile questions of law" involve the integrity of much more than 34 affidavit ballots--they involve the integrity of the entire election scheme of this State. The majority ignores the larger questions and issues in reaching its result. I dissent.

I.

The mandatory initialing requirement of [Miss.Code Ann. § 23-15-541 \(1972\)](#) applies to affidavit ballots cast pursu-

ant to [Miss.Code Ann. § 23-15-573 \(1972\)](#).

[Miss.Code Ann. § 23-15-541](#) provides:

At all elections ... [w]hen any person entitled to vote shall appear to vote, he shall first sign his name in a receipt book or booklet provided for that purpose and to be used at that election only and said receipt book or booklet shall be used in lieu of the list of voters who have voted formerly made by the managers or clerks; whereupon and not before, the initialing manager or, in his absence, the alternate initialing manager shall indorse his initials on the back of an official blank ballot, prepared in accordance with law, and at such place on the back of the ballot that the initials may be seen after the ballot has been marked and folded, and when so indorsed he shall deliver it to the voter, which ballot the voter shall mark in the manner provided by law, which when done the voter shall deliver the same to the initialing manager or, in his absence, to the alternate initialing manager, in the presence of the others, and the manager shall see that the ballot so delivered bears on the back thereof the genuine initials of the initialing manager, or alternate initialing manager, and if so, but no otherwise, the ballot shall be put into the ballot box; and when so done one (1) of the managers or a duly appointed clerk shall make the proper entry on the pollbook. If the voter is unable to write his name on the receipt book, a manager or clerk shall note on the back of the ballot that it was receipted for by his assistance.

This provision applies to paper ballots which are used when other voting systems, as provided in [Miss.Code Ann. § 23-15-391 et seq.](#), voting machines, electronic voting systems, and optical mark reading equipment, are not used. This paper ballot provision applies to all elections, primary, general, and special. Before the current Election Code was passed in 1986, this provision applied only to primary elections under the Corrupt Practices Act, [Miss.Code Ann. § 23-3-13 \(1972\)](#), having been brought forward since Hutchinson's Code, ch. 7, art. 5(6) (1848). See also [Allen v. Snowden](#), 441 So.2d 553, 556, n. 1 (Miss.1983); [Hubbard v. McKey](#), 193 So.2d 129, 131 (Miss.1966) (explaining that the initialing requirement applied at that time only to primary elections).

The requirements of this statute, including the initialing re-

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quirement, from early times have been held by this Court to be mandatory; failure of election officials to comply with the initialing requirement has resulted in uninitialed ballots being declared illegal and the votes thereon not being counted. See [Wallace v. Leggett](#), 248 Miss. 121, 158 So.2d 746 (1963); [Ulmer v. Currie](#), 245 Miss. 285, 147 So.2d 286 (1962); [Starnes v. Middleton](#), 226 Miss. 81, 83 So.2d 752 (1955); \*1200 [May v. Layton](#), 213 Miss. 129, 56 So.2d 89 (1952); [Chinn v. Cousins](#), 201 Miss. 1, 27 So.2d 882 (1946).

[Miss.Code Ann. § 23-15-573](#) provides the procedure for voting by affidavit ballot:

No person whose name does not appear upon the pollbooks shall be permitted to vote in an election; but if any person offering to vote in any election whose name does not appear upon the pollbook shall make affidavit before one (1) of the managers of election in writing that he is entitled to vote, or that he has been illegally denied registration, his vote may be prepared by him and handed to the proper election officer who shall enclose the same in an envelope with the written affidavit of the voter and seal it and mark plainly upon it the name of the person offering to vote. In canvassing the returns of the election, the executive committee in primary elections, or in a general election the election commissioners, shall examine the records and allow the ballot to be counted, or not, as shall appear to be legal.

This provision, which now applies to all elections, applied only to primary elections in Miss.Code § 3703 (1906), Hemingway's Code § 6395 (1917), Miss.Code § 5872 (1930), and Miss.Code Ann. § 3114 (1942). The statute was repealed in 1970 and reappeared in the Election Code passed in 1986 in its present form. It reads now virtually identically to the former Codes. Heretofore, this Court has not been called upon to consider whether or not the initialing requirement for paper ballots in general applies to paper ballots used for affidavit ballot purposes.

In construing different sections of the Code dealing with the same subject matter, this Court has consistently followed this principle:

The controlling rule of construction dispositive of this case is that each section of the Code dealing with the same or similar subject matter must be read *in pari mater-*

*ia* and to the extent possible each section of the Code must be given effect so that the legislative intent can be determined.

[Miss. Public Service Comm. v. Municipal Energy Agency of Miss.](#), 463 So.2d 1056, 1058 (Miss.1985). Again, in [Allgood v. Bradford](#), 473 So.2d 402, 411 (Miss.1985), we stated the principle thusly: "In construing statutes, all statutes *in pari materia* are taken into consideration and the legislative intent is deduced from the consideration as a whole." See also [Atwood Chev.-Olds v. Aberdeen Mun. Sch. Dist.](#), 431 So.2d 926, 928 (Miss.1983) ("When statutes are *in pari materia*, although apparently conflicting, they should, if possible, be construed in harmony with each other to give effect to each."); [Lamar Cty. Sch. Bd. of Lamar Cty. v. Saul](#), 359 So.2d 350, 353 (Miss.1978).

