

# CHAPTER 9:

## ELECTION CONTESTS

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## I. INTRODUCTION

Ideally, elections conclude with clear-cut and unchallenged victories by the candidates and ballot measure positions that represent the will of the electorate. Election contests sometimes follow, however, especially when the margin of victory is small. Election contests are statutorily created judicial proceedings that usually allege that fraud, irregularities, or other problems changed the election's outcome or rendered the outcome uncertain. Contestants, typically the candidates who finished second, usually ask the court to declare them the winner or to order a new election. State statutes may authorize voters to file election contests, although these challenges might be limited to contesting the results of ballot measure elections. Contestees<sup>1</sup> seek to uphold the election results and take or keep their office.

Election contests differ from recounts because contests posit that fundamental flaws in the election or its administration undermined the will of the voters.<sup>2</sup> Unlike recounts, which are limited to a facial review of the cast ballots, election contests dig deeper and review allegations of fraud, illegalities, and irregularities.

Election laws reflect a public policy preference for the pre-election resolution of most election-related problems, concerns, and improprieties. Nevertheless, when pre-election relief is unavailable, such as when the complained of irregularities or illegalities occurred immediately before or during Election Day, or when pre-election suspicions of irregularities were confirmed only during the election,<sup>3</sup> post-election relief in the form of recounts<sup>4</sup> or election contests may be possible.

<sup>1</sup> The winning candidate is usually the sole contestee. Less commonly, government officials may be mandatory defendants.

<sup>2</sup> See *supra* Chapter 8: Canvassing, Certification, and Recounts for additional information on recounts.

<sup>3</sup> *Toney v. White*, 488 F.2d 310 (5<sup>th</sup> Cir. 1973) (en banc).

<sup>4</sup> See *supra* Chapter 8: Canvassing, Certification, and Recounts for additional information on recounts.

The common law recognizes election contests only when fraud infects an election.<sup>5</sup> Modern election contest statutes reflect the importance and value placed on ensuring that the will of legal voters is accurately recorded by providing expanded—though not expansive—grounds for election contests. This statutory expansion of the circumstances under which an election contest can be filed is not without costs because contests may result in special elections that consume public and private time and money.<sup>6</sup> In addition, the delays attendant in the contest lawsuit may result in the challenged office remaining vacant if the existing office holder's term expires before the challenge is decided. Courts, therefore, usually strictly construe election contest statutes,<sup>7</sup> both because of the costs associated with election contests and because of policy preferences that favor electoral finality and political stability.<sup>8</sup> Resolution of an election contest ultimately requires a court to navigate and balance the sometimes competing values of electoral stability, finality, integrity, and giving effect to the electorate's will.

Acceptable contest grounds, the applicable contest procedures, and the level of proof the contestant must meet are generally specified in the state's election law, administrative code, or constitution. Case law may provide the analytical approaches judges use in evaluating contest allegations as well as guidance on how to determine if the alleged irregularity invalidates the challenged votes or the entire election. Finally, laches sometimes foreclose an election contest.

Although not explicitly, courts frequently resolve election contests by using the following informal three-part approach:

1. First, the court reviews the complaint for *compliance* with *procedural* and *substantive* requirements. The court may also consider the contestee's requests to apply laches or stay an impending general election if the contested election is a primary.
2. Second, the court *identifies* and *classifies* the alleged fraud and election irregularities to determine their impact on the challenged votes or the election itself.
3. Third, the court *allots* invalid, fraudulent, or uncounted legal votes to the proper candidate, if known, and adjusts the vote totals accordingly. When the recipient is unknown, the court may attempt to approximate their impact on the election's results. The court also attempts to ascertain the effects of election administration errors on the election's outcome. After considering the impact of illegal votes, fraudulent votes, and officials' errors on the election, including its fairness and integrity, the court decides the contest with one of the following outcomes:
  - a. the original results are upheld,

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<sup>5</sup> Pullen v. Mulligan, 561 N.E.2d 585, 589 (Ill. 1990). *But see* Fiegenbaum v. McFarlane, 77 N.E.2d 816, 818 (Ill. 1948) (stating that because no common law right to an election contest existed, the right is purely statutory).

<sup>6</sup> Primary election contests, for example, reduce the campaigning time available to primary winners and general election contests shorten the preparation, organization, and transition time available to newly elected office holders. *See Developments in the Law-Elections, VI. Postelection Remedies*, 88 HARV. L. REV. 1298, 1301 (1975).

<sup>7</sup> Both the strict construction of election contest statutes and the looser construction given to statutes governing most other aspects of the election work to favor the court's upholding of the just-concluded election if at all possible.

<sup>8</sup> *See* Heleringer v. Brown, 104 S.W.3d 397, 404 (Ky. 2003) (identifying the public policy interests surrounding elections).

- b. the original results are changed and a new winner is announced, or
- c. the election is voided and a new election called or the vacancy is filled through appointment.

Ideally, the court also issues a written opinion to explain its reasoning and provide future guidance.

This chapter discusses the most significant legal issues commonly raised in election contests along with the processes and analyses courts use to resolve them. The special considerations inherent in primary and ballot measure election contests are identified and discussed at the end of the chapter.

## II. STATUTORY COMPLIANCE REVIEW

Losing candidates<sup>9</sup> (or voters if state statutes allow) may initiate an election contest. A contestant encounters significant barriers to success, not the least of which are requirements to operate quickly, thoroughly, and provide specific factual allegations that validate the contestant's claims.

Courts can generally dismiss election contests that fail to meet all statutory prerequisites, the most common of which include:

- filing within the limitations period,
- requesting a recount before initiating a contest action, and
- citing appropriate grounds with specific factual allegations.

### A. FILING WITHIN THE LIMITATIONS PERIOD

The statute of limitations period for election contests is typically short<sup>10</sup> and strictly construed.<sup>11</sup> States differ in their choice of the election-related event(s) that trigger(s) the beginning of the contest statute of limitations period, and the court may initially need to decide how to measure the limitations period. Courts have decided that statutes of limitations periods accrued with the following events:

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<sup>9</sup> A losing candidate may have standing to file an election contest even if he does not seek to be declared the winner. See *Files v. Hill*, 594 S.W.2d 836 (Ark. 1980).

