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Elections and Covid-19: Pandemic Concerns and Trends

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An Article discussing recent developments in election processes, often vigorously contested, during the COVID-19 crisis and the concern about possible contagion caused by in-person voting. This Article examines voter access during normal voting times, candidate and initiative proponents' ballot access, the tendency of higher courts including the Supreme Court to intervene early in election cases, and the issue of whether elections including that in November 2020 may be delayed.

The fervor associated with a presidential election year is generally tense enough. Now in 2020, those tensions merge with the pressures of conducting elections in the midst of the ongoing coronavirus pandemic. This Article provides an overview of pandemic election topics and trends stemming from already-conducted primary elections and those advancing before the November 2020 election day. This Article also discusses how elections need to evolve to survive the current pandemic and ensure that COVID-19 does not lead to massive disenfranchisement.

This Article specifically discusses:

- Voter access to polls and ballots. COVID-19 spreads rapidly from close contact, which is causing states to grapple with how to conduct in-person voting in a manner protecting voters and poll workers alike. This Article explores how states have already dealt with the issue on the primary level, by:
  - expanding mail-in voting;
  - early voting;
  - delaying elections; or
  - easing access to an absentee ballot.
- Candidate and initiative access to ballots. COVID-19's ability to spread rapidly from in-person contact is also preventing candidates and those advancing initiatives from conducting the canvassing necessary to gaining signatures for inclusion on the ballot. This Article explores how several states and courts are addressing the issue of access to the ballot in light of the pandemic.
- The growing Supreme Court shadow docket. A common thread has been woven into many suits filed to widen access to polls and the ballots in the midst of this pandemic: the Supreme Court is stepping in to become a court of first decision, not simply review. This Article takes a look at some of those cases and how the removal of judicial review from the Courts of Appeals has and can continue to cause massive disenfranchisement of voters.
- Delaying a federal election. In recent months, President Donald Trump stated that "[w]ith Universal Mail-In Voting,...2020 will be the most INACCURRATE & FRADULENT Election in history." The President then suggests that the US "[d]elay the Election until people can properly, securely and safely vote???." This Article explores:
  - the constitutional and statutory mechanisms that set federal election day;
  - the legislative action necessary to delay the election; and
  - the lack of presidential power for delaying an election.

This area of law is continually evolving, with new executive, judicial, and legislative action taken daily to counter pandemic effects on elections. While this Article aims to be current, events are likely to occur in the future that may change its conclusions.

Voter Access to Polls and Ballots

The COVID-19 pandemic, like other pandemics including the 1918 Spanish flu and Ebola virus, spreads due to close contact and is especially deadly to those with preexisting health conditions and the immunocompromised. While

COVID-19 and influenza (flu) are both contagious respiratory illnesses and exhibit similar symptoms, COVID-19 is caused by a newly identified coronavirus (SARS-CoV-2), while flu is caused by influenza viruses. The characteristics of COVID-19 become more worrisome when looking at the traditional in-person voting system in the US. The system must be flexible to ensure that all voters have a safe way to access the polls and cast a vote in November's important presidential election.

So far, states held primary races during the pandemic with some success and pitfalls experienced along the way. Aside from increased distancing and sanitizing practices, other voting access solutions started to emerge, such as increased voting by mail and expanded absentee access. While time will tell if the solutions may be successful in November, a brief exploration of how states, legislature, and courts handled the introduction of new voting strategies offers a good primer.

Absentee Ballot Return Windows and Election Day Delay Attempts

Wisconsin

Wisconsin fought the first pandemic-era voting battle in the national spotlight. That fight occurred on both the state and federal court levels and ended with a nail-biting finish only hours before the scheduled election.

In advance of an April 2020 primary election, Wisconsin officials encouraged the use of absentee ballots, which resulted in a "significant uptick in absentee ballot requests," creating a backlog in officials' ability to review the applications and send out the requisite ballots. This backlog became the focus of voters in *Democratic National Committee v. Bostelmann*, along with a challenge to other absentee witness and identification requirements (2020 WL 1638374 (W.D. Wis. Apr. 2, 2020)).

In that matter, a federal district court sides with the voters, finding:

- The burden placed on absentee voters by a quick or late return of ballots was severe.
- The state interest in preserving ballot return deadlines was not compelling enough.
- Extending the deadline for absentee ballot requests and receipt of the ballots was in favor of the public interest of "permitting as many qualified voters to vote as possible."

The court then ordered that Wisconsin voters be able to request an absentee ballot by April 3, 2020, at 5:00 p.m. and that they be able to return those ballots by April 13, 2020, at 8:00 p.m., without any restriction on postmark dates, to have their vote counted in the April 7 election. The Seventh Circuit denied a request for stay, while the Supreme Court with a majority of justices with conservative voting reputations stayed the district court's injunction and provided that for an absentee ballot to be counted, it " must be either (i) postmarked by ... April 7, 2020, and received by April 13, 2020, at 4:00 p.m., or (ii) hand-delivered ... by April 7, 2020 at 8:00 p.m." (*Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1208 (Apr. 6, 2020)).

On the state court level, the fight focused on Governor Evers' attempt to delay the election. First, Evers issued an executive order requiring the legislature to convene and consider the sole issue of delaying the election until May 19, to provide more time to prepare properly. The legislature convened but did not consider the delay matter. This caused Evers to issue a second order delaying the election until June 9 and requesting that the legislature convene to agree on the delayed date.

The state supreme court intervened with its order mere hours after Evers' second executive order, enjoining that order as exceeding Evers's gubernatorial authority. Therefore, the election proceeded as planned, despite a flurry of last-minute intervention by the executive and judicial branches. It was riddled with issues attributable to the pandemic, including:

- Shortages of elderly poll workers.
- Shuttering of many traditional polling places.
- Failure by the state to timely provide requested absentee ballots.
- Failure by the US Postal Service to postmark absentee ballots, leaving many ballots invalid.