To this principle is also added the principle that a specific statute will control over a general one. [Andrews v. Waste Control, Inc.](#), 409 So.2d 707, 713 (Miss.1982), states:

When different code sections deal with the same subject matter, these sections are to be construed and interpreted not only so they harmonize with each other but also where they fit into the general and dominant policy of the particular system of which they are part. [citations omitted] Courts may also consider the several acts of the legislature touching the subject matter in order to ascertain the legislative intent in the several acts. [citations omitted] In [McCrorry v. State](#), 210 So.2d 877 (Miss.1968), this Court stated:

It is a fundamental rule of statute construction that when two statutes encompass the same subject matter, one being general and the other specific, the latter will control. 1 Sutherland, *Statutory Construction* § 2022 (3rd ed. 1943). (210 So.2d at 877-78).

[McCaffrey's Food Mkt., Inc. v. Miss. Milk Comm.](#), 227 So.2d 459, 463 (Miss.1969), stated these principles:

First, it is well settled that in the interpretation of statutes by the courts that the particular subject will control, as to the terms of the special subject, over the general statutes dealing with like subjects in a general way. [citations omitted] Second, it is also a rule of law that in its effort to construe a statute the \*1201 courts must seek to ascertain the legislative intent of the statute in question as a whole, taking into consideration each provision of the statute on

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the entire subject. [citations omitted]

*McCaffrey's* goes on to quote [1 Am.Jur.2d Administrative Law § 40](#), "Statutes or statutory sections which relate to the same subject matter or are in *pari materia* must be read together to determine the mind of the legislature." *Id.* See Also [Martin v. State, 501 So.2d 1124, 1127 \(Miss.1987\)](#).

This principle was more succinctly stated in [Benoit v. United Companies Mortg. of Miss., 504 So.2d 196, 198 \(Miss.1987\)](#):

Moreover, we have recognized as a principle of statutory construction that, in the event of apparent conflicts, statutes dealing specifically with a matter are to be preferred over those of a more general nature. In [Lincoln County v. Entrican, 230 So.2d 801 \(Miss.1970\)](#) we stated

The rule is well established that where a special and particular statute deals with a special and particular subject its particular terms as to that special subject control over general statutes dealing with the subject generally.

[230 So.2d at 804; McCaffrey's Food Market, Inc. v. Mississippi Milk Commission, 227 So.2d 459, 463 \(Miss.1969\)](#).

This Court has read election code provisions as being in *pari materia*. [Allen v. Snowden, 441 So.2d 553 \(Miss.1983\)](#); [Ulmer v. Currie, 245 Miss. 285, 147 So.2d 286 \(1962\)](#); [Lopez v. Holleman, 219 Miss. 822, 69 So.2d 903 \(1954\)](#); [Neal v. Board of Supervisors, 217 Miss. 102, 63 So.2d 540 \(1953\)](#); [Simpson County v. Burkett, 178 Miss. 44, 172 So. 329 \(1937\)](#).

Reading these two statutes in *pari materia*, the initialing requirement of [§ 23-15-541](#) necessarily applies to affidavit ballots. Both statutes are part of an overall scheme for the conduct of an election at the polling places; the scheme's purpose is to protect the integrity of elections, to see to it that voters express their choices through legal procedures and on legal ballots. Being part of the same scheme, and being read together, these two statutes manifest no conflict in their plain words and plain meaning such that the statutory construction principle of "specific" over "general" ought to apply. The majority's creation of a conflict between the general paper ballot statute and the specific affidavit ballot statute so as to hold that the specific statute controls belies logic, ignores elementary principles of statutory construction, and most seriously, vitiates the purpose of the overall elec-

tion scheme.

The general statute, [§ 23-15-541](#), provides the procedure for handling regular paper ballots at the polling place. The statute dealing with affidavit ballots, [§ 23-15-573](#), provides that, having made a written affidavit, the affidavit voter's "vote may be prepared by him and handed to the proper election officer who shall enclose the same in an envelope with the written affidavit of the voter and seal it and mark plainly upon it the name of the person offering to vote."

In "preparing" the vote, this statute contemplates that the affidavit voter will mark a paper ballot. (See, e.g., [Miss.Code Ann. § 23-15-435](#), which provides that where voting machines are used, only voters whose names appear on the pollbooks or are not challenged may vote by use of a voting machine). Issuing a paper ballot to a person voting by affidavit is no different in particulars from issuing a paper ballot to a voter entitled to vote because his name appears on the pollbooks. The only difference comes in depositing the ballot in a sealed affidavit envelope, the name of the person offering to vote on the outside of the envelope, rather than simply depositing the ballot in the ballot box. The provisions of these two statutes when read together are consistent, promote uniformity in handling all paper ballots at the polling places, and assure that voters express their choices through legal procedures on a legal ballot.

Understanding the purpose of the initialing requirement for paper ballots explains why the requirement must apply to any paper ballot that issues from the polling place.