<sup>10</sup> *In re Ernest Davis*, 427 N.Y.S.2d 190 (Sup. Ct. 1980) (three days); *Whittington v. Mathis*, 324 S.E.2d 727 (Ga. 1985) (five days); *DeHoff v. Attorney General*, 564 S.W.2d 361 (Tenn. 1978) (ten days); *Harmon v. Tyler*, 83 S.W. 1041, 1044 (Tenn. 1904) (within twenty days post-election); *Clark v. City of Trenton*, 591 S.W.2d 257 (Mo. Ct. App. 1979) (thirty days); *Cook v. Brown* 2003-EC-02515-SCT (¶8) (Miss. 2005) (statutory "forthwith" requirement for filing an election petition has been interpreted to mean as little as four or as many as forty-one days).

<sup>11</sup> *Pearson v. Alverson*, 49 So. 756, 757 (Ala. 1909); see also *Donaghey v. Attorney General*, 120 Ariz. 93, 584 P.2d 557, 559 (Ariz. 1978) (noting that the public policy favoring electoral stability and finality justifies enforcing strict compliance with the statute of limitations).

- the date the canvassing board determined the results,<sup>12</sup>
- at different junctures if the original results are changed, such as after the Secretary of State certified the original results for the original contestant, and again after the certification of the recounted results for the originally named winner,<sup>13</sup> or
- the date the original canvassing board illegally threw out the election returns.<sup>14</sup>

Expiration of the limitations period generally forecloses both the would-be contestant's right to file an election contest and the court's power to hear it.<sup>15</sup> However, statutes or court rules may allow a court to accept *nunc pro tunc*<sup>16</sup> election contest petitions from contestants who miss the statutory filing deadline because of election officials' errors.<sup>17</sup>

Timely-filed contest petitions cannot usually be defeated by a court employee's error,<sup>18</sup> but a contestant who files late based on incorrect information from an election official may be unable to salvage the contest because the contestant bears ultimate responsibility for knowing the steps and time-tables governing election contests.<sup>19</sup>

In addition to missing an opportunity to file an election contest because he waited too long, a losing candidate might inadvertently foreclose his contest opportunity by filing too early, such as before a winner was officially declared or certified.<sup>20</sup> The early filing may doom the contest

<sup>12</sup> Hall v. Martin, 208 S.W. 417 (Ky. Ct. App. 1919).

<sup>13</sup> Hammill v. Valentine, 373 S.E.2d 9 (Ga. 1988) (noting that if the second period was unavailable, then the candidate originally proclaimed the winner would be unable to contest the election if the recount resulted in another candidate being named the winner).

<sup>14</sup> Sears v. Carson, 551 So.2d 1054 (Ala. 1989).

<sup>15</sup> Cooper v. Dix, 771 P.2d 614, 617 (Okla. 1989); see also Koter v. Cosgrove, 844 A.2d 29 (Pa. Commw. Ct. 2004) (en banc) ("The continuing and efficient operation of government is dependent upon the prompt resolution of election contests. Our system depends upon the timely certification of a winner. The operation of each of three branches of government would be threatened in the absence of clear limitations for the challenging of an election.") (footnote omitted); Mayor and Council of City of Wadley v. Hall, 410 S.E.2d 105 (Ga. 1991) (denying contestant's petition that was filed after the five-day statutes of limitations period solely because election officials wrongfully withheld information essential to the petition after noting the court's liberal acceptance of amendments meant the contestant should have filed a skeleton petition that he could amend when he finally received the withheld information).

<sup>16</sup> *Nunc pro tunc*—literally "now for then"—filings operate as if they were filed on an earlier date that was within the statute of limitations period even though, in actuality, they are filed after the limitations period has run. Pennsylvania appears to be the only state to recognize these filings in election contests. See Thomas v. York County Board of Elections, 59 Pa. D. & C.2d 377 (Ct. Com. Pl. 1972) (allowing a *nunc pro tunc* contest where the contestant had no knowledge that election officials' incorrectly transcribed precinct level tallies until it resulted in certification of his opponent as the winner); but see *In re Recanvass of Certain Voting Machines and Absentee Ballots For Democratic Primary Election For Candidates For Council For City of Monessen*, 887 A.2d 330 (Pa. Commw. Ct. 2005) (finding *nunc pro tunc* filing unavailable without an electoral board error).

<sup>17</sup> See Thomas, 59 Pa. D. & C.2d 377 (holding that contestant's late filing was excused when election returns posted at the polling place indicated he won and he was unaware the final canvass declared his opponent the winner).

<sup>18</sup> See e.g., Redding v. Balkcom, 272 S.E.2d 324 (Ga. 1980).

<sup>19</sup> White v. District of Columbia Board of Elections and Ethics, 537 A.2d 1133 (D.C. 1988) (per curiam).

<sup>20</sup> Tazwell v. Davis, 130 P. 400, 402 (Ore. 1913); Wells v. Noldon, 679 S.W.2d 889, 890 (Mo. Ct. App. 1984).

because the short limitations period may have expired before the initial petition is disqualified, thus leaving the would-be contestant without an opportunity to refile.

Courts should become familiar with their state's policy on whether contestants can amend their petitions after the contest statute of limitations period expires. States differ in their approaches, with some states allowing amendments at the court's discretion,<sup>21</sup> and other states not permitting amendments.

## B. REQUESTING A RECOUNT

Recounts are the most common pre-contest process required, but state statutes may require other processes as well. Recounts may always be required<sup>22</sup> or may be necessary only under certain circumstances, such as when the contest is based on challenges to specific ballots, but not when it is based on fraud, voter eligibility, or the election's legality.<sup>23</sup> States also vary on whether, and when, election contest-related discovery is allowed. States that permit discovery do not always require it before an election contest can be filed.<sup>24</sup> See Chapter 8: Recounts for additional information on recounts.

## C. APPROPRIATE GROUNDS WITH SPECIFIC ALLEGATIONS

The common law generally permitted election contests only for fraud.<sup>25</sup> State statutes now support broader grounds, but usually require specific allegations.

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<sup>21</sup> *Ross v. Kozubowski*, 538 N.E.2d 623, 629 (Ill. App. Ct. 1989) (noting the court's discretionary right to grant an amendment). Courts in states that allow amendments may strictly enforce the initial limitations period because the opportunity to amend the pleading to add necessary details means the contestant should be able to file something within the limitations period. See *Mayor and Council of City of Wadley v. Hall*, 410 S.E.2d 105 (Ga. 1991). In states that do not allow amendments, the running of the limitations period generally prevents the contestant from filing additional pleadings that state new and distinct contest grounds, even those filed in response to the contestee's answer. See *e.g.*, *Harmon v. Tyler*, 83 S.W. 1041 (Tenn. 1904) (noting considerations other courts weight in determining if pleadings could be amended and not considering the contestant's response to the assertion that the election fraud benefited the contestant more than the contestee). See *Pearson v. Alverson*, 49 So. 756, 757 (Ala. 1909) (holding the expiration of the limitations period prevented the contestant from amending his original pleading to cure its defective omission of a statutorily-required statement that the contestant was a qualified elector).