This took place in a state with a no-excuse mail-in voting system but vastly unprepared for the increased demand on mail-in ballots.

Pennsylvania

Pennsylvania made a similar change to no excuse mail-in voting for its spring primary and upcoming November 2020 election. The Trump reelection campaign and several other organizations challenged the change in federal court. In that matter, the district court granted the state's motion for *Pullman* abstention, awaiting the state court's resolution of the involved Pennsylvania election statutes (*Trump for President, Inc. v. Boockvar*, 2020 WL 4920952 (W.D. Pa. Aug. 23, 2020)).

With a decision from the Pennsylvania Supreme Court still pending, the district court dismissed the request for injunctive relief without prejudice. In doing so, the court cited the state supreme court's deadline on briefing of the matter of September 8, 2020, as support that a decision was forthcoming in a manner to prevent harm to the plaintiffs (*Trump for President, Inc. v. Boockvar,* 2020 WL 5407748 (W.D. Pa. Sept. 8, 2020)). While the push for no excuse mail-in voting coincides with the expansion of voting mechanisms in other states, the response by the President's reelection campaign coincides with its consistent accusations of fraud in the mail-in voting system without much factual support to date.

The Pennsylvania Supreme Court acted quickly by entering an order on September 17, 2020, that:

- Allowed for collection of hand-delivered mail-in ballots at drop boxes.
- Extended the deadline for returning an absentee or mail-in ballot by three days to November 6, 2020 for ballots postmarked by election day.
- Presumed ballots received by the extended deadline to have been mailed on election day, even if they arrive on time but without a postmark or other proof of mailing.

(*Pennsylvania Democratic Party v. Boockvar*, 2020 WL 5554644, at *31 (Pa. Sept. 17, 2020).)

Pennsylvania also faces COVID challenges in other significant areas of the law. Specifically, a federal court recently found that the state's COVID-related emergency orders on business closures and congregate gathering limit violated its citizens' constitutional rights. The decision stands out from other courts which upheld similar restrictions upon finding that the public health and safety was sufficient justification.

(*See County of Butler v. Wolf*, 2020 WL 5510690 (W.D. Pa. Sept. 14, 2020).)

The lesson from Wisconsin's and Pennsylvania's elections may be that mail-in voters need to consider obtaining a ballot as early as possible. Only time will tell whether Wisconsin's future pandemic voting fairs better than its first foray, as the federal voting plaintiffs have been given an opportunity to amend their complaint to extend to concerns for the November election.

New York: Election Cancellation and Reinstatement

This cautionary tale has potentially limited future impact, as most elections are necessary and therefore incapable of being outright cancelled. However, it provides an interesting commentary on a commitment to the right to vote for political representation.

New York postponed its president primary race from April to June 2020 as a result of COVID-19 precautions. States do delay elections in this manner for primaries, but it is unlikely that any similar delay can occur for the November 2020 election, as a delay is likely only necessary on that level if a vaccine was imminent. Soon after delaying the election, Governor Cuomo signed into law a statute that allowed, at the discretion of state election commissioners, the removal of a primary candidate for the office of US President from the ballot because the candidate:

- Publicly announced they are no longer seeking the nomination.
- Announced that they are terminating or suspending their campaign.
- Sent a letter to the State Board of Elections (SBE) indicating that they no longer wished to appear on the ballot.

In advance of the primary, eleven candidates qualified with the SBE for the Democratic Presidential ticket. In the early months of 2020, all but one of those candidates, Joe Biden, "publicly announced that they are no longer seeking the nomination for the office of president of the United States, or that they are terminating or suspending their campaign." (*Yang v. Kellner*, 2020 WL 2129597, at *5 (S.D.N.Y. May 5, 2020).)

Under the power granted by the recently enacted elections statute, SBE members adopted a resolution to remove ten Democratic candidates from the ballot, leaving only Biden. This move also removed all of the candidates for delegates for those removed presidential candidates. Another statute declared that when only one candidate remains on the ballot, that candidate "shall be deemed nominated or elected ... without balloting." (*Yang*, 2020 WL 2129597, at *7-8, quoting N.Y. Elec. Law § 6-160(2)). With only Biden remaining on the ballot, the primary election was cancelled on April 27, 2020 by operation of law.

A day after the cancellation, several New York Democratic Party voters, including Andrew Yang, his delegate candidates, and delegate candidates for Bernie Sanders, sued for emergency relief in the form of election reinstatement. In *Yang*, the court immediately found irreparable harm in the form of:

- An abridgement of the right to vote if the election was not held.

- An elimination of the voters' ability to cast votes for candidates and the political views expressed by them.

The Supreme Court has adopted a flexible framework for reviewing election law challenges, requiring courts to consider the following:

- The plaintiffs' constitutional right at stake.
- The state's interest justifying the burden placed on that right.
- The extent to which the interest justifies the burden.

(See *Anderson v. Celebrezze*, 460 U.S. 780 (1983) and *Burdick v. Takushi*, 504 U.S. 428 (1992).)

In cases where the plaintiffs' right is severely burdened by the state's restrictions, the court employs a strict scrutiny approach. In cases where the state restrictions impose only a reasonable imposition on the subject right, the court employs a more deferential review, generally siding with the state's interests.

Employing the *Anderson-Burdick* framework in this matter, the court in *Yang* further held:

- Cancellation of the election and removal of delegate candidates from the ballot imposed a substantial burden, effectively eliminating the ability of the candidates to be elected and advocate for their agendas at the national convention.
- Cancellation does not meaningfully advance the state's interest in limiting the spread of COVID-19 because of the availability of universal mail-in voting and other primary elections were still being held.
- Difficulties encountered by the state in holding the primary did not overshadow the burden to the right to vote, as it had nearly two months to properly prepare.

(*Yang*. 2020 WL 2129597, at *26-41).)

