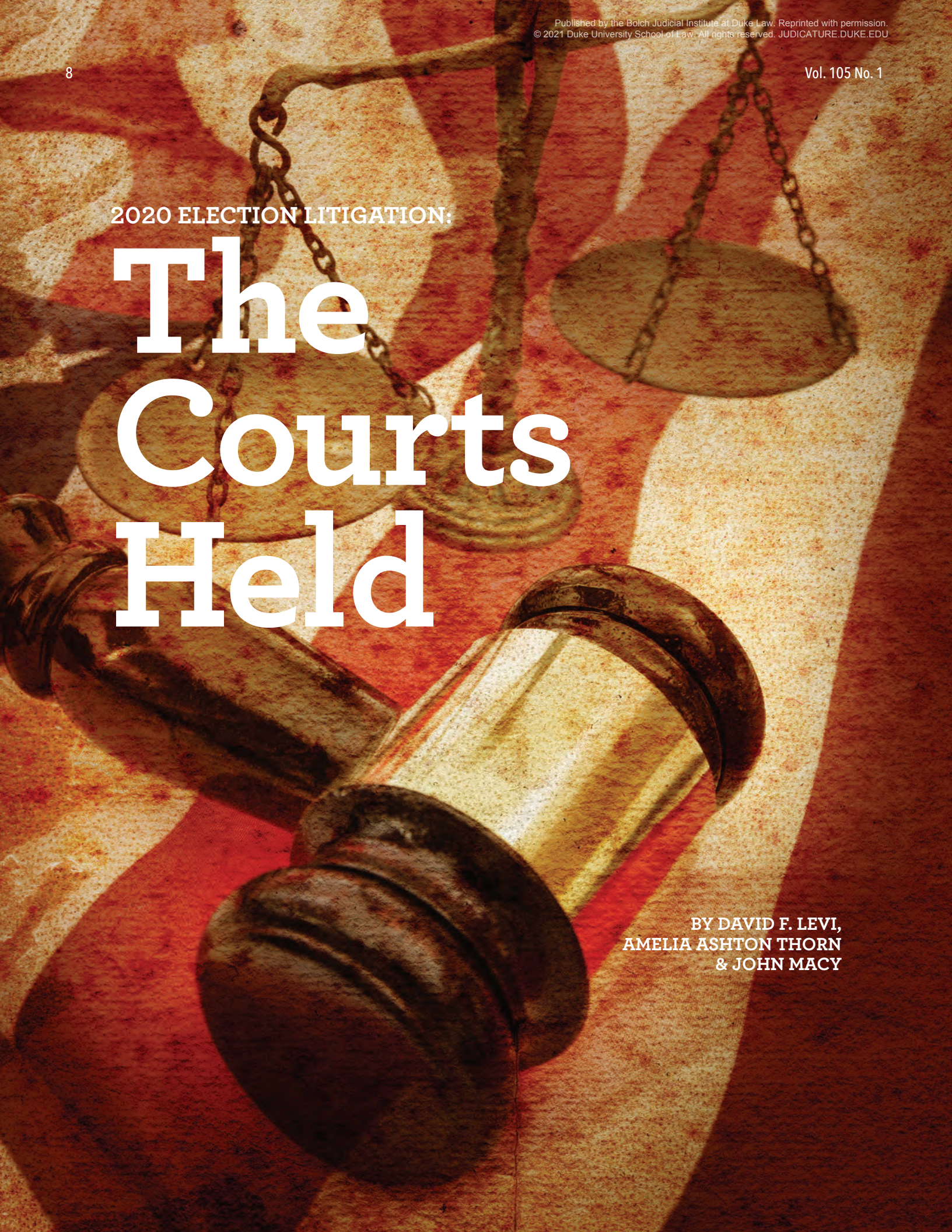

2020 ELECTION LITIGATION:

The Courts Held

BY DAVID F. LEVI,
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WE HAD AN EXTRAORDINARY ELECTION IN NOVEMBER 2020. More Americans voted than in any other election, even though an infectious virus still stalked the nation. Immediately following election day, we then experienced an unprecedented series of challenges to the outcome, launched by a sitting president. Like so many of our institutions, our state and local election systems were not designed for a broad-based "stress test" such as President Donald Trump put into place. It was unclear if these systems would withstand the pressure. But our courts and judges, over our long history, have been repeatedly tested, and, once again, they came through this challenge with flying colors — inspiring confidence, demonstrating their impartiality, and doing their job in transparent, orderly, and dignified fashion. They deserve our thanks.