<sup>22</sup> *Miller v. County Commission of Boone County*, 539 S.E.2d 770, 776 (W. Va. 2000) (finding the contest was precluded when recount petition filed approximately twenty hours after the forty-eight hour statute of limitations ran).

<sup>23</sup> *Id.* (discussing the conditions under which, as found here, a recount is necessary before a contest can be filed).

<sup>24</sup> *In re Contest of Election For Offices of Governor and Lieutenant Governor Held at General Election on November 2, 1982*, 444 N.E.2d 170, 179 (Ill. 1983).

<sup>25</sup> Hence the common law is of no avail to would-be contestants who cannot satisfy a state's limited statutory or constitutional grounds for an election contest. For example, although the winning candidate violated federal corrupt practices statutes by offering voters a lottery-type drawing and providing them gasoline vouchers, the losing candidate could not file a contest based on these incidents because state law

Contestants usually cannot maintain a contest on their mere belief that an irregularity occurred or on indefinite information<sup>26</sup> because courts usually cannot purge the alleged illegal votes based solely on general allegations of fraud, official misconduct, or misconduct by another candidate or his supporters.<sup>27</sup>

The specificity requirement is important for two reasons. First, it notifies the contestee, who holds *prima facie* title to the office because he has the most votes after the initial canvas, the specific facts the contestant relies upon in attempting to dislodge the contestee from office.<sup>28</sup> Second, it provides the information necessary to demonstrate the true will of the electorate—which receives deference even when it is irregularly expressed—was not reflected in the official election returns.<sup>29</sup>

Although their language varies by state, contest statutes typically require the contestant to plead that the complained of fraud or irregularities 1) *changed the election's outcome* or 2) *rendered the outcome uncertain*.<sup>30</sup> Known respectively as “*but for*” and the “*uncertain outcome*”<sup>31</sup> tests, courts measure the contestant’s proof against these standards to determine if the contestant prevails. If contest statutes are silent on how the alleged fraud and irregularities must have affected the election’s outcome before the contestant prevails, then state case law may provide the appropriate test. Depending on the state, the contestant may be able to choose which pleading to make, may be able to plead both, or may be limited to a single state designated standard.

The application of the “*but for*” and “*uncertain outcome*” standards to evaluate whether the contestant met his burden of proof is discussed later in this chapter. They are mentioned here to highlight the level and specificity of factual allegations the contestant must satisfy to survive the contestee’s attempt to dismiss the contest on the pleadings.

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did not recognize federal election law violations as contest grounds. See *Dansereau v. Ulmer*, 903 P.2d 555 (Alaska 1995).

<sup>26</sup> See *Akaka v. Yoshina*, 935 P.2d 98, 103 (Haw. 1997).

<sup>27</sup> *Nelson v. Sneed*, 83 S.W. 786, 789 (Tenn. 1904).

<sup>28</sup> See *Tazwell v. Davis*, 130 P. 400, 403 (Or. 1913) (holding general allegations afford the contestee insufficient notice) and *Nelson v. Sneed*, 83 S.W. 786, 788-89 (Tenn. 1904).

<sup>29</sup> *Files v. Hill*, 594 S.W.2d 836, 839 (Ark. 1980) (upholding the election results, although irregular, when the pleadings did not specify the results would have been different nor indicate in which precincts problems existed and the nature of the “clear and flagrant” wrongs attendant to the election); *Akaka v. Yoshina*, 935 P.2d 98, 103 (Haw. 1997) (finding complaint legally insufficient in the absence of facts demonstrating the claimed irregularities exceed the winning margin and noting the court disfavors “fishing expeditions”) (citation omitted).

<sup>30</sup> State statutes may also allow election contests that allege the election was unfair, unconstitutional, or void for failure to comply with statutory prerequisites. Finally, separate statutes may support challenges to winner’s eligibility for office.

<sup>31</sup> Sometimes phrased as “reasonably uncertain.” These two terms are interchangeable.

## 1. “But for” Pleadings

Two versions of the “but for” test exist. Under the strictest form, contestants must allege facts that demonstrate the election’s true outcome differed from the results shown on the official returns.<sup>32</sup> In other words, “but for” its problems, the election would have resulted in the contestant being declared the winner. The “but for” contestant may also be required allege (and later demonstrate) that available direct evidence demonstrates that more legal votes were *actually cast* for the contestant than the contestee.<sup>33</sup> Under this strict requirement, the mere possibility that fraud, abuse, or election administration errors affected the election’s outcome cannot sustain a contest.<sup>34</sup>

A slightly less rigid version of the “but for” test requires contestants to prove that more legal votes were *probably* cast for them than the announced winners.

In many instances, contestants who meet the “but for” burden of proof are declared the winner because they demonstrated they received more valid votes.

## 2. “Uncertain Outcome” Pleadings

Under the “uncertain outcome” requirement, contestants plead that the impact of electoral fraud or irregularities, such as when the number of allegedly illegal votes exceeds the margin of victory,<sup>35</sup> renders the election’s outcome uncertain.<sup>36</sup> An uncertain outcome may also occur in the absence of fraud or corruption, such as when sufficient numbers of legal voters were disenfranchised or legal votes were rejected to affect the outcome.<sup>37</sup> Under the uncertain outcome standard, contestants must prove that “no reasonable certainty” exists as to the

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<sup>32</sup> *Files v. Hill*, 594 S.W.2d 836, 839 (Ark. 1980) (finding that pleadings should specify the election results would have been different and should have indicated in which precincts problems existed and the nature of the “clear and flagrant” wrongs attendant to the election); *Akaka*, 935 P.2d at 103 (finding complaint legally insufficient in the absence of facts demonstrating the claimed irregularities exceed the winning margin); *Akaka v. Yoshina*, 935 P.2d 98, 103 (Haw. 1997) (“[A]ctual information of mistakes or errors” is required; the court disfavors “fishing expeditions”).