The court reinstated the election. Because the state waited until after the court ruling to print the ballots, distribution to mail-in voters was slow. Vote counting was slow too, as more mail-in ballots were returned, with many of those invalidated for various reasons, including:

- A lack of postmark on ballots.
- Failure to sign the ballot in the correct location.
- The use of affidavit ballots caused by moved polling sites.
- The summer heat breaking envelope seals on mail-in ballots.

The lesson here is that New York and other states must better prepare for the counting delays caused by a heightened use of mail-in voting to ensure an accurate and quick count during November elections.

This example stands out as one of the only cases where an election was cancelled during the primary season and then reinstated. It serves as a good example of the importance of preserving the right to vote, even if it trumps an easy-to-manage method of reducing COVID-19 exposure at the polls. Cancellation is not likely in November, especially because delaying a presidential election creates an excessive burden. However, this example serves as a reminder that even a seemingly in-the-bag election should be in the hands of the voters.

Absentee Ballot Qualifications on COVID-19 Fear and Lack of Immunity

Texas

Texas election law allows for voting by mail for:

- Absentees.
- Voters 65 years of age or older.
- Voters with a disability.
- Certain voters in the jail system.

In light of the coronavirus, some Texas voters sought to expand the definition of disability to include:

- Lack of immunity to the virus.
- Fear of contracting the same at a polling place.

The voters first sought this relief in the state courts, with a state district court siding with the voters and issuing a temporary injunction. The state appealed and the Texas Attorney General issued correspondence to election officials contradicting the injunction and threatening to prosecute those encouraging the use of mail-in voting for those claiming fear of COVID-19 as a disability.

As a result of the attorney general's actions, the voters sought relief in the state court of appeals to enforce the lower court's injunction. The court of appeals reinstated the injunction, but the state supreme court stayed the reinstatement and superseded the trial court's order. The state supreme court eventually sided with the state, finding that:

- "A lack of immunity to COVID-19, though certainly physical, is not an abnormal or distinguishing condition."
- Being disabled involves a physical incapacity.
- "In no sense can a lack of immunity be said to be such an incapacity."

(*In re State of Texas*, 602 S.W.3d 549, 560 (Tex. May 27, 2020).)

A similar suit proceeded at the federal level, with the district court siding with the voters. Specifically, that court held in *Texas Democratic Party v. Abbott* that "[a]ny eligible Texas voter who seeks to vote by mail to avoid transmission of COVID-19 can apply for, receive, and cast an absentee ballot in upcoming elections during the pendency of pandemic circumstances" (2020 WL 2541971, at *5 (W.D. Tex. May 19, 2020)). The Fifth Circuit disagreed and stated that the coronavirus's "emergence has not suddenly obligated Texas to do what the Constitution has never been interpreted to command, which is to give everyone the right to vote by mail" (*Texas Democratic Party v. Abbott*, 961 F.3d 389, 409 (5th Cir. June 4, 2020)). This appellate decision was left in place in advance of the subject election when the Supreme Court denied later requests for stay.

The Fifth Circuit later vacated the lower court's injunction, finding that the Texas absentee statute did not deny or abridge the plaintiff's right to vote under the 26th Amendment. The matter was remanded to the district court for further consideration of the plaintiffs' equal protection claims on the level of scrutiny question, either under a rational basis test or by the *Anderson-Burdick* framework (*Texas Democratic Party v. Abbott*, 2020 WL 5422917, at *16-18 (5th Cir. Sept. 10, 2020).)

The election proceeded without an expansion of mail-in voting, but with postal service delays and closures of polling places due to a lack of poll workers. This case bears watching as it progresses in the federal arena, leading to a potential expansion of mail-in voting before the November elections.

Mississippi

Mississippi recently enacted legislation that expanded the definition of "temporary physical disability" for purposes of absentee voting to those voters:

- Under a physician-imposed quarantine due to COVID-10 during 2020.
- Caring for a dependent under this quarantine.

(Miss. Code Ann. § 23-15-713(d).)

This expansion was challenged in state court, with the plaintiff voters requesting a declaration that the amended statute:

- Permits voters with preexisting conditions causing COVID-19 to present a greater risk of severe illness or death to the voter to vote absentee.
- Permits voters seeking to avoid voting polls due to fear of transmission of COVID-19 to vote absentee.

(*Watson v. Oppenheim*, 2020 WL 5627095 (Miss. Sept. 18, 2020).)

The county court granted the requested relief to voters with preexisting conditions, but not for those fearing transmission. On appeal, the Mississippi Supreme Court struck down the positive relief for voters with preexisting conditions, finding no statutory language allowing this, and upheld the denial of relief to voters fearing virus transmission.

A similar challenge, *Parham v. Watson*, is pending in a Mississippi federal district court. These plaintiffs seek:

- Relief for those fearing transmission of COVID-19.
- Suspension of the state's absentee notarization and attestation requirements to minimize COVID-19 exposure.
- Notice and opportunity to cure procedures for absentee ballots rejected based on signature mismatches.

Parham had a preliminary injunction motion filed on September 17, 2020.

Louisiana

In Louisiana, there was a different outcome to a similar situation. There, Louisiana took proactive steps to consider COVID-19 in its absentee system by approving a plan that expanded the state's list of accepted excuses to include considerations for those:

- At higher risk of severe illness from COVID-19 based on underlying medical conditions.
- Subject to medically necessary COVID-19 quarantine or isolations orders.
- Advised by a medical professional to self-quarantine due to COVID-19.
- Experiencing symptoms of COVID-19 and seeking a medical diagnosis.
- Caring for an individual that is subject to a quarantine or isolation order.

Notarization Requirement for Absentee Ballots

Oklahoma

In Oklahoma, voters sought clarification of existing state law for relief from existing absentee requirements.