\*1202 In [Allen v. Snowden, 441 So.2d 553, 555 \(Miss.1983\)](#), this Court explicated the purpose of the initialing requirement:

The requirement that "paper ballots" be initialed by someone other than the receiving manager was to prevent the fraudulent conduct commonly known as the "tasmanian dodge" whereby a blank ballot was passed to a dishonest politician who premarked it and paid a corrupt voter to take it to the poll to vote. The corrupt voter received his ballot, but put the premarked ballot in the ballot box. He then took the blank ballot he received at the poll to the dishonest politician who again premarked it and paid the second corrupt voter to vote the ballot. This process con-

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tinued throughout election day.

This practice was eliminated by requiring the initialing manager to initial the ballot before it was given to the voter. A checking system was created by requiring that the initialing manager be someone other than the receiving manager, the manager receiving the blank ballots from the distributor.

The Court went on to hold in *Allen* that the initialing requirement does not apply to ballot cards under the Electronic Voting Systems Act because such types of ballot cards are serially numbered which prevents the kind of voting fraud the initialing requirement was designed to prevent. *Id.* at 556.

The same question, then, must be asked about the procedures under the affidavit ballot provision. Does the procedure outlined for the voting of ballots by affidavit ensure against the kind of voter fraud the initialing requirement was designed to prevent? It is just as important to ensure that the affidavit voter's ballot issued from that polling place at the time the voter appeared to vote rather than having been a premarked or substituted. It is no less possible for the "tasmanian dodge" to happen with affidavit voters-- arguably, it would be easier to accomplish. Initialing is the statutory protection for the legality of the affidavit ballot, just as it is for any other paper ballot.

I know that it seems unpalatable that 28 voters may not have their votes counted because of the failure of an election official to initial the ballots, particularly in light of the stipulation that there is no evidence questioning the integrity of the voters who cast these ballots. But the very fact that these ballots were uninitialed makes them illegal. It is not that the voters may or may not have done anything wrong; it is that the will of the voter may only be expressed through a legal instrument. By statute, a paper ballot is a legal instrument upon which a voter may cast a vote only when the ballot issues from that polling place at the time the voter shows up to vote. Only the initials on the back of a ballot assure that the ballot issued from that polling place at the time the voter showed up to vote. The law cannot be blamed, and we cannot depart from the law, because poll workers failed to follow it and provide a legal ballot for voters to vote upon.

Many years ago this Court answered this concern this way:

The reasoning of the special tribunal that since the voters at the West Biloxi box had signed the register and were thus identified as qualified electors, no omission of a third party ought to thwart their will, is more acceptable as logic than as law. It stands upon the assumption that they have cast a legal ballot. Be it an act of negligence, inadvertence or design, its cause is less important than its result. A penciled ballot or one marked with an improper device quite accurately discloses the will of the voter, even though it defies the will of the statute.

The voter must express his will through a legal ballot. A ballot not initialed by a manager may not be deposited in the box, for "the manager shall see that the ballot so delivered bears on the back thereof the genuine initials of the initialing manager, and if so, but not otherwise, the ballot shall be put into the ballot box." Obvious justification for such requirement need not be summoned to fortify the force of its plain language.

\*1203 [Chinn v. Cousins](#), 201 Miss. 1, 7, 27 So.2d 882, 883 (1946).

Viewing the Election Code as a whole and understanding its intent, the conduct of fair and legal elections, leads to the conclusion that affidavit ballots must be subject to the same initialing requirement as any other paper ballot. An uninitialed ballot is not a legal instrument through which a voter can legally express a choice. The majority's result-driven decision chips away at this safeguard to fair and legal elections which we in this State have long struggled to achieve. The majority's reasoning and result risk too much the integrity of the election process.

## II.

The Opening Of Six (6) Envelopes Containing Affidavit Ballots at the Polling Places Renders the Ballots Illegal and Void Under [Miss.Code Ann. § 23-15- 573 \(1972\)](#).

This issue involves a departure from the provisions of [§ 23-15-573](#), again the affidavit ballot statute, which states: "In canvassing the returns of the election, the executive committee in primary elections, or in a general election the election commissioners, shall examine the records and allow the [affidavit] ballot to be counted, or not, as shall appear to be legal." In this case, the poll workers in one precinct opened 8 envelopes containing affidavit ballots, counted the

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ballots, then put the ballots back in their respective envelopes and segregated them from the other elections materials. The election commissioners then examined the records and determined that 2 of these voters were not registered or qualified to vote but that the remaining 6 were registered and qualified to vote in that district. However, they disallowed counting these 6 ballots because the envelopes had been opened by the poll workers.

It is clear that the election managers are to put the ballots into the affidavit envelope and seal it, marking the name of the person offering to vote on the outside of the envelope. It is also clear that the election commissioners are to examine the records and count the ballots as appears legal. These two points being clear, I do not understand the majority's cavalier description of what happened to the 8 affidavit ballots at issue as a "technical irregularity."