<sup>33</sup> *Developments in the Law-Voting and Democracy, VI. Deducting Illegal Votes in Contested Elections*, 119 HARV. L. REV. 1155, 1155-56 (2006). See also *Jordan v. Officer*, 525 N.E.2d 1067, 1074 (Ill. App. Ct. 1988) (stating that if the complaint does not involve improprieties by election officials, then the contestant must prove which candidate received each illegal vote as well as demonstrate that the contestee receive a sufficient number to alter the result or the contestant’s petition fails); *Forbes v. Bell*, 816 S.W.2d 716, 719 (Tenn. 1991) (finding the contestant’s claim she was the true winner unavailing because the contestant did not demonstrate that adjusting for the effects of illegal counted votes or wrongfully withheld votes would have changed the outcome).

<sup>34</sup> *Akaka*, 935 P.2d at 103.

<sup>35</sup> *Developments in the Law-Voting and Democracy, VI. Deducting Illegal Votes in Contested Elections*, 119 HARV. L. REV. 1155, 1155-56 (2006).

<sup>36</sup> *Carlson v. Oconto County Bd. of Canvassers*, 2001 WI App 20, ¶ 10, 6240 Wis. 2d 438, ¶ 10, 23 N.W.2d 195, 198 (Ct. App. 2000).

<sup>37</sup> *Crow v. Bryan*, 113 S.E.2d 104, 107 (Ga. 1960); see also *United States v. City of Hamtramck*, 2000 WL 34592762 (E.D. Mich. 2000) (uncertain outcome caused by voter disenfranchisement).

preferred candidate's identity.<sup>38</sup> Unlike contestants pleading under a "but for" standard, uncertain outcome contestants are not required to prove they would have won an untainted election; they must only allege that the taint clouded the outcome and left the true winner's identity uncertain.<sup>39</sup>

A successful challenge under the uncertain outcome standard results in a voided election. The resulting office vacancy is filled as the state's statutes direct, generally by a special election or by appointment.

## D. CONTESTEE FILINGS

Some states allow a contestee to answer the contestant's pleadings. When contestees are permitted to file answers, they generally may do so even if the limitations period has expired because the contestee had no reason to complain of electoral irregularities until the contestant made them an issue.<sup>40</sup> A contestee usually has the right to demonstrate that the contestant's claims are untrue and that the contestant did not receive a majority of the legally cast votes.<sup>41</sup> The contestee may also be permitted to allege that the contestant received fraudulent and illegal votes, that legal votes were omitted from the contestee's vote totals, or any other statutorily recognized grounds permitting votes totals to be challenged or adjusted in the contestee's favor.<sup>42</sup> Generally, however, a contestee cannot file a cross-contest because her status as the recognized winner means no one else has a right to the office; thus she has nothing to contest.<sup>43</sup>

Contestees sometimes plead laches. Laches is an equitable doctrine—frequently characterized as an equitable defense<sup>44</sup>—that allows a court to dismiss a lawsuit when the plaintiff's unreasonable delay in pursuing the claim prejudiced another party, usually the defendant. Although similar in operation to a statute of limitations, laches is separate from it.<sup>45</sup>

Courts commonly use laches to dismiss election-related cases when the contestant knew of, or could have discovered and challenged, the now targeted irregularities before the election.<sup>46</sup>

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<sup>38</sup> Scholl v. Bell, 102 S.W. 248, 256 (Ky. Ct. App. 1907). Note that the test is also sometimes described as "reasonably certainty," which suggests that absolute uncertainty is not always a requirement.

<sup>39</sup> *Id.*

<sup>40</sup> See Dayhoff v. Weaver, 808 A.2d 1002 (Pa. Commw. Ct. 2002).

<sup>41</sup> Harmon v. Tyler, 83 S.W. 1041, 1047 (Tenn. 1904).

<sup>42</sup> *Id.* at 1047.

<sup>43</sup> Cooper v. Dix, 771 P.2d 614 (Okla. 1989) (finding that without statutory authorization for a cross-petition, the court could not hear it). See also Harmon, 83 S.W. at 1046.

<sup>44</sup> The contestee should introduce and request laches.

<sup>45</sup> Ellis v. Swensen, 16 P.3d 1233 (Utah 2000) (noting that laches may bar even a timely filed case). See *infra* Chapter 10: Statutes of Limitations and Laches for additional information on laches.

<sup>46</sup> Dayhoff v. Weaver, 808 A.2d 1002, 1009 (Pa. Commw. Ct. 2002) (ballot irregularities); Thurston v. State Board of Elections, 392 N.E.2d 1349, 1350 (Ill. 1979) (validity of winning candidate's nomination); Tate v. Morley, 153 S.E.2d 437, 439 (Ga. 1967) (winning candidate's nomination); Thirty Voters of County of Kauai v. Doi, 599 P.2d 286 (Haw. 1979) (*per curiam*) (ballot measure wording); Kilbourne v. City of Carpinteria, 128 Cal.Rptr. 133 (Ct. App. 1976) (recall election where the successfully recalled official's name was misspelled on the ballot, which had been published before the election); Rogers v. State Election Board of Oklahoma, 533 P.2d 621, 623 (Okla. 1974) (winning candidate's residency as stated on

Laches may not apply, however, if the contestant attempted to file a pre-election complaint but was prevented from doing so.<sup>47</sup>

Courts should strongly consider applying laches and dismissing election contests when laches' criteria are satisfied and the contestant raises it. See Chapter 10: Statutes of Limitations and Laches for additional information on laches.

Finally, courts have sometimes prevented the purported winner from taking office while the court election contest is ongoing.<sup>48</sup> Although postponing the swearing-in ceremony means voters are not represented in the challenged office, this outcome is frequently considered preferable to granting political power to an unauthorized person.<sup>49</sup>

### III. IDENTIFICATION AND CLASSIFICATION OF IRREGULARITIES

Elections are complex systems designed and run by fallible humans. Thus, it is not surprising that mistakes, errors, or some other imperfection occurs during an election. Because absolute electoral perfection is unlikely and because finality and stability are important values, not every error, imperfection, or combination of problems supports an election contest, voids the election, or changes its outcome. The court that hears an election contest may spend much of its time determining whether votes affected by minor irregularities are nonetheless valid, and if so, separating them from the votes that are invalid because they are tainted by more serious irregularities.

Two important presumptions operate in the state's favor in an election contest, and a contestant must generally overcome them to prevail in his contest. The first presumption is that all votes counted by election officials are legal,<sup>50</sup> and the second is that election officials performed all their statutorily required duties.<sup>51</sup> To overcome these presumptions, contestants must establish that illegal votes were counted and/or that election officials erred when they performed or

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his declaration of candidacy); *McKinney v. Superior Court*, 21 Cal. Rptr. 3d 773 (Ct. App. 2004) (city charter does not allow write-in votes in run-off races).