Specifically, they applied to the state supreme court for original jurisdiction and extraordinary relief, presenting the following to the court in *League of Women Voters of Oklahoma v. Ziriax*:

- The pandemic increased the need for absentee voting in upcoming Oklahoma elections.
- Oklahoma voters seeking to vote absentee were seriously disadvantaged because the Oklahoma Election Board required an absentee ballot to "be accompanied by an affidavit notarized in person by a notary public."
- The notary requirement was an issue, as many notaries were closed due to the pandemic, voters must leave the home to reach a notary, risking exposure, and state law prohibited a notary from notarizing more than 20 ballots in a single election.

(463 P.3d 524 (Okla. May 4, 2020).)

The voters explained that a solution to their problem already existed, as a certain statute provided that a handwritten, unsworn statement signed under penalty of perjury is adequate whenever, under any Oklahoma law, a matter must be supported by a sworn affidavit. The voters insisted that the inconsistency between this statute and the absentee requirement needed to be clarified before the state's approaching primary election.

In defense, the state argued that

- The notary statute did not apply because it governed civil procedure.
- It only applied to affidavits in judicial and quasi-judicial proceedings.
- Applying it in the requested manner renders notaries unnecessary and undermine election security.

The state supreme court sided with the voters and ordered the state to:

- Recognize absentee ballots sworn under penalty of perjury.
- Send absentee voters instructions on how to swear a statement instead of using a notary.
- Cease use of forms that suggested a notarized statement was the only form acceptable for absentee purposes.

Upset with this decision, the state legislature and governor quickly approved a new law amending the statute at the heart of the court's order. Specifically, the new law:

- Excepted absentee ballots from the ability to replace this affidavit with a statement sworn under penalty of perjury.
- Allowed absentee voters to submit a photocopy of a form of identification, instead of the required notarized affidavit, if the governor issued a COVID-19 related state of emergency within 45 days of the election.
- Expanded the absentee ballot definition of "physically incapacitated" to include:
  - those that had tested positive for COVID-19;
  - those awaiting COVID-19 test results;
  - those with COVID-19 symptoms; and
  - those considered at higher risk of severe illness caused by COVID-19.

The election carried on under this statute and it saw a slight uptick in absentee voting from the 2016 presidential primary race.

States with Other Notarization and Validation Issues

Other states have similarly dealt with absentee notary, identification, and validation issues as follows:

- **Alabama.** In *People First Alabama v. Merrill*, a federal district court sided with older voters and held that a notary or two-witness requirement and an identification requirement on absentee ballots were unconstitutional, as they created burdens for those vulnerable to COVID-19 exposure, enjoining the requirement in a primary election for those that the CDC had designated as particularly susceptible to COVID-19. The 11th Circuit denied a request for stay, while the Supreme Court proceeded in granting it, allowing the requirements to stand for the subject election. (2020 WL 3604049 (July 2, 2020).)
- **North Dakota.** In *Self Advocacy Solutions N.D. v. Jaeger*, North Dakota voters challenged the state's invalidation process for absentee ballots. The district court held that the state had to provide absentee voters with notice and an ability to cure before invalidation, with the parties agreeing on a process to provide this relief before the state's June 9, 2020 primary election (2020 WL 2951012 (D. N.D. June 3, 2020)). This also occurred in North Carolina's federal suit, *Democracy North Carolina v. North Carolina State Board of Elections*, where the court required the state to create a notice and hearing process before a ballot was invalidated (2020 WL 4484063 (M.D.N.C. Aug. 4, 2020).)

- **Louisiana.** In *Clark v. Edwards*, Louisiana voters challenged the state's notice and opportunity to cure process, as well as the state's absentee witness requirement. The plaintiffs lacked standing on the witness requirement, but the defendants gave in on the ability to cure, promulgating a rule on provision of notice and the ability to cure before a ballot was invalidated (2020 WL 3415376 (M.D. La. June 22, 2020).)
- **Georgia.** In *Black Voters Matter Fund v. Raffensperger*, also dealing with absentee issues in a federal suit, the court found that requiring voters to affix their absentee ballot applications and absentee ballots was not a poll tax, where other application and ballot return options were available at no cost and where the moderate postage burden was outweighed by the state's fiscal interest in saving money on postage when it was already expending additional funds to better prepare polling sites and to mail out absentee ballots to all registered active voters. (2020 WL 4597053 (N.D. Ga. Aug. 11, 2020).)

Adding Georgia's poll tax matter to the growing list of absentee ballot disputes clarifies that this body of law is on a path to greatly evolve during this election cycle.

Kentucky: Reduction of Polling Places with Expansion of Absentee Voting

At the urging of his secretary of state, Governor Beshear delayed the primary election from May to June by executive order to combat the effects of the COVID-19 pandemic. The order also directed the SBE to establish procedures for election officials to follow in regard to:

- Easing absentee ballot requirements for qualified voters.
- Wider access to in-person absentee period, outdoor voting opportunities, drive through voting, and increased advertising of these opportunities.
- Reduction of in-person voting locations on election day.

The SBE promulgated Emergency Regulation 4:190E which allowed:

- No excuse absentee voting without need for notarization of ballot.
- Postcard advertisement of voting changes made in advance of delayed election.
- Establishment of an online portal for absentee ballot requests.
- Increased in-person absentee voting for two weeks in advance of election.
- Reduction in the number of polling sites, with reductions to be preapproved by the SBE.

The regulation opened up absentee voting for many but resulted in drastic reduction of polling places in highly populated areas. Specifically, the counties containing Louisville and Lexington each reduced their polling places to a single location, citing a difficulty in finding a sufficient number of poll workers and personal protective equipment (PPE), as well as difficulty in preparing sites to CDC standards.

The reduction in polling places led to *Nemes v. Bensinger*, where voters claimed First and 14th Amendment violations, especially for those African American, elderly, and disabled voters, as those voters were at a greater disadvantage of severe illness from exposure to the virus from a crowded polling place and the travel modes necessary for them to get there. The state countered that the expansion of absentee voting curbed any closure effects on turnout and access(2020 WL 3402345 (W.D. Ky. June 18, 2020).)