Numerous cases were filed in state and federal courts by the Trump campaign, challenging the results of the election in different states and on a variety of grounds. Some of the cases alleged fraud, while others asserted that votes were cast or counted in violation of state-specific election rules. The cases came before judges of all types — elected and appointed, Democrat and Republican, rural and urban, state and federal, Northern and Southern, Eastern and Western. The federal judges who heard these cases were appointed by recent presidents of both parties — Barack Obama and Donald Trump, Jimmy Carter and Ronald Reagan, Bill Clinton and George H.W. Bush and George W. Bush.

Despite their different backgrounds, judges came to the same conclusions and rejected the Trump campaign's allegations. Across more than 60 cases in 12 states, judges found that the challenges to the election outcome came up short. (A database of election cases is available at *Democracy Docket*, **www.democracydocket.com**.)

The resoluteness of the judiciary in this time of turmoil provided inspiration and calm to the country. While the guardrails of democracy generally may need our attention and shoring up, the judiciary rose to the occasion without missing a step. In celebration and remembrance of this great service, we have here collected a sample of some of the cases and decisions following the election. May they remind us that the laws are not self-executing, and that it is only through the efforts of wise, impartial, and dedicated judges that the promise of democracy may be fulfilled.

— David F. Levi

A Sample of Lawsuits Challenging the 2020 Presidential Election

In re: Canvass of Absentee and Mail-in Ballots of Nov. 3, 2020 Election
The Supreme Court of Pennsylvania
241 A.3d 1058

Chief Justice Thomas G. Saylor; Justices Max Baer, Debra Todd, Christine Donohue, Kevin M. Dougherty, David N. Wecht, Sallie Updyke Mundy

Shortly after the election, the Trump campaign filed suit in several Pennsylvania counties, seeking to disqualify mail-in or absentee ballots that were signed by a qualified voter but lacked a handwritten name, address, and/or date. The campaign argued that such ballots violated the Pennsylvania election code and should not be counted. Those cases were consolidated on appeal and decided by the Pennsylvania Supreme Court in a single opinion.

The majority opinion, written by Justice Christine Donohue, concluded that mail-in ballots signed by a qualified voter could be counted even if they lacked a handwritten address, name, or date. The court began by noting that its "longstanding jurisprudence" required a determination of whether the Election Code made the relevant information mandatory or merely directory. Citing a Pennsylvania case from 1954,[1] the court stated that election laws "ordinarily will be construed liberally in favor of the right to vote," and that "[t]echnicalities should not be used to make the right of the voter insecure."

The Trump campaign pointed to the language of the election code that says voters "shall fill out, date, and sign" a declaration on mail-in ballots. According to the campaign, the use of the word "shall" was an indication that the provision was mandatory. The court responded by citing numerous occasions in the past where the court found similar language to be directory. In the court's view, the text, context, and legislative intent behind the election code, in combination with the court's historical approach to election laws, pointed to a finding that the language was directory in this case as well.

The majority's holding was unanimous regarding a voter's name and address. Indeed, the court pointed out that mail-in ballots were received by voters with their name and address *already printed* on the envelope. Thus, it seemed plausible that many voters would feel no need to handwrite the same information again. The two partial-dissents (although one joined fully in the judgment) argued that the date requirement should be treated differently. ▸

Donald J. Trump for President, Inc. v. Secretary Commonwealth of Pennsylvania
U.S. Court of Appeals for the Third Circuit
830 F. App'x 377

District Judge Matthew Brann; Chief Judge D. Brooks Smith, Circuit Judges Michael Chagares and Stephanos Bibas

The Trump campaign sued the Secretary of Pennsylvania in federal court, seeking a preliminary injunction preventing Pennsylvania from certifying its election results. The campaign alleged that various Pennsylvania counties restricted Trump-affiliated poll watchers from observing the vote count, and that some counties allowed voters to fix technical defects in their mail-in ballots after they were cast (but prior to election day). The Trump campaign asserted that these alleged errors in election administration amounted to violations of the Equal Protection Clause of the U.S. Constitution.