Returning to some principles of statutory construction, the case of [Mississippi Ins. Guar. Ass'n v. Vaughn, 529 So.2d 540, 542 \(Miss.1988\)](#), provides these guidelines for construing a statute:

We construe such a statute according to familiar principles. We give the statute that reading which best fits the legislative language and is most consistent with the best statement of policies and principles justifying that language. [citations omitted.] We seek no historical fact. "We do not inquire what the legislature meant; we ask only what the statute means." Holmes, *Collected Legal Papers* 207 (1920). We afford the statute the best fit reading it may be given today. We seek the best statement of policies and principles which may justify the statute today, not in 1970 when it was originally enacted. We also afford the statute that reading most coherent in principle, given the entire statutory scheme and the other valid rules in the field. [citation omitted].

The particular question, then, is whether this statute requires that only the election commissioners open affidavit ballots and count them after determining whether or not, according to the records, the person offering to vote can legally do so, or whether the poll workers can open them and count them, leaving the question of the legal status of the voter to the election commission. The affidavit ballot statute is clear that only the election commissioners can count the affidavit bal-

lots and only after they have determined that the voter was registered and qualified to vote. The statute precludes affidavit envelopes being opened and the votes counted by the poll workers.

Again reading the election scheme as a whole, which our principles of statutory construction demand that we do, other counting provisions throughout the Election Code indicate in clear terms whether, and how, poll workers are to count the \*1204 ballots or electronic votes. For instance, under Article 15, "Voting Systems," § 23-15-441 provides that election managers or poll workers shall read the counters on the voting machines for each office and title as they appear on the ballot and announce the count for each. These results are to be recorded by 2 managers on 2 statements of canvass.

Again, Article 15, "Voting Systems," § 23-15-483 provides for counting electronic voting systems ballots. These ballots are counted at counting centers and are electronically tabulated with an electronic print-out showing the final results. To the print-out results are added "write-in and absentee votes" and damaged ballots. The procedure for counting ballots with Optical Mark Reading Equipment is provided in § 23-15-523; they are also counted at counting centers under provisions similar to those for counting other electronically tabulated ballots.

Counting paper ballots is provided for in § 23-15-581 under Article 17, "Conduct of Elections." This statute provides that the ballot box shall be immediately opened at the close of the polls and the votes read aloud and counted, with clerks "taking down" the results.

Also interesting to note is that absentee ballots are opened and counted at the precincts by the poll workers, § 23-15-639, having been delivered by the registrar to each precinct inside the ballot boxes which are delivered to each precinct before election day, § 23-15-637. Challenged ballots are counted or rejected by the poll workers at the precincts but are carefully segregated so that the election commission can easily discern them from other ballots. *See* § 23-15-579.

By contrast, the affidavit ballot statute does not indicate that

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the poll workers should open and count them and in fact clearly indicates that the election commissioners must count them. If only the election commissioners must count them, then there is no fathomable reason for poll workers to have opened and counted these affidavit ballots at the polls. Further, the affidavit ballot statute provides no procedure for the poll workers to open, count and segregate affidavit ballots from the other paper ballots once they are opened and counted as do, for instance, the challenged ballot statute, § 23-15-579, and absentee ballot statutes, §§ 23-15-639 and 23-15-641. Again, the absence of such a procedure indicates that affidavit ballots are not intended to be opened at the polls. In the face of other Election Code provisions which do indicate that poll workers are to count other kinds of ballots, and how to count them, it is sheer nonsense for the majority to pretend that the "statute is silent as to when, where and by whom the ballots may or shall be opened." The statute clearly contemplates that affidavit ballots should be sealed by the poll workers in an envelope and the envelope should not be opened until the election commissioners determine whether or not such ballots should be counted, with the election commissioners then counting them or not.

But the further question is whether or not those affidavit ballots improperly opened by poll workers should be counted. This issue turns on whether or not the statute's provisions as to counting are mandatory or directory. The general counting provision for regular paper ballots has been construed by this Court to be mandatory. See [Clark v. Rankin County Democratic Executive Com.](#), 322 So.2d 753, 757 (Miss.1975); [Briggs v. Gautier](#), 195 Miss. 472, 15 So.2d 209 (1943) (construing former § 23-3-13 (1972) which contained all of current §§ 23-15-581 and 23-15-541).

Again, this statute was originally part of the Corrupt Practices Act which applied only to primary elections until passage of the current Election Code in 1986 where it appeared as applying to all elections. The rationale for holding the counting provision mandatory was to prevent election fraud in the counting of ballots and prevent "stuffing" ballot boxes.

The provisions for counting paper affidavit ballots by the election commissioners is likewise designed to prevent fraud in the counting of votes; thus, the provisions likewise

must be mandatory. Any deviation from the statutory provisions must result \*1205 in the ballots affected by the deviation not being counted.

Today's questions on appeal involve the two most crucial junctures of the voting process: providing legal ballots upon which voters mark their choices and counting those ballots. At both junctures, our Election Code protects the integrity of the ballot and the vote cast thereon. However, the majority shuns those protections for the affidavit ballot, refusing to see the Election Code as a whole cloth in which to wrap the election process. Instead, the majority cuts one piece from the cloth--the affidavit ballot--to wrap around this one election. I fear the whole cloth will soon unravel. Therefore, I dissent.