<sup>47</sup> *D'Amico v. Mullen*, 351 A.2d 101, 104 n.6 (R.I. 1976) (finding laches inapplicable when the contestant lodged pre-election objections to another candidate's nominating papers by every reasonable means) (citing *Dupre v. St. Jacques*, 153 A. 240 (1931)).

<sup>48</sup> *Marks v. Stinson*, 19 F.3d 873, 887 (3<sup>rd</sup> Cir. 1994) (upholding injunction preventing winner from taking office while trial court on remand determined if the election outcome would have been different had the irregularities not occurred; here this also overturned the trial court's declaring the contestant to be the real winner because it did not adequately determine the irregularities' effects).

<sup>49</sup> *Id.* at 889 (noting that no candidate should be certified unless the record supports the conclusion that the named candidate would have been won without the irregularities supported sufficiently to be worthy of the electorate's confidence).

<sup>50</sup> *McCavitt v. Registrars of Voters of Brockton*, 434 N.E.2d 620, 629 (Mass. 1982); *Tazwell v. Davis*, 130 P. 400, 405 (Or. 1913) (holding at the time a voter is permitted to deposit his ballot, his vote is presumptively legal and the challenger must show the voter's disqualification).

<sup>51</sup> *McDunn v. Williams*, 620 N.E.2d 385, 401 (Ill. 1993) (presuming that election officials would have initialed all ballots as required thus suggesting that all uninitialed ballots were illegally cast).

omitted necessary duties, which resulted in the election's doubtful or inaccurate outcome.<sup>52</sup> Contestants may sometimes satisfy this burden by demonstrating the probability—rather than the absolute certainty—that the results were affected.<sup>53</sup>

Election contests typically involve:

1. disputes about the validity of individual votes,
2. allegations of fraud, and
3. allegations of electoral irregularities.

Except for fraudulent votes, which should never be counted, irregularities in casting a vote or conducting the election do not necessarily void the affected vote or election.

## A. VOTE CLASSIFICATIONS

At the end of the initial canvass, individual votes have either been counted or not counted. During recounts and election contests additional vote categorization frequently occurs, resulting in votes<sup>54</sup> classified as:

1. valid,
2. irregular,
3. invalid, or
4. fraudulent.

*Valid* votes are proper legal votes that are counted for the designated candidate or ballot measure position. *Valid* votes also include irregular votes that were salvaged because their irregularity merely violated directory election code provisions. See the next section for additional information on the distinction between mandatory and directory.

*Irregular votes* become the focus of many election contests. Candidates attempt to have irregular votes cast for them counted and irregular votes cast for their opponent invalidated. Many, if not most, irregular votes are technically illegal for failure to fully comply with applicable governing statutes, perhaps because the voter improperly marked them or an election official's error tainted them. At the end of the contest "irregular votes" will either be counted or not. During the contest evaluation process, however, it is helpful to conceptualize this category as a holding tank. As the court reviews the irregular votes—sometimes in a painstaking vote-by-vote analysis—the court decides if the irregular votes should be "moved" to the valid or invalid categories. Whether or not irregular votes are validated or invalidated depends in large part on whether their nonconformity violates a mandatory or directory election statute. Some of the

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<sup>52</sup> *Akaka v. Yoshina*, 935 P.2d 98, 104 (Haw. 1997); *Pyron v. Joiner*, 381 So.2d 627, 628 (Miss. 1980) (en banc) (denying relief because contestant failed to prove he received the most legal votes or that irregularities justified a new election).

<sup>53</sup> *Matter of De Martini v. Power*, 262 N.E.2d 857, 858 (N.Y. 1970).

<sup>54</sup> Ballots can also be classified in these categories as well, depending on the nature of the problems. If the ballot is disqualified, then any vote on it in any election is disqualified, but if an individual vote is disqualified, the rest of the ballot may be able to be counted.

common circumstances that create irregular votes, as well as the analysis courts undertake to validate or invalidate them, are discussed later in this chapter.

*Invalid* votes are illegal under the state's election code and should not be counted. Invalid votes include votes cast by ineligible voters, cast in incorrect polling places, or irregular votes that were deemed to violate mandatory election code provisions. This manual uses "invalid" to describe votes that cannot be counted because they do not conform to statutory requirements because of the voter's or election official's inattention, innocent error, or misunderstanding, and that have not been fraudulently cast or altered. These votes may or may not have been included in the original tally, but they not "in play" because all parties agree that they should not be counted.

*Fraudulent* votes are not only illegal under the state's election code; they represent a deliberate attempt to thwart the electorate's will. Fraudulent votes include those votes cast by voters who accepted bribes, received improper assistance, voted multiple times, or voted knowing they were ineligible. Fraudulent votes also include those that are the byproduct of intimidation, harassment, and vote or voting-equipment tampering. Fraudulent votes should not be allowed to decide an election's outcome.

During election contests, the court is commonly asked to determine if the contested votes or election practices should result in:

- irregular votes being reclassified as valid or invalid,
- invalid votes being reclassified as valid or fraudulent, or
- valid votes being reclassified as invalid or fraudulent.

Although both invalid and fraudulent votes are illegal votes<sup>55</sup> that are not counted for the candidate who received them when the recipient is known, initially distinguishing between these two categories is important because some courts approach them differently when the recipient candidate's identity is unknown. The difference in approaches occurs because intentional fraud is unlikely to be randomly distributed amongst the candidates. Inattentive voters or sloppy election administration, on the other hand, is likely to randomly affect all candidates on at more or less the same rates per affected precinct. As a result, some courts may be more willing to use a probability analysis or apportion invalid votes even as the court assesses the impact of fraudulent votes on the election differently. Other courts may not distinguish between invalid and fraudulent votes and may use proportional deduction<sup>56</sup> regardless of the reason the vote was disqualified.

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<sup>55</sup> This manual uses "illegal votes" to refer to invalid and fraudulent votes collectively, but the individual terminology of "invalid" and "fraudulent" when the distinctions between the two matters.

<sup>56</sup> The premise underlying the probability analysis is that the non-conforming votes to be subtracted from the candidates' vote totals were randomly distributed; hence it is inapplicable to an election infected by intentional fraud.