Four days after the Trump campaign filed suit in the district court, the Third Circuit released a decision in a different election case, *Bognet, et al. v. Boockvar et al.*,[2] that cast serious doubt on whether the Trump campaign had Article III standing to pursue its claims. The campaign amended its complaint in hopes of avoiding the unfavorable precedent, but it was not successful. Judge Brann found that the campaign could not establish that it had suffered an "injury in fact," and dismissed the complaint. The Trump campaign then moved to amend its complaint again. The district court denied this motion, and the campaign appealed.

In *Donald J. Trump for President, Inc. v. Secretary Commonwealth of Pennsylvania,* in an unpublished opinion written by Judge Stephanos Bibas, the Third Circuit denied relief. The court began with the following observation: "Free, fair elections are the lifeblood of our democracy. Charges of unfairness are serious. But calling an election unfair does not make it so. Charges require specific allegations and then proof. We have neither here."

The appeals court concluded that any further amendment to the plaintiff's complaint would be "both inequitable and futile." The court described the second amended complaint as "light on facts"; in the context of the campaign's equal protection claims, the court noted that the campaign's amended complaint was devoid of any factual allegation that the Trump campaign had been treated differently from the Biden campaign. Indeed, there was no allegation that *only* Biden voters were given leave to cure their ballots, or that *only* Trump poll watchers were prevented from observing the vote count. Finding no plausible claim under the Equal Protection Clause, and citing the authority of the *Iqbal* and *Twombly* line of pleading cases, the Third Circuit affirmed.

Ward v. Jackson et al.
Superior Court of Arizona, Maricopa County; Arizona Supreme Court
CV 2020-015285

Judge Randall H. Warner

Kelli Ward, a Republican nominee to be one of Arizona's presidential electors, sued various Arizona state officials in Arizona state court, seeking an injunction preventing the certification of the presidential election results. Ward alleged that poll watchers were given "insufficient opportunity" to observe the actions of election officials, election officials were not "sufficiently skeptical" when comparing signatures on mail-in ballots with signatures on file, and election officials committed errors when creating duplicate ballots.

In an order written by Judge Randall H. Warner, the court held against the plaintiff on all claims. To start, the court dismissed the claim regarding poll watchers as untimely. According to the court, the observation procedures during the presidential election were identical to those used during the August primary, and any objection to them should have been brought at a time when deficiencies could have been cured. With respect to the other two claims, however, the court ordered the examination of randomly selected ballots in order to determine whether fraud or widespread error occurred.

First, the court ordered that forensic document examiners could review 100 randomly selected mail-in ballots to do signature comparisons. Two document examiners, one for the plaintiff and one for defendants, undertook an investigation of the randomly selected ballots. Although both examiners found a few signatures out of the 100 to be "inconclusive,"[3] neither examiner found signs of forgery or simulation, and neither found any basis for rejecting the signatures. The court noted that each ballot examined listed a phone number that matched a phone number on file. After reviewing the ballots and testimony, the court found that there was no evidence of "misconduct, impropriety, or violation of Arizona law" in reviewing the signatures on mail-in ballots.

Second, the court ordered that counsel could review a random sample of 100 duplicate ballots. Maricopa County voluntarily made another 1,526 duplicate ballots available, for a total of 1,626. Under Arizona law, election officials are sometimes required to manually duplicate a ballot so that it can be fed through a voting machine. Out of the 1,626 duplicate ballots reviewed, nine had an error in the duplication of the vote for president.[4] The court noted that the duplication process was 99.45 percent accurate,

May these cases remind us that the laws are not self-executing, and that it is only through the efforts of wise, impartial, and dedicated judges that the promise of democracy may be fulfilled.

and that there was no evidence of intentional misconduct or fraudulent intent. Furthermore, the court concluded that a 0.55 percent error rate did not show any impact on the outcome.