[HAWKINS](#) and [DAN M. LEE](#), P.JJ., join this opinion.

[SULLIVAN](#), J., joins as to part II of this opinion.

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## H

District of Columbia Court of Appeals.  
 Anthony A. WILLIAMS, Petitioner,  
 v.

### **DISTRICT OF COLUMBIA BOARD OF ELECTIONS AND ETHICS, Respondent.**

Dorothy A. Brizill, Shaun Snyder, Gary Imhoff, and Mark  
 Sibley, Intervenors.  
**No. 02-AA-854.**

Argued Aug. 6, 2002.  
 Decided Aug. 7, 2002.  
 As Corrected Aug. 14, 2002.

Board of Elections and Ethics denied mayor a place on the ballot for primary election, and mayor petitioned for review. The Court of Appeals held that the obviously falsity of signatures in nominating petitions submitted by some of the mayor's circulators justified the Board's decision to disallow all the signatures submitted by such circulators without engaging in a signature-by-signature analysis.

Affirmed.

West Headnotes

#### **[1] Elections** 144 [144k144 Most Cited Cases](#)

In challenge to nominating petitions to place mayor on primary ballot, evidence that purported signatures on petitions submitted by some of mayor's circulators included actors, television characters, politicians, and sports figures, that many signatures appeared to be in the same handwriting, that no addresses appeared after some names, that one circulator collected 540 signatures in a 24 hour period, that some petition pages contained the non-existent date of June 31, and that such circulators asserted their Fifth Amendment privilege when subpoenaed, supported finding by Board of Elections and Ethics that there had been widespread obstruction and pollution of the nominating process, and that it was not possible to determine if any of the signatures on petition sheets submitted by such circulators were in fact genuine and properly obtained without undue influence or fraud. D.C. Official Code, 2001 Ed. §§ 1-1001.05, 1-1001.08(b)(3), 1-1001.08(o)(1).

#### **[2] Elections** 144 [144k144 Most Cited Cases](#)

Papers.

Obvious falsity of signatures in many of the nominating petition sheets submitted by some of the circulators working to place mayor on ballot could be properly considered by the Board of Elections and Ethics in judging the veracity of all of the signatures such circulators submitted, and it was within the authority of the Board to disregard all of the signatures attributable to such circulators without conducting a signature-by-signature review. D.C. Official Code, 2001 Ed. §§ 1-1001.05, 1-1001.08(b)(3), 1-1001.08(o)(1).

#### **[3] Elections** 305(7) [144k305\(7\) Most Cited Cases](#)

Court of Appeals must accept findings of fact by the Board of Elections and Ethics so long as they are supported by substantial evidence on the record as a whole.

#### **[4] Statutes** 219(9.1) [361k219\(9.1\) Most Cited Cases](#)

Court of Appeals must defer to the interpretation by the Board of Elections and Ethics of the statute which the Board administers so long as that interpretation is not plainly wrong or inconsistent with the legislative purpose.

#### **[5] Elections** 271 [144k271 Most Cited Cases](#)

Board of Elections and Ethics could consider in challenges to mayor's primary election nominating petitions improprieties committed by some of mayor's circulators in procuring signatures on petitions, even though electoral statute specified criminal misdemeanor penalties for willful misconduct by a petition circulator, as evidence of fraud by circulators related directly to Board's duty to resolve challenges to the nominating petitions. D.C. Official Code, 2001 Ed. §§ 1-1001.05, 1-1001.08(b)(3, 4), 1-1001.08(o)(1).

#### **[6] Elections** 285(3) [144k285\(3\) Most Cited Cases](#)

Mayor was put on notice that issues before Board of Elections and Ethics would include allegations of fraud by some of the circulators of his nominating petitions, where challenges filed with Board clearly implied that petitions sub-

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mitted by such circulators contained forgeries or were not personally circulated by them, challengers asked Board to throw out all petitions attributable to such circulators, Board's general counsel informed the parties at pre-hearing conference that Board was not only interested in validity of signatures but the manner in which those signatures were obtained, and at hearing questions directed to circulators who appeared indicated the Board's concerns.

\*317 [Vincent Mark J. Policy](#), with whom [Douglas J. Patton](#), [Paul J. Kiernan](#), and [Damien G. Stewart](#) were on the brief, Washington, DC, for petitioner.

Kenneth J. McGhie, with whom Terri D. Stroud and Rudolph McGann were on the brief, for respondent.

[Ronald L. Drake](#), Washington, DC, for intervenors.

Before [FARRELL](#), [REID](#), and [WASHINGTON](#), Associate Judges.

PER CURIAM:

Anthony Williams, the Mayor of the District of Columbia, petitions for review of a decision of the District of Columbia Board of Elections and Ethics (the Board) denying him a place on the ballot for the Democratic mayoral primary election scheduled for September 10, 2002. [\[FN1\]](#) The Mayor's principal argument before us is that the Board exceeded its authority in categorically excluding the signatures contained on nominating petitions allegedly circulated by three individuals, Scott Bishop, Sr., Scott Bishop, Jr., and Crystal Bishop. The Board's disallowance of these signatures left Mayor Williams considerably below the 2000 signatures required for ballot access. See [D.C.Code § 1-1001.08\(i\)\(1\)\(B\) \(2002\)](#). The Mayor contends that the Board failed to "engage in the signature-by-signature review that would be necessary to sustain any challenge" to the signatures he offered (Br. for Pet. at 15), instead eliminating an entire class of signatures based upon suppositions of fraud and forgery in the circulation process, especially by the Bishops.