## B. MANDATORY/DIRECTORY DISTINCTION

Courts usually apply the election code to protect—not defeat—the right to vote.<sup>57</sup> Election contests challenge the validity of votes or the validity of the election. Public policy favors salvaging the election and giving effect to the voter’s intent, if possible. In keeping with these principles, courts determine the effect to give to irregular votes and irregular election administration processes by evaluating whether the irregularities violated mandatory or directory election code provisions.<sup>58</sup>

All election statutes are mandatory in the sense that compliance is expected.<sup>59</sup> Compliance failures do not automatically void the election, however, especially if the failure is not challenged until after the election. Instead, courts typically construe statutes that are not challenged until after the election as directory,<sup>60</sup> which allows the court to overlook harmless compliance failures, unless one of the following conditions applies:

- explicit statutory language states the provisions are mandatory,
- explicit statutory language specifies the election is voided because of the failure,
- the violation obstructed voter’s ability to cast a vote free of intimidation or harassment
- the violation affected an essential electoral component, or
- the violation changed the election’s outcome or rendered it uncertain.<sup>61</sup>

<sup>57</sup> See *In re the 2003 Election for Jackson Township Supervisor*, 840 A.2d 1044 (Pa. Commw. Ct. 2003).

<sup>58</sup> *Hester v. Kamykowski*, 150 N.E.2d 196, 199 (Ill. 1958). Note that election statutes are almost always construed as mandatory when compliance is evaluated before the election.

<sup>59</sup> All election code requirements are generally evaluated as mandatory when failure to follow them is challenged before the election. Even under these circumstances, however, failure to follow election code provisions are sometimes saved by “substantial compliance” or the challenges themselves are barred by laches.

<sup>60</sup> *Henderson v. Maley*, 806 P.2d 626, 630 (Okla. 1991) (finding statutory post-election ballot preservation requirement is directory and not mandatory so substantial compliance is sufficient); *Johnson v. Tanka*, 154 N.W.2d 185, 187 (Minn. 1967) (construing post-election review statutes as directory rather than mandatory unless the election’s results are uncertain because of a departure from statutory requirements); *Donn v. McCuen*, 797 S.W.2d 455, 456 (Ark. 1990) (finding election provisions mandatory if enforcement is sought pre-election, but directory if not challenged until post-election); *Pullen v. Mulligan*, 561 N.E.2d 585, 596 (Ill. 1990) (holding if only the spirit of the directory law is violated and the election result is fairly ascertainable, then literal compliance is not required); *McNally v. Tollander*, 302 N.W.2d 440, 444 (Wis. 1981) (finding, in the face of substantial compliance with statutory requirements the court traditionally construes the statutes as directory); *Lambeth v. Levins*, 702 P.2d 320, 324 (Kan. 1985) (finding substantial statutory compliance sufficient to uphold the election results and give effect to the will of the people where election officials’ informality and non-compliance results in “mere irregularities.”). In some jurisdictions, however, courts evaluate the impact on the election’s outcome under both mandatory and directory constructions before deciding on a final approach. See, e.g., *Pullen*, 561 N.E.2d 585, 595, 596 (reviewing the nature and object of the statutory provision as well as the consequences arising from mandatory and directory constructions before deciding on an approach).

<sup>61</sup> *Att’y Gen. ex rel. Miller v. Miller*, 253 N.W. 241, 243 (Mich. 1934); *D’Amico v. Mullen*, 351 A.2d 101, 104 (R.I. 1976); see also *People ex rel. Woods v. Green*, 106 N.E. 504, 506 (Ill. 1914). *But see Pullen v. Mulligan*, 561 N.E.2d 585 (Ill. 1990) (evaluating the outcome under a mandatory and a directory construction to determine which one is appropriate).

Multiple irregularities may occur during any given election, with some of the irregularities violating mandatory statutory requirements and others violating directory requirements. In one case, the court held that votes cast by unregistered individuals and double-voters violated mandatory (“non-directory”) election code requirements and were invalid, but election officials’ errors, such as reversing the candidates’ names in the results, failing to use an electronic vote counter, and failing to have all voters sign the official poll books, were excused as directory violations.<sup>62</sup> Ultimately, the court determined that the “non-directory” violations did not affect the election’s outcome so it upheld the original results.<sup>63</sup>

Occasionally, an identical requirement is construed as mandatory when applied to some ballots, but directory when applied to others. One court determined that state statutes that required election officials to initial all ballots were mandatory for in-precinct cast ballots because voters had the opportunity notice their ballots were not initialed and to ask officials to initial them before the voters cast their votes.<sup>64</sup> The court found the same statute directory as applied to absentee ballots because these ballots were not supposed to be initialed until they were opened and canvassed, thus absentee voters had no opportunity to notice and correct the officials’ errors.<sup>65</sup>

In addition, substantial compliance with an election statute, given its nature and underlying rationale, may save a ballot that does not exhibit complete conformity with a mandatory requirement because even the irregularly expressed will of the majority should be respected.<sup>66</sup> This premise underlies many of a court’s considerations when it decides whether a given irregular vote is valid or invalid. The following sections on absentee and write-in votes illustrate these considerations and where many courts draw the line or make distinctions. In their identification and classification of challenged irregularities, courts frequently find themselves analyzing substantive election law violations involving considerations of the following:

1. voter compliance and voter intent,
2. failures in election administration,
3. voting equipment-related failures, and
4. candidate qualification challenges.

The following sections discuss how courts evaluate the above types of electoral irregularities to determine how to classify the challenged votes.

### C. VOTER COMPLIANCE AND VOTER INTENT

Although voter compliance or voter intent challenges can arise with any ballot, contests are frequently focused on voter compliance with statutes governing the following types of ballots:

- absentee ballots,

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<sup>62</sup> Jackson v. Maley, 806 P.2d 610 (Okla. 1991).

<sup>63</sup> *Id.*

<sup>64</sup> McDunn v. Williams, 620 N.E.2d 385, (Ill. 1993).

<sup>65</sup> *Id.*

<sup>66</sup> Att’y Gen. *ex rel.* Miller v. Miller, 253 N.W. 241, 243 (Mich. 1934).