The plaintiff requested expedited review from the Supreme Court of Arizona. The court granted such review and affirmed, finding that any errors were "statistically negligible,"[5] and no evidence of misconduct was presented.

Donald J. Trump for President, Inc. v. Benson
Michigan Court of Claims
Case No. 20-000225-MZ

Judge Cynthia Diane Stephens

Just one day after the election, the Trump campaign, along with a credentialed "election challenger,"[6] sued the Michigan Secretary of State in the Michigan Court of Claims seeking to stop the counting of absentee ballots. The parties alleged that various instances of illegal conduct justified a preliminary injunction. First, they argued that the election challenger had been prevented from observing the counting of absentee ballots, in contravention of Michigan law. Second, the parties submitted an affidavit from a poll watcher who alleged that a poll worker told her that *other* poll workers were instructing ballot counters to change the "date received" on absentee ballots. Third, they argued that election challengers were not given access to video surveillance of ballot drop boxes, in violation of Michigan law.

Judge Cynthia Diane Stephens declined to issue the preliminary injunction. As to the exclusion of poll watchers, she found that there was no basis to sue Michigan's Secretary of State, who had issued appropriate guidance to local election officials. If any unlawful exclusion did occur, the proper defendant would be city or township clerks and not the Secretary of State. As to the poll watcher's affidavit, Judge Stephens found it inadmissible because it was based on multiple layers of hearsay rather than direct evidence.

Finally, the court found no legal basis for the third claim regarding access to video surveillance of ballot drop boxes. Judge Stephens noted that the Michigan statute providing for video surveillance of drop boxes only applied to drop boxes installed after October 1, 2020, and there was no evidence indicating how many drop boxes fit this description, or where they were located. Furthermore, nothing in the statute provided that poll watchers or election challengers should have access to the footage. The statute simply stated that "[t]he city or township clerk must use video monitoring of that drop box to ensure effective monitoring of that drop box."

The court also held that all of the claims were moot, because most of the absentee ballots had already been counted. It was on this ground that the Michigan Court of Appeals and the Michigan Supreme Court affirmed the decision.

Wood v. Raffensperger
U.S. Court of Appeals
for the Eleventh Circuit
981 F.3d 1307

Chief Judge William Pryor, Circuit Judges
Jill Pryor and Barbara Lagoa

In *Wood v. Raffensperger*, a Georgia voter sued the Secretary of State of Georgia in federal court, seeking an injunction preventing the Secretary from certifying the Georgia election results. Wood argued that the absentee ballot and recount procedures that were used in the 2020 election violated Georgia law and his federal constitutional rights. Among other things, Wood challenged the procedure for rejecting absentee ballots, and he alleged that poll watchers were excluded or otherwise prevented from observing vote-counting. The evidence presented by Wood included testimony and affidavits from several poll watchers. One poll watcher stated that the counting was hard for her to follow, and that she thought there were possible tabulation errors. Another poll watcher testified that "one batch of absentee ballots felt different from the rest, and that that batch favored Joe Biden to an unusual extent."

In an opinion written by Chief Judge William Pryor, the court pointed out that "[t]his appeal turns on one of the most fundamental principles of the federal courts: our limited jurisdiction." The court held that Wood's claims faced two jurisdictional defects. First, Wood lacked Article III standing to bring his claims because he lacked a "concrete and particularized" injury. Wood claimed that the Georgia procedures diluted his vote, and that the procedures gave a preference to mail-in voters. However, the court pointed out that both injuries were shared in equal measure by a large class of citizens, and thus were not "particularized." In any event, voters had the *choice* to vote ▸

in-person or by mail, so any preference was more imaginary than real.