[FN1](#). The Board was established by the District of Columbia Charter as an independent agency. See District of Columbia Self-Government and Governmental Reorganization Act, § 491, [Pub.L. No.](#)

[93-198, 87 Stat. 774](#), 809 (1973) (codified at [D.C.Code § 1-1001.03](#)). The Board has both regulatory and investigative powers over the conduct of elections in the District of Columbia. See [D.C.Code § 1-1001.05](#).

[\[1\]\[2\]](#) We conclude that there is ample factual and legal support for the Board's decision to disregard all of the signatures attributable to the Bishop petitions. The Board determined that there had been "widespread obstruction and pollution of the nominating process as it pertains to nominating petition sheets circulated by the Bishops." In support of this conclusion, it explained that the Mayor had not even attempted to defend 214 of the 512 petition pages submitted in his petition, with 167 (or 78%) of the 214 attributable to \*318 the Bishops. Among that total of approximately 4,240 signatures, the Board found that many had been forged (the questionable pages, the Board said, were "replete with forgeries"), and the Board additionally had grave concerns about the veracity of circulator affidavits signed by the Bishops that accompanied their petitions. [\[FN2\]](#) Those concerns were not allayed, moreover, when each of the Bishops, subpoenaed to answer questions about his or her role in the petition process, categorically refused to answer questions by asserting their Fifth Amendment privilege. The Board thus was unable, in its words, "to ascertain whether the [Bishop] circulators personally circulated petitions, or personally witnessed each person actually sign the petition," all as required by the election statute. Although the Registrar of Voters' "preliminary review" of the petition sheets submitted by the Mayor had yielded a total of 2,235 presumptively valid signatures, she likewise was unable to determine the veracity of the affidavits related to the Bishop petitions. Accordingly, the Board still was unable to determine "whether any of the signatures on the petition sheets from the Bishops were in fact genuine and properly obtained without undue influence or fraud." [\[FN3\]](#)

[FN2](#). Even a cursory examination of petition sheets contained in the record reveals signatures casting doubt on the validity and accuracy of affidavits signed by the Mayor's circulators, especially Scott Bishop, Jr., and Crystal Bishop, swearing to the validity of those signatures. Among the purported

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signatures are those of actors, television (or cartoon) characters, politicians, and sports figures—including Robert De Niro, Wing Woo, Kelsey Grammer, Carroll O'Connor, Dudley Moore, Rosa Parks, George W., Tony Blair, Jack Kemp, Donald Rumsfeld, Kofi Annan, Martha Stewart, Stanley Marsh, George Allen, Brian Cox, Terre(a)ncc Allen (listed twice), Ray Lewis, Joe Smith, and Reggie Lewis, to name just some. Also included are "Jahovas Witness" and "Saint Paul I." Moreover, countless petitions signed by Scott Bishop, Jr., and Crystal Bishop appear to list names of petitioners in the same handwriting and bear signatures apparently made by the same person. At times, no address appears after the petitioner's name, and occasionally the same name and address appear twice on the petition. One challenger alleged, without contradiction on the point, that Scott Bishop, Jr. had purportedly collected an improbable 540 signatures in one 24-hour period (*i.e.*, one approximately every two minutes), implying that he had either forged some of the signatures or not personally circulated the petition. Other petition pages signed by Scott Bishop, Sr., contained the non-existent date of June 31.

**FN3.** The Board took pains to note that "it [was] aware of no evidence that the Mayor personally encouraged or directed any circulators or other persons ... to fail to comply with the requirements set out by our laws and regulations."

**[3][4]** This court "must accept the Board's findings of fact so long as they are supported by substantial evidence on the record as a whole." *Allen v. District of Columbia Bd. of Elections & Ethics*, 663 A.2d 489, 495 (D.C.1995). "Insofar as the Board's legal conclusions are concerned, we must defer to its interpretation of the statute which it administers ... so long as that interpretation is not plainly wrong or inconsistent with the legislative purpose." *Id.* In the circumstances of this case, where the Board found, with the support of substantial evidence in the record, that the integrity of the nominating process has been seriously compromised by the actions of the Bishop circulators, we hold that it was within

the Board's authority to disallow all of the signatures affected by the wrongdoing. As the Board recognized, the circulator's role in gathering signatures for a nominating petition is critical to ensuring the integrity of the collection process. In the case of candidate nomination for access to the ballot in a primary election, the circulator is responsible for collecting the \*319 genuine signatures of duly registered voters within the candidate's party. Indeed, with respect to nominating petitions, the circulator performs functionally the same role the Board itself fills in verifying signatures on an initiative or referendum petition. See [D.C.Code § 1-1001.16\(o\)\(3\)](#).