Employing the *Anderson-Burdick* framework for the constitutional claims, the court found:

- The alleged burdens based on exposure and susceptibility of particular residents was modest in light of the expansion of in-person absentee voting and eased absentee restrictions (Nemes, 2020 WL 3402345, at *37).
- The defendants "offered evidence of a substantial government interest in implementing voting plans that provide for a free and fair election while attempting to minimize the spread of COVID-19," which justified the modest burden (2020 WL 3402345, at *44).

On the claimant's Voting Rights Act claims, the court determined that the plaintiffs failed to demonstrate that the burden of a single polling place disproportionately affected members of a protected class.

The election took place, polling place reductions intact, with a surge in absentee voting. Approximately 1.13 million Kentuckians voted in the election, either in-person or by using absentee ballots, with an estimated 29% turnout of registered voters. Compared to the 20.6% turnout in the 2016 primary election and 13.9% in the 2012 primary election, it appears that the fears over a single polling place did not necessarily result in lower turnout, likely due to increased absentee and early voting. The best practice here is that limitations on day-of access to the polls should be tempered with an expansion of other reasonable avenues to vote.

Candidate and Initiative Access to Ballots

Access to the ballot is as important to voters as it is to candidates and those advancing ballot initiatives. Because it thrives on personal contact, the coronavirus has also made it difficult for candidates and organizations to canvas and obtain the signatures needed to get on the ballot. The following section discusses examples from candidates and organizations that took to the courts to determine their canvassing rights in the time of COVID-19.

Pennsylvania: *Acosta v. Wolf*

Pennsylvania requires all candidates for the US House of Representatives to collect 1,000 signatures from registered voters to appear on the ballot, with those signatures due by August 3, 2020, for this year's cycle. Acosta aimed to get on the ballot as an independent candidate for the US House of Representatives but claimed that the emergency orders issued by Governor Wolf impeded his ability to collect signatures (I*Acosta v. Wold*, 2020 WL 3542329, at *1 (E.D. Pa. June, 30, 2020)). He made these claims even after the orders expired, based on his preexisting medical conditions preventing him from canvassing.

Unusually, Acosta brought an employment discrimination claim against the state related to his inability to collect the requisite signatures and made similar claims that the state was violating his civil rights and rights under the ADA as his employer. However, the state was not his employer. Acosta requested relief in the form of his being automatically added to the ballot without fulfilling the signature requirement. Acosta did not plead the number of signatures he had collected or whether he continued to seek out signatures after the emergency orders expired.

The court dismissed Acosta's claims as frivolous. However, it did consider the merits briefly and found that the Supreme Court "has upheld the state's interest to require a candidate to make a preliminary showing of substantial support to qualify for a place on the ballot as an 'undoubted right,'" and that that practice was necessary because "it is both wasteful and confusing to encumber the ballot with the names of frivolous candidates" (2020 WL 3542329, at *9). This was supported by similar findings from Utah, Illinois, and New York federal courts. In the end, this candidate's failure rests squarely on bad pleadings.

Oregon: *People Not Politicians Oregon v. Clarno*

People Not Politicians Oregon v. Clarno focused on an initiative making it on the ballot, with the plaintiff organization supporting an initiative that amends the state constitution, creating an independent redistricting commission (2020 WL 3960440 (D. Or. July 13, 2020)). After completing an initial process of obtaining 1000 signatures to get a ballot title issued, those wishing to put an initiative on an Oregon ballot must submit signatures of voters supporting the initiative to the secretary of state four months before the election. Those later signatures must be equal in number to 8% of the ballots cast in the most recent governor's race or 149,360 for the 2020 ballot.

As a result of the coronavirus and calls for limited physical contact, the plaintiff organization shifted its strategy and attempted to mail packets to obtain their necessary signatures, but they quickly realized that they had only collected 64,172 and that they were falling short by the July 2, 2020 signature deadline. The organization filed suit in federal court to challenge the state's initiative requirements, alleging they were unable to meet the requirements due to COVID-19 and the resulting restrictions put into effect by the governor. The court found that the organization's political speech was restricted by the government's requirement of physical distance and because the government did not provide a reasonable accommodation on the signature requirement.

From there, the court determined that strict scrutiny applied because:

- The organization had been reasonably diligent in in their attempts to collect signatures, especially where they pivoted to other means when the pandemic struck
- The state's stringent application of the initiative requirements and other restrictions faced by the organization significantly inhibited their ability to get the initiative on the ballot.

(*People Not Politicians* Oregon, 2020 WL 3960440, at *12-17.).)

In relief, the court allowed the state to decide whether it either:

- Automatically adds the initiative to the ballot.
- Reduces the signature requirement by 50% and gives the organization an additional month to collect the remaining signatures.

(*People Not Politicians* Oregon, 2020 WL 3960440, at *18-19.)

The state chose the second option.

On appeal, the Ninth Circuit permitted an expedited appeal schedule to accommodate the need for quick adjudication and denied the state's request for a stay. The US Supreme Court reversed course and granted the stay pending the expedited appeal, with the initiative's future in limbo as the appeals proceed and the election draws nearer. A similar initiative fight is occurring on the appellate level in *Little v. Reclaim Idaho*, with the two cases seemingly intertwined as they proceed (2020 WL 4360897 (9th Cir. July 30, 2020)).

Ohio: *Thompson v. Dewine*

The organizations involved in *Thompson v. Dewine* tried to get their initiatives on the November 2020 ballot to amend the state constitution but were restricted by coronavirus precautions and state signature requirements (2020 WL 2557064 (S.D. Ohio May 19, 2020)). They also dealt with requirements that all signatures be in ink and be witnessed by a circulator. The restrictions also led the organizations to sue, alleging violations of First Amendment political speech.