- cross-over votes,
- provisional ballots, and
- write-in votes.<sup>67</sup>

## 1. Absentee Ballots

No federal constitutional right to vote by absentee ballot exists<sup>68</sup> although individual states may recognize one. Because absentee voters complete their ballots outside of the scrutiny and neutrality that polling places provide, absentee voting is more vulnerable to fraud.<sup>69</sup> This enhanced susceptibility to fraud generally supports more stringent state regulation of absentee voting compared to in-precinct voting. Once states offer absentee balloting, however, they cannot arbitrarily accept or reject such ballots. The improper or discriminatory application of absentee ballot laws by electoral boards is also impermissible.<sup>70</sup>

Courts become involved in absentee ballot challenges when election contestants allege absentee ballot improprieties played a role in changing the election's outcome or rendering its results uncertain. The alleged non-compliance may involve election officials,<sup>71</sup> absentee voters, or the absentee ballots themselves. The most common allegations include the following:

1. ineligible voters cast absentee ballots,
2. absentee voters received improper assistance, and
3. absentee ballots failed to comply with validation procedures.

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<sup>67</sup> In elections that use hand-marked and manually counted paper ballots, votes are sometimes invalidated because they bear "distinguishing marks." Distinguishing marks are pre-arranged extraneous markings the voter makes on the ballot to indicate that he voted as promised. Because distinguishing marks suggest voter bribery or intimidation, some states invalidate ballots that contain them. *See, e.g.,* *Devine v. Wonderlich*, 268 N.W.2d 620, 625 (Iowa 1978). Under these states' statutes, intentional signalers and careless or idiosyncratic voters alike risk invalidating their votes because of the non-conforming markings. In general, ballots are invalidated for distinguishing marks (doodles, flourishes, extraneous writing, or elaborate checkmarks) if the extra words or marks allow the voter to be identified. *See also In re Contest of Election For Offices of Governor and Lieutenant Governor Held at General Election on November 2, 1982*, 444 N.E.2d 170, 180 (Ill. 1983) (finding the party that wishes to invalidate the vote must prove the voter, and not another individual, place the mark on the ballot). *Fitzgerald v. Morlock*, 120 N.W.2d 339, 352 (Minn. 1963).

<sup>68</sup> *See* *Qualkinbush v. Skubisz*, 826 N.E.2d 1181, 1192, (Ill. App. Ct. 2005) (nunc pro tunc) *and In re The Protest of Election Returns and Absentee Ballots in the November 4, 1997 Election for the City of Miami*, 707 So.2d 1170, 1173 (Fla. Dis. Ct. App. 1998) (per curiam) *and Blankenship v. Blackwell*, N.E.2d 382, 392 (Ohio 2004); *see also Griffin v. Roupas*, 385 F.3d 1128 (7<sup>th</sup> Cir. 2004) (finding no fundamental right to vote by absentee ballots for working mothers on that basis alone).

<sup>69</sup> *Rogers v. Holder*, 636 So.2d 645, 649 (Miss. 1994); *Qualkinbush v. Skubisz*, 826 N.E.2d 1181, 1197 (Ill.App. 1 2005) (nunc pro tunc) (considering evident absentee voting's greater susceptibility to influence, manipulation, and fraud).

<sup>70</sup> *Marks v. Stinson*, 19 F.3d 873, 880 (3<sup>rd</sup> Cir. 1994) (finding the elections board not only participated in a fraudulent absentee ballot scheme, but later ruled on it when it was challenged).

<sup>71</sup> Election officials' compliance with absentee ballot statutes is discussed in the election administration portion of this section.

Finally, the contest may be based, in whole or in part, on allegations of absentee ballot fraud.<sup>72</sup>

a. Ineligible Voters Cast Absentee Ballots

Some states allow any qualified elector to vote early or through no-excuse absentee voting,<sup>73</sup> while others only permit absentee voting under specified circumstances.<sup>74</sup> States that limit the circumstances under which absentee voting is offered differ on whether the voter's good faith belief at the time he completed his absentee ballot application that he will continue to be eligible to vote by absentee ballot on election day is sufficient, or whether the voter's absentee voting eligibility is an ongoing requirement that continues to exist after the absentee ballot has been voted and returned to election officials and throughout election day. In states that limit the circumstances under which voters qualify for absentee ballots, a voter's failure to provide the appropriate justification will generally invalidate their ballot.<sup>75</sup>

Absentee voter eligibility challenges should usually be made before the ballot is opened and commingled with other ballots.<sup>76</sup> The legality of the ballot itself, however, may be challenged later.<sup>77</sup>

b. Absentee Voters Received Improper Assistance

Because of concerns about absentee ballot fraud, some states regulate the assistance absentee voters may receive. State statutes regulate assistance to absentee voters by:

- limiting the persons who may provide it,
- prohibiting it all together, or
- requiring disclosure of any assistance, including the names of the persons providing it and their relationship to the voter.

Courts may be asked to determine if absentee ballots should be invalidated because of improper assistance or if they should be counted despite the violation. Absentee voters most commonly receive assistance in the following areas, which not all states allow:

- completing the absentee ballot application,
- receiving the absentee ballot from election officials,
- marking the ballot, and
- returning the voted ballot to election officials.

Failure to comply with assistance regulations can void the ballot.<sup>78</sup>

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<sup>72</sup> Absentee ballot fraud is discussed in the fraud portion of this section.

<sup>73</sup> Oregon's all mail voting is similar to absentee voting by all electors.

<sup>74</sup> ELECTIONLINE.ORG, PRE-ELECTION DAY AND ABSENTEE VOTING BY MAIL RULES, <http://www.electionline.org/Default.aspx?tabid=474> (last visited September 1, 2007).

<sup>75</sup> *Qualkinbush v. Skubisz*, 826 N.E.2d 1181, 1203 (Ill. App. Ct. 2005) (nunc pro tunc); *Marks*, 19 F.3d at 877.

<sup>76</sup> *Lambeth v. Levins*, 702 P.2d 320, 325 (Kan. 1985).

<sup>77</sup> *Id.* at 325.

Voters may be required to complete the absentee ballot application form themselves or disclose any assistance they received. Absentee ballots may be challenged when the application was completed by an individual other than the voter, particularly when campaign workers are involved.<sup>79</sup>

State statutes may limit the individuals who can pick up and return absentee ballots on behalf of the absentee voter.<sup>80</sup> Statutes may restrict pick up and return tasks to a specified list of individuals—such as a spouse, child or neighbor—or statutes may specify the individuals who are prohibited from performing these task, such as political parties, candidates, and their respective staff members. Compliance with unambiguous absentee ballot delivery requirements is mandatory and failure to comply can invalidate the vote.<sup>81</sup> For example, if absentee voters are physically able to return the ballot themselves, they may be required to do so, and if they entrust their ballot's return to a third party instead, the vote is invalidated.<sup>82</sup>

If state statutes allow third parties to mark absentee ballots on behalf of absentee voters, then ballots so marked are generally legal and valid if marked at the voter's direction, but illegal if the vote represents the assistant's choice.<sup>83</sup> For example, where a challenged absentee ballot could break a tied election, the court remanded the contest to the trial court so it could determine whether the contested absentee ballot represented the disabled voter's choice--in which case it was a valid vote—or if it was an illegal double-vote by the voter's spouse who actually marked it.<sup>84</sup>

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<sup>78</sup> See *Stebbins v. Gonzales*, 5 Cal. Rptr. 2d 88, 91-92 (Ct. App. 1992) (disallowing absentee ballot in part because his spouse returned the ballot on his behalf although he was neither disabled nor ill).