Accordingly, [D.C.Code § 1-1001.08\(b\)\(3\)](#) provides that each nominating petition

shall contain an affidavit, made under penalty of perjury, in a form to be determined by the Board and signed by the circulator of that petition which shall state that the circulator is a registered voter and has:

- (A) Personally circulated the petition;
- (B) Personally witnessed each person sign the petition; and
- (C) Inquired from each signer whether he or she is a registered voter in the same party as the candidate....

Underscoring the importance of this affidavit is [D.C.Code § 1-1001.08\(o\) \(1\)](#), which provides that, subject to the results of any challenge after posting of the petition, "[t]he Board is authorized to accept any nominating petition for a candidate ... as bona fide with respect to the qualifications of the signatures thereto." A genuine and complete affidavit, then, undergirds the presumptive validity of voter signatures on a petition. Not surprisingly, therefore, a Board regulation declares that "[s]ignatures appearing on nominating petition sheets shall not be counted as valid unless all required information is provided by the circulator in his or her signed affidavit." 3 DCMR § 1600.6 (2002).

The upshot is that the presumption of validity of petition signatures depends heavily on the role of the circulator and on the truthfulness and completeness of the representations made in the circulator's affidavit. But in this case, as we have seen, the Board had firm grounds to doubt the veracity of the sworn representations by the Bishops as to the genuineness of the signatures they submitted, including-

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--ultimately--their total refusal to be questioned about their conduct in the circulation process. The result, it may be said, was as if the affidavits had not furnished any of the information required by [D.C.Code § 1-1001.08\(b\)\(3\)](#), thus authorizing the Board to discount the accompanying signatures. 3 DCMR § 1600.6.

In circumstances similar to these, other courts have regularly concluded that nominating petitions tainted by fraud or the strong appearance of fraud may be discounted in their entirety by an elections board. In [Brousseau v. Fitzgerald](#), [138 Ariz. 453, 675 P.2d 713 \(1984\)](#), for example, the Supreme Court of Arizona enjoined the placing of a mayoral candidate's name on the ballot in light of evidence of fraudulent conduct by circulators, despite the fact that the county recorder had certified a minimally sufficient number of signatures as those of properly registered voters. The court reasoned:

Defects either in circulation or signatures deal with matters of form and procedure, but the filing of a false affidavit by a circulator is a much more serious matter involving more than a technicality. The legislature has sought to protect the process by providing for some safeguards in the way nomination signatures are obtained and verified. Fraud in the certification destroys the safeguards unless there are strong sanctions for such conduct such as voiding of petitions with false certifications.

*Id.* at 715. After reviewing similar decisions from Ohio, Illinois, Pennsylvania, New York and New Jersey, [\[FN4\]](#) the Arizona \*320 court concluded that the only way to protect the integrity of the nominating process was to void petitions containing false certifications by circulators and bar any signatures on those petitions from being "considered in determining the sufficiency of the number of signatures to qualify for placement on the ballot." *Id.* at 716.

[FN4.](#) The court summarized these decisions as follows:

In [Weisberger v. Cohen](#), [22 N.Y.S.2d 1011, 1012 \(Sup.Ct.\)](#), *aff'd*, [260 App. Div. 392, 22 N.Y.S.2d 835 \(1940\)](#), the New York court held that "[t]he surest way to keep [the petitions] free from fraud is to let it be known that any taint of fraud will wholly invalidate them...." See also In [Matter of](#)

[Lombardi v. State Board of Elections](#), [54 A.D.2d 532, 386 N.Y.S.2d 718 \(3rd Dept., 1976\)](#) (court invalidates two entire sheets of signatures when they were "permeated with fraud"); [Lebowitz v. Barnes](#), [32 Misc.2d 8, 221 N.Y.S.2d 703 \(Sup.Ct.1961\)](#) (candidate should not derive any benefit from petition with fraudulent circulation verification committed by supporters). The New Jersey Superior Court, in [McCaskey v. Kirchoff](#), [56 N.J.Super. 178, 152 A.2d 140 \(1959\)](#), noting that a court should not sit as "a bookkeeper rather than a justice, to apply a rule of arithmetic rather than a principle of equity," (quoting Abrahams, *New York Election Law*, 123 (1950)) invalidated entire nomination petitions where those seeking nominations themselves irregularly certified petitions which included forged signatures. Cf. [Lawson v. Davis](#), [116 N.J.Super. 487, 282 A.2d 784 \(App.Div.1971\)](#) (where verifications were made carelessly but not fraudulently there was no need to strike the petition when the election clerk independently checked the signatures). [675 P.2d at 715-16.](#)

Petitioner appears to regard this body of law as irrelevant because the petition sheets that the Board found to be, among other things, "replete with forgeries" were *not* petitions the Mayor relied on to support his nomination. Thus, petitioner asserts that "there was no evidence that Scott Bishop, Sr., Scott Bishop, Jr., or Crystal Bishop forged any circulator affidavit on the petition sheets *that the Mayor was defending*, or that the petitions attributable to them *in the group that the Mayor was defending* had their names forged, or that they signed petition sheets which they had not circulated" (Reply Br. of Pet. at 10) (emphasis added). We reject the implication in this argument that the Bishops' conduct in its *entirety* was not relevant to the Board's deciding whether sworn assertions accompanying *any* of their petitions could be credited. As the Board properly found, "[t]he Bishops' nominating petition sheets predominate Mr. Williams's nominating petition submission," and as to a sizeable number of the signature sheets the Bishops compiled overall, "[t]he attendant circumstances in the record controverted each material aspect of the [included] affidavit." Beyond this was the fact that "Scott Bishop, Sr. coordinated the peti-