Using the *Anderson-Burdick* framework, the Ohio district court determined:

- The strict enforcement of the stay at home order and the ballot access restrictions placed a severe burden on the plaintiffs.
- The state's interest in properly authentication by requiring ink signatures was not compelling enough of a state interest.
- The numerical and geographic signature requirements were compelling enough to ensure integrity and support for an initiative.
- Needing the signatures to be submitted by a specific deadline to ensure time for review and authenticity was not compelling enough of a state interest.

After additionally finding plaintiffs suffer irreparable harm from the loss of their First Amendment right, that an injunction was in the public interest, and that the plaintiffs' burden outweighed any harm to the state, the court granted a preliminary injunction allowing for the collection of signatures via digital means and allowed for collection through July 31, 2020.

The Sixth Circuit stayed the district court's injunction and later refused to lift the stay at the plaintiffs' request based on a similar holding in Michigan (959 F.3d 804 (6th Cir. May 26, 2020)). The Supreme Court chose not to get involved by refusing to vacate the Sixth Circuit stay. This case and those out of Oregon and Idaho share many similarities, but this case provided another solution, digital signature collection, that faced the same demise.

Arkansas: *Whitfield v. Thurston*

Unlike the frivolous causes of action used by the pro se claimant in *Acosta*, the claimants in *Whitfield v. Thurston* chose to take an approach similar to that of the ballot initiatives in Oregon and Ohio. These claimants attempted to run for offices as independents on the upcoming November ballot in Arkansas but found that social distancing and state emergency guidelines impeded their efforts to collect the number of signatures required by law to get on the ballot. Before filing suit, the claimants informally attempted to resolve the matter and find a resolution permitting them to run, despite signature shortages, with the secretary of state and the governor.

When those attempts failed, a suit was filed in federal court alleging violations of the claimants' "right to freedom of political association, right to cast a vote effectively, and right to petition as protected by the First Amendment" (2020 WL 3451692, at *23 (E.D. Ark. June 24, 2020)). On those allegations, the court found as follows:

- Under the *Anderson-Burdick* framework the plaintiffs failed to demonstrate that the signature requirements posed a severe burden because:
  - independent candidates did not generally obtain enough qualifying signatures in the past;
  - some independent candidates had successfully met the burden despite the pandemic;
  - signature collection proceeded during the state of emergency; and
  - the state interest in requiring candidates to show substantial support was substantial enough to justify the plaintiffs' non-severe burden.
- An Anderson-Burdick framework looks the same for the 14th Amendment equal protection claims as it did for the First Amendment consideration above.
- Neither irreparable harm, the balance of equities, nor the public interest weighed in favor of a preliminary relief, as such the motion for this relief was denied.

Unlike the initiative backers in Oregon, Idaho, and Ohio, the Arkansas candidate hopefuls did not receive any relief

at the district court level. A notice of appeal to the Eighth Circuit was filed by the plaintiffs, but no further decision has been made in the intervening months.

The Growing Supreme Court Shadow Docket

In 2015, University of Chicago law professor William Baude defined a "shadow docket" as "a range of orders and summary decisions that defy its normal procedural regularity." Five years later, a shadow docket centered on the Supreme Court's involvement in decisions on election changes and modifications spurred by the COVID-19 pandemic has emerged. Specifically, the Supreme Court has intervened in cases of stay requests, erring on the side of governments and veering away from the traditional appellate review by federal circuit courts.

Many shadow docket outcomes seemingly stem from the court's holding in *Purcell v. Gonzalez* (549 U.S. 1 (2006)). *Purcell* itself focused on Arizona's enforcement of new voter ID laws. It advanced to the Supreme Court after the Ninth Circuit entered an interlocutory injunction before the involved district court provided a finding of facts and conclusions of law in support of its order denying a preliminary injunction. In its per curiam *Purcell* opinion, the Supreme Court found that "[c]ourt orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from polls" (549 U.S. at 4-5). However, as found in Louisiana's *Clark v. Edwards*, *Purcell* supports cautious intervention in fast-approaching election cases, not the failure to intervene at all.

In this emerging shadow docket, majority opinions and dissents alike use *Purcell* to advocate for the court's ability to step in to remedy near-election opinions from lower courts or to let the lower courts make the ultimate decision, respectively. This path of contradiction is growing, potentially leading to the confusion and disenfranchisement it aims to prevent.

A review of the most recent election cases best displays the COVID-19 shadow docket emerging since the pandemic began and governments realized the stress the virus placed on their election systems. The following glimpses cover the election case, its procedural history, and the Supreme Court's decision, with a highlight on how parallel or contradictory that decision was.

Wisconsin: *Republican National Convention v. Democratic National Convention*

Wisconsin voters sued to gain additional days to submit absentee ballots, as the uptick in absentee applications caused postal system delays. The district court allowed ballots to be requested up to four days before the election and returned six days after its conclusion, without restrictions on ballot postmark dates. The Seventh Circuit denied a motion to stay this portion of the district court's injunction. Entering a stay just a day before the April 7 election, a majority of the Supreme Court's justices decided ballots had to be postmarked or hand delivered by election day to be counted.

That majority employed *Purcell*, stating that lower federal courts "should ordinarily not alter the election rules on the eve of an election," finding their last-minute intervention as appropriate in fixing the district court's apparent error (140 S. Ct. 1205, 1207 (Apr. 6, 2020)). The dissent likewise employed *Purcell* to chastise the Supreme Court's involvement at such a late date, especially where the involvement results in "massive disenfranchisement" caused by delayed mailing of absentee ballots because of increased demand (140 S. Ct. at 1209).

Texas: *Texas Democratic Party v. Abbott*

Texas voters challenged election law preventing them from seeking absentee ballots due to a fear of and lack of immunity to COVID-19. The district court held that "[a]ny eligible Texas voter who seeks to vote by mail to avoid transmission of COVID-19 can apply for, receive, and cast an absentee ballot in upcoming elections during the pendency of pandemic circumstances" (2020 WL 2541971, at *14-15). Weeks later, the Fifth Circuit stayed that injunction and stated that the coronavirus's "emergence has not suddenly obligated Texas to do what the Constitution has never been interpreted to command, which is to give everyone the right to vote by mail" (961 F.3d at 409).