Second, the court held that Wood's claims were moot. After Wood's claims failed at the district court, the election results were certified. The court acknowledged that "'[w]e cannot turn back the clock and create a world in which' the 2020 election results are not certified." Thus, much of the relief requested by the plaintiff was impossible for the court to provide.

Due to these jurisdictional defects, Wood's claims could not properly be heard in federal court: "[W]e may not entertain post-election contests about garden-variety issues of vote counting and misconduct that may properly be filed in state courts."

Boland v. Raffensperger et al.
Superior Court of Georgia, Fulton County
Civil Action No. 2020CV343018

Judge Emily K. Richardson

Paul Andrew Boland, a Georgia voter, sued various Georgia state officials in state court, seeking an audit of Georgia election documents and decertification of the results if such audit were to "demonstrate that the results of the election cannot be relied upon."[7] Boland made two allegations of impropriety: First, he alleged that a YouTube video analyzing United States Postal Service forwarding information proved that over 20,000 voters in the Georgia election were ineligible to vote in Georgia. Second, he alleged that certain Georgia signature-matching procedures, which were adopted through a settlement agreement a year prior to the election, were inconsistent with Georgia's election code.

Georgia Superior Court Judge Emily K. Richardson held that Boland's case suffered from a litany of procedural and jurisdictional defects: The plaintiff failed to select the proper defendants for an election challenge under Georgia law, the plaintiff's challenges to election procedures adopted long before the election were untimely, and the plaintiff suffered from similar standing and mootness defects as the plaintiff in *Wood*. The court also noted that Boland's allegations rested on "speculation rather than duly pled facts," and that the factual allegations, even if credited, did not plausibly support his claims. The court concluded that the facts pleaded by Boland did not "demonstrate that the results of the election cannot be relied upon." Even if the court accepted some of Boland's allegations, the defects were not enough to support the conclusion that sufficient illegal votes were cast to change the outcome of the election.

Boland appealed the order to the Georgia Supreme Court, which affirmed the judgment without opinion.[8]

Trump v. Wisconsin Election Commission
U.S. Court of Appeals for the Seventh Circuit
983 F.3d 919

Judges Joel Flaum, Ilana Rovner, and Michael Scudder

Two days after Wisconsin certified the results of its 2020 election, President Trump sued the Wisconsin Election Commission (WEC) and other state officials in federal court, seeking to decertify the election results. President Trump argued that election procedures in Wisconsin violated the Electors Clause of the U.S. Constitution. The clause specifies that the legislature of a state shall direct the "Manner" in which the state's electors will be selected. Wisconsin election laws give considerable deference to municipalities in running elections, and President Trump argued that the municipal officials so misused this power as to alter the "Manner" by which Wisconsin appointed its electors.

Specifically, he challenged three election procedures issued as guidance by the WEC in advance of the 2020 election: (1) The WEC clarified the procedure for voters to qualify as "indefinitely confined" and thus vote absentee without presenting photo identification, (2) it endorsed the use of "drop boxes" as a means to submit absentee ballots, and (3) it allowed municipal clerks to contact voters for the purposes of correcting the address on an absentee ballot.[9] President Trump alleged that these procedures were contrary to Wisconsin statutory law and, with respect to drop boxes specifically, invited voter fraud. The district court found for the defendants, and President Trump appealed.

In an opinion written by Judge Michael Scudder, the court began by finding that President Trump's delay in bringing suit disqualified his challenges to Wisconsin election procedure. "The timing of election litigation matters," the court said, noting that "[t]he President had a full opportunity before the election to press the very challenges to Wisconsin law underlying his present claims." According to the court, "[t]he President's delay alone is enough to warrant affirming the district court's judgment."

That said, the court added that the suit would "fare no better" if the court reached the merits of the Electors Clause claim. Given the broad grant of authority to the Election Commission by the Wisconsin Legislature, the court found that the WEC acted "under color of authority expressly granted to it by the Legislature." Indeed, prior to this case, the Wisconsin Supreme Court already had rejected some of the same claims in state court.[10] Thus, the court found no violation of the Electors Clause and affirmed the decision of the district court.