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tion process" generally. Thus, the obvious falsity of signatures in many of the Bishop petition sheets was properly considered by the Board in judging the veracity of all the affidavits they submitted. *Cf.* 2 J. WIGMORE, EVIDENCE § 278, at 133 (Chadbourn ed. 1979) ("The inference [properly drawn from fabrication of evidence] does not necessarily apply to any specific fact in the cause, *but operates, indefinitely though strongly, against the whole mass of alleged facts* constituting [a party's] cause.") (quoted in [Mills v. United States](#), 599 A.2d 775, 783-84 (D.C.1991)). [FN5]

[FN5] We do not consider the propriety of the Board's reliance on newspaper and other media articles that chronicled the irregularities in the petition circulating process, as that reliance was ultimately not prejudicial. See [D.C.Code § 11-721\(e\) \(2002\)](#).

[5] We similarly reject the Mayor's argument that, because the electoral statute specifies criminal misdemeanor penalties for willful misconduct by a petition circulator, impropriety by the Bishops can be dealt with only in that forum and could not \*321 be considered by the Board in deciding whether to accept individual signatures they had collected and which the Mayor was offering. See [D.C.Code § 1-1001.08\(b\)\(4\)](#). Evidence of fraud by circulators related directly to the Board's duty to resolve challenges to the nominating petition.

In sum, on the record before it the Board acted within its proper authority by disallowing all of the signatures attributable to the Bishops. Cases cited by the Mayor admonishing caution in remedying violations of electoral rules, lest the effect be to disenfranchise legitimate voters, are beside the point in a case such as this where the Board had substantial evidence in the record supporting its conclusion that the integrity of the nominating process had been undermined by forgeries and possible fraud. [FN6]

[FN6] See [Dankman v. District of Columbia Bd. of Elections & Ethics](#), 443 A.2d 507 (D.C.1981) (en banc); [Harvey v. District of Columbia Bd. of Elections & Ethics](#), 581 A.2d 757 (D.C.1990). See also [Buckley v. American Constitutional Law Found.](#), 525 U.S. 182, 191 n. 10, 119 S.Ct. 636, 142 L.Ed.2d 599 (1999) (invalidating provisions of

state electoral law on First Amendment grounds but not questioning lower court's validation of affidavit requirement designed to " 'ensure that circulators ... exercise special care to prevent mistake, fraud, or abuse in the process of obtaining ... signatures of only registered electors....' "). Judge Feren's opinion in *Dankman*, cited by the Mayor at oral argument, was careful to point out that the Board had rejected assertions of deceptive or misleading conduct by the circulators. See [443 A.2d at 519](#).

[6] Petitioner's remaining contention is essentially a procedural one. He contends that he was surprised by the Board's decision which focused on misconduct by circulators, because "the sole basis announced for the Board's decision now was expressly *not* an issue at the hearing" (Reply Br. of Pet. at 1). Our review of the record, however, leads us to a contrary conclusion. Challenges filed by Mark Sibley and Shaun Snyder clearly implied that the petitions submitted by the Bishops contained forgeries or, at best, were not personally circulated by them. Challenger Brizill also questioned the validity of the circulator affidavit of Mr. Bishop, Sr., by asserting that he did not live at the address listed for him on the Board's voter registration rolls. Both challenges asked the Board to throw out all of the petitions attributable to any of the Bishops. The Mayor was further put on notice that the allegations of circulator fraud would be part of the Board's consideration of the petition challenges at the Board's Pre Hearing Conference. Over objections by the Mayor's counsel, the Board's general counsel informed the parties that the Board was interested not only in the validity of the signatures on the petitions, but in the manner by which those signatures had been obtained, and that it was his belief that "the circulator issue is going to make or break what goes on [at the hearing]."

Even if we assume the Mayor's campaign was not on notice by the end of the pre-hearing conference that the issues before the Board included allegations of circulator fraud, the questions directed to the circulators who did appear at the hearing had to have put the Mayor on notice of the Board's concerns. [FN7] Moreover, campaign managers for the Mayor were questioned about the Bishops' activities in certi-

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fyng \*322 the validity of the nominating petitions. In light of these circumstances, we are unpersuaded by petitioner's argument that he was unaware that the Board was considering--and would resolve--allegations of fraud in the nominating process.

[FN7](#). All of the circulators who testified at the formal hearing in this case were questioned about the validity of the signatures appearing on their affidavits, and both Ms. Lewis and Mr. Wilds testified under oath that several of the petition pages attributed to them were not signed by them. One of the circulators, Ms. Alston, testified that signers' names were added to her petition after she turned the sheets into the Williams campaign.

For the reasons stated, we affirm the order of the Board of Elections and Ethics under review.

*So ordered.*

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