The Supreme Court denied later applications for reversal of the Fifth Circuit's stay that was handed down less than a month before the subject election, which was interesting where the lower and appellate courts disagreed. Only Justice Sotomayor offered elaboration in her concurrence, hoping "that the Court of Appeals will consider the merits of the legal issues in this case well in advance of the November election" (*Tex. Democratic Party v. Abbott*,

140 S. Ct. 2015 (June 26, 2020)). Here, the Supreme Court strayed from stepping in at the 11th hour, as it did in Wisconsin.

Alabama: *People First of Alabama v. Merrill*

In *People First of Alabama v. Merrill*, Alabama voters challenged laws requiring that an absentee ballot be witnessed by a notary or two witnesses or presented with a copy of a photo ID, as potentially dangerous for those especially susceptible to COVID-19 (2020 WL 3207824 (N.D. Ala. June 15, 2020)). The district court entered an injunction that prevented Alabama officials from enforcing the challenged requirements during the July 14th runoff for individuals designated by the CDC as particularly susceptible to COVID-19 that provided a sworn statement that they were in that class.

The Eleventh Circuit did not stay that injunction, allowing the district court order to stand. Here, despite the lack of dissent in the lower courts, as in the Texas case, the Supreme Court stepped in and granted a stay pending appeal in the Eleventh Circuit.

Rhode Island: *Republican National Committee v. Common Cause Rhode Island*

In *Republican National Committee v. Common Cause Rhode Island*, Rhode Islanders challenged the state's requirement that mail-in votes be signed by either two witnesses or a notary. The parties agreed to suspend these requirements in the September 8 and November 3 elections in a district court approved consent order. The district court denied the Republican National Committee's (RNC) request to intervene against the consent order (*Common Cause R.I. v. Gorbea*, 2020 WL 4365608 (D.R.I. July 30, 2020)). The First Circuit denied the RNC's request for stay of the consent order pending appeal. (*Common Cause R.I. v. Gorbea*, 970 F. 3d 11 (1st Cir. 2020).

The Supreme Court likewise denied the RNC's application for stay. Like the Alabama case, the lower and appellate courts were in agreement. Unlike in Alabama, the Supreme Court decided not to intervene in the appeal, as the state government and plaintiffs agreed on the change in election law implemented during the pandemic.

Idaho: *Little v. Reclaim Idaho*

Reclaim Idaho challenged election laws requiring a certain number of signatures for an initiative to appear on the general ballot, as COVID-19 and related safety protocols slowed canvassing efforts extensively. The district court granted an injunction, ordering the state to either:

- Certify the collected signatures and place the initiative on the ballot.
- Allow an additional 48 days to collect the remaining signatures online.

The Ninth Circuit denied the state's motion to stay the order.

Despite the Ninth Circuit moving forward on an expedited schedule to hear the matter in advance of the certification date for initiatives, the Supreme Court granted the state's application for stay, intervening where the lower and appellate courts chose not to. A Roberts concurrence and a Sotomayor dissent bookended the opinion, with Roberts finding the state's burden in certifying digital signatures to be overwhelming in light of all pandemic voting considerations and Sotomayor finding a stay to be so prohibitive that it doomed the organization's claims to mootness "before any appellate court has had the chance to consider their merits" (2020 WL 4360897 (July 30, 2020)).

Summary Reversal and Bypass of Traditional Review Role

With time, the effects of this shadow docket and the Supreme Court's involvement in COVID-19 voting cases is likely to become more apparent. This is especially true:

- Where *Purcell* is concerned.
- In cases where the lower and appellate courts declined the stays granted by the Supreme Court.
- Where expedited appeals were already underway.

Federal courts are aware and cautious of this trend, like the court in Georgia's *S.P.S. ex rel. Short v. Raffensperger*, when it cautioned to a plaintiff amending a complaint that "timing is critical, especially given ... the Supreme Court's recent trend of orders forestalling any relief on the eve of an election" (2020 WL 4698372, at *12 (N.D. Ga. Aug. 13, 2020)).

Perhaps Justice Sotomayor provided the best caution on this shadow docket and weaponizing of *Purcell* in her dissent in *Little v. Reclaim Idaho*:

"Today, by jumping ahead of the Court of Appeals, this Court once again forgets that it is "a court of review, not of first view, and undermines the public's expectation that its highest court will act only after considered deliberation."

(2020 WL 4360897, at *9-10 (July 30, 2020).)

She also had a pointed dissent in *Raysor v. DeSantis*:

"This Court's inaction continues a trend of condoning disenfranchisement. Ironically, this Court has wielded *Purcell* as a reason to forbid courts to make voting safer during a pandemic, overriding two federal courts because any safety-related changes supposedly came too close to election day. Now, faced with an appellate court stay that disrupts a legal status quo and risks immense disenfranchisement – a situation that Purcell sought to avoid – the Court balks."

(2020 WL 4006868, at *9-10 (July 16, 2020).)

She also may have captioned the controversy perfectly in her *Wolf v. Cook County* dissent:

"Today's decision follows a now-familiar pattern. The Government seeks emergency relief from this Court, asking it to grant a stay where two lower courts have not. The Government insists – even though review in a court of appeals is imminent – that it will suffer irreparable harm if this Court does not grant a stay. And the Court yields."

(140 S. Ct. 681 (Feb. 21, 2020).)

Either way, the Supreme Court has waded into murky waters during this pandemic-era of election law that is likely to extend past the field of elections, as it already has in the public charge and immigration arenas seen in *Wolf* and *DHS v. New York*.