Law et al. v. Whitmer et al.
The First Judicial District Court for the State of Nevada, Carson City
Case No. 20 OC 00163 1B

Judge James T. Russell

Republican presidential elector candidates filed a statement of contest challenging the 2020 presidential election results in Nevada. The plaintiffs asked the Nevada district court to either issue an order declaring Donald Trump as the winner in Nevada, and thus certify the plaintiffs as electors, or to issue an order declaring Joe Biden's victory "null and void," and that no electors be certified for either candidate.

The plaintiffs made several allegations of fraud and illegality. Primarily, the plaintiffs objected to the use of voting machines to count mail-in ballots. The plaintiffs argued that the machines used to count mail-in ballots were prohibited by Nevada law, and that the mechanical process for automatically matching signatures was inefficient and susceptible to error. The plaintiffs also argued that thousands of votes came from non-Nevada residents or deceased persons, and that poll watchers were not given meaningful access to observe the vote count.

Nevada District Court Judge James T. Russell granted judgment to the defendant electors. The court began by explaining that several procedures were in place to ensure the integrity of voting machines, including extensive testing and auditing. Furthermore, the issue of whether the machines were illegal under Nevada law had already been decided in a case brought by the Trump campaign prior to the election.[11] With this prior case in mind, the court concluded that the plaintiffs here were "adequately represented" by the plaintiffs in the prior action. Thus, their legal claim was precluded by the decision in the previous case.

The court then examined the evidence provided by the plaintiffs to show various other kinds of fraud, including votes by ineligible voters or deceased persons. The court pointed out that much of the evidence provided by plaintiffs was in the form of witness declarations. The court found that the declarations, as out-of-court statements, constituted inadmissible hearsay. Furthermore, they were outside the scope of the Nevada election-contest statute, which prefers depositions as a means of presenting evidence, so that cross-examination under oath may be made possible. Nonetheless, the court stated that it would consider the totality of the evidence presented.

The court also expressed doubts regarding the expert evidence provided by the plaintiffs. The plaintiffs' experts offered analysis based on phone surveys, commercially available databases, and affidavits. The court noted that the plaintiffs' experts were in some cases unable to identify the sources of their data, and the data they did offer lacked independent verification or scrutiny. Accordingly, the court gave the evidence little weight. Ultimately, the court concluded that the evidence presented was not enough to support the plaintiffs' fraud claims "under any standard of evidence."

The plaintiffs appealed to the Nevada Supreme Court, which quickly affirmed the district court. In a short order, the court held that "appellants have not pointed to any unsupported factual findings [by the district court], and we have identified none."[12]

1 *Appeal of James*, 105 A.2d 64 (Pa. 1954).
2 980 F.3d 336 (3d Cir. 2020).
3 "Inconclusive" meaning that the examiner could not testify that the signature on the ballot was a match with one on file. The examiner for the plaintiff found six signatures out of 100 to be inconclusive, and the examiner for the defendant found 11.
4 The Supreme Court of Arizona later noted in its opinion on review that the nine ballots, if corrected, would have resulted in seven additional votes for Trump and two for Biden. *Ward v. Jackson*, No. CV-20-0343-AP/EL (Ariz. 2020), at 4.
5 *Id.* at 6.
6 Michigan law provides for designation of "election challengers" under MCL 168.730. Among other things, election challengers are given access to observe election procedures. MCL 168.733.
7 *See* plaintiff's complaint, page 2.
8 *Boland v. Raffensperger*, No. S21M0565 (Ga. 2020).
9 Although the first two of these procedures were issued as guidance in 2020, the procedure for curing an absentee ballot address had been in place since 2016.
10 The Wisconsin Supreme Court expressly rejected President Trump's challenge to the procedure allowing "indefinitely confined" voters to vote absentee without presenting identification. The court refused to reach the other two challenges on the ground of laches. *Trump v. Biden*, 951 N.W.2d 568 (Wis. 2020).
11 *See Kraus v. Cegavske*, No. 82018 (Nev. 2020).
12 *Law v. Whitmer*, No. 82178 (Nev. 2020) at 4.

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