Delaying a Federal Election

As mentioned, the President has stated that inaccuracies and fraud in mail-in voting support may lead to delaying the November 2020 election day until a time as people can vote safely and securely in person. At a press conference the same day, he provided that he did not want to see a date change but that he also did not "want to see a crooked election." Whether the mention of a delay was serious or meant as a distraction from current matters is unknown. However, a brief primer on how election day is set and the mechanics for delaying it are to properly explain why this decision rests with the legislative branch alone.

Legislature's Constitutional Election Deadlines

The Constitution provides several guidelines for determining when the President, Vice President, and the states' Senate and House of Representatives members must be selected:

- Article I, Section 2: Members of the House of Representatives shall be chosen by people of the states every two years.
- Article II, Section 1: The power to determine the time and day for states' electors to provide their votes for the offices of President and Vice President lies with Congress.
- 17th Amendment: Senators shall serve for six-year terms.
- 20th Amendment, Section 1: The terms of the President and Vice President shall end at noon on January 20th.
- 20th Amendment, Section 1: The terms of Senators and Representatives end at noon on January 3.

These are the guidelines set by the Constitution, which do not provide authority to the executive branch to alter the time and date of elections or terms of office. The cumbersome amendment process in Article V, requiring a two-thirds vote in both houses of Congress and ratification by three-fourths of the states, also must be overcome to alter these guidelines.

Statutory Authority on Setting Election Day

Beyond the broad guidance of the Constitution, statutory authority offers further direction on how and when states must elect a President, Vice President, and members of the House and Senate. Those statutes are discussed briefly as follows:

- 2 U.S.C. § 1: Senators must be elected at a regular election next preceding the expiration of the term for a sitting Senator for a term commencing on January 3.
- 2 U.S.C. § 7: Representatives must be elected the Tuesday after the first Monday in November every even number year for a term starting on January 3.
- 2 U.S.C. § 8: If Senators and Representatives are not elected by the date prescribed by law, states can determine the time for holding elections on the vacancies.
- 3 U.S.C. § 1: States must appoint electors for President and Vice President on the Tuesday after the first Monday in November every four years.
- 3 U.S.C. § 2: Should the electors fail to be appointed on the date referenced above, they can be selected on any later day in a manner allowed for by the state's legislature.
- 3 U.S.C. § 7: The states' electors must meet and give their votes for President and Vice President on the

Monday after the second Wednesday in the December following their appointment.

Congress flexed its power under Article II, Section 1 by enacting these statutes and setting a common election day of the Tuesday after the first Monday in November for the offices of President, Vice President, Senator, and Representative, or November 3 in this year's election cycle. Congress also allowed some leeway when Senators, Representatives, and electors for President and Vice President were not selected on that date.

Again, nowhere did these statutes confer on the executive branch the power to amend or delay the provisions of these statutes. Formally amending or modifying these statutes requires an act of Congress, one that Congress does not seem willing to discuss, with Senate Majority Leader Mitch McConnell, R-Ky., agreeing that the election date was "set in stone" and Speaker of the House Nancy Pelosi, D-Cal., responding with a quote of Congress's Article II, Section 1 powers.

Methodologies for Delaying Legislature-Set Election Day

While Congress set a national election day for the offices of President, Vice President, and Senators and Representatives, it also provided some workarounds for states to consider in delaying elections due to COVID-19.

As it pertains to state electors for President and Vice President, 3 U.S.C. § 2 provides the mechanism for states to delay the election and select electors at a later date. If this is a route chosen by a state to better facilitate a pandemic election, the state should understand that it must select those electors and conclude the related election no later than the Monday after the second Wednesday in December or December 14. Even if a delay extends further than that date, the term of a sitting President still ends on January 20 at noon, as prescribed by the Constitution.

Likewise, 2 U.S.C. § 8 provides a delay mechanism for state elections of Senators and Representatives. Once again, states should be careful as it appears their delayed election is to be cabined in by the January 3 start date for those offices. Therefore, a delayed election for Congress should be resolved no later than January 3 at noon.

The mechanism for delaying an election due to an emergency varies from state to state. These mechanisms, whether executive or legislative in nature, are not discussed in depth here.

Use of President's Executive Order Likely Not Sufficient

During a hearing of the House Judiciary Committee, Louisiana Representative Cedric Richmond asked US Attorney General William Barr if the President can individually delay a federal election. Barr stated that he had not "looked into that question under the Constitution." As discussed above, the power to set the national election day rests with Congress, as does the power to revise that date. It is possible for states, on their own, to consider whether a delay is necessary due to exigent circumstances and with the understanding that certain deadlines still apply. However, nothing reviewed therefore far gives the President any power to affect the time of election day.

On the subject of use of an executive order to delay an election, the simple answer is that the President's ability to issue an executive order does not extend to a suspension or an amendment of the Constitution or other laws. Specifically, the Supreme Court found in *Youngstown Sheet & Tube Co. v. Sawyer* that "[t]he President's power, if any, to issue the order must stem from an act of Congress or from the Constitution itself" (343 U.S. 579, 586 (1952)). As seen, the Constitution and Congress afford no power to the President in setting or delaying elections.

COVID-19 Adds even More Pressures

This year's already controversial and divisive presidential election faces even more pressure under the weight of the COVID-19 pandemic. Whether that pressure comes from voters or candidates, election officials across the country must be careful not to succumb and cause disenfranchisement, especially where modern avenues are available to decrease in-person voting, and therefore disease transmission.

The Supreme Court must also grapple with disenfranchisement but may be facing a bigger problem in a shadow docket set to balloon past the pending COVID-19 election cases.

One thing voters should not have to grapple with is the fact that the November election day must take place, as generations before us have voted consistently through the Civil War, the 1918 Spanish Flu, and the Great Depression.

As Thomas Jefferson said, "We do not have government by the majority. We have government by the majority who participate." It is now up to American election officials and voters to ensure that a pandemic does not eliminate their ability to belong to the majority participating.