<sup>79</sup> *Qualkinbush*, 826 N.E.2d 1181 (challenging absentee ballots because campaign workers filled out absentee applications in whole or in part in addition to other irregularities involving absentee ballots).

<sup>80</sup> At least two courts have upheld state regulation of absentee ballot distribution and return against allegations such regulations violate the Voting Rights Act. See *Qualkinbush*, 826 N.E.2d at 1196 (upholding state statute restricting the individuals who may return a disabled voter's absentee ballot against claims that the Voting Rights Act provides allows disabled voters the assistance of their choice); *In re Canvass of Absentee Ballots of Nov. 4, 2003 General Election*, 843 A.2d 1223, 1232-33 (Pa. 2004).

<sup>81</sup> *In re Canvass of Absentee Ballots of Nov. 4, 2003 General Election*, 843 A.2d 1223, 1231 (Pa. 2004) (dismissing appellee's arguments that the delivery statute that required non-disabled absentee ballot voters to personally deliver or mailed their completed ballot should be construed liberally in favor of upholding the right to vote); see also *Qualkinbush*, 826 N.E.2d at 1196 (invalidating absentee ballots returned by a campaign worker because the unauthorized delivery presented an opportunity to tamper with them and opportunity, not proof of actual tampering, was sufficient to give rise to a presumption tampering occurred).

<sup>82</sup> *Stebbins*, 5 Cal. Rptr. 2d 88, 91-92 (Ct. App. 1992) (absentee voter also failed to fill out the required residency declaration and did not sign the identification envelope); *In re Canvass of Absentee Ballots of Nov. 4, 2003 General Election*, 843 A.2d 1223, 1231 (Pa. 2004) (holding that notwithstanding the election board's erroneous instructions to voters, "shall" is a mandatory requirement, thus absentee ballots personally delivered by individuals other than the voter are invalid).

<sup>83</sup> *Lambeth v. Levins*, 702 P.2d 320 (Kan. 1985) (deciding whose choice was reflected on the ballot where one spouse provided assistance to the other spouse). Statutes may also limit who may provide assistance to an absentee voter and assistance provided by persons not on the approved list will invalidate the ballot).

<sup>84</sup> *Id.*

### c. Absentee Ballots Failed to Comply With Validation Procedures

In addition to marking the ballot to indicate their preferences, many states require absentee voters to validate their ballots by completing one or more of the following actions:

- signing an attestation statement,
- signing an oath of identification (swore an oath) – also put in paragraph 2 that these reqs are always changing)
- having their ballot or attestation statement witnessed or notarized,
- reaffirming their absentee voter-eligibility,
- stating whether they received any assistance in filling out the ballot and, if so, by whom, and
- completing a residency declaration or a voter identification section.

These requirements affect the ballot's legality, which may be challenged independent of challenges to the absentee voter's eligibility.<sup>85</sup> When voters fail to complete these additional requirements, courts must decide if the omissions violated mandatory or directory statutes and if substantial compliance nevertheless validated the vote.<sup>86</sup> For example, one court applied the presumption that officers operate within their jurisdiction to validate an absentee ballot where the notary made a mistake in the venue.<sup>87</sup> The same court upheld the invalidation of an absentee ballot where the person who swore the oath to the voter did not hold an approved rank, but validated several other votes cast by military voter's where the oath-giver's rank was on the approved list, even though the identification information the oath-giver provided was complete in other respects.<sup>88</sup> In another case, when the voter marked the ballot in front of the notary even though the voter failed to show the ballot to the notary before marking it, a court found that the state notarization requirement was met, and thus the ballot was counted as valid, but when the voter marked the ballot outside the notary's presence, the court found that the voter did not substantially comply with the statute, and thus the ballot was invalid.<sup>89</sup>

## 2. Crossover Votes

Crossover voting occurs when a voter votes a straight party ticket option<sup>90</sup> and "crosses over" from his preferred political party to vote for an independent candidate or a different political

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<sup>85</sup> See *id.* at 325.

<sup>86</sup> Note that this vote-by-vote analysis is different from the wholesale disregard of the requirements that the court found to rise to the level of a constitutional violation. See *Roe v. State of Alabama*, 43 F.3d 574, 581 (11<sup>th</sup> Cir. 1995) (per curiam).

<sup>87</sup> *State v. Boehner*, 119 N.W.2d 147, 150 (Neb. 1963) (treating as if the space to indicate the venue was left blank when it contained "State of York" when no such state existed).

<sup>88</sup> *Id.* at 151.

<sup>89</sup> *McCavitt v. Registrars of Voters of Brockton*, 434 N.E.2d 620, 628 (Mass. 1982) (noting that absentee voters should not be disenfranchised if they substantially complied with election laws).

<sup>90</sup> Some voting machinery allows a voter to select a party option rather than have to vote for each individual candidate running under that party's designation. Voters may also be able to vote for individual candidates as well. Although technically an "overvote" or voting for more candidates than the office allows, cross-over votes are also viewed as an efficient way for a party-oriented voter to support the majority of the party's ticket while still permitting individual opt-outs. Cross-over voting may be a

party's candidate. Crossover voting means the voter cast one vote for two different candidates for a single vacant office. In localities that allow crossover voting, the vote is usually counted for the individually selected candidate and not the candidate who was marked as a result of the straight party ticket vote.<sup>91</sup>

### 3. Provisional Ballots

Provisional ballots are cast by voters who did not appear to meet all of the eligibility requirements--perhaps because the voter's name did not appear on the registration list or the voter did not present identification—when the voter appeared at the polling place to vote. Provisional ballots allow the voter to cast a ballot that is kept separate from regular ballots and counted only if the voter demonstrates his eligibility within a fixed time after the election. Sometimes provisional ballots are only counted if their number exceeds the margin of victory. The Help America Vote Act (HAVA) mandates that states provide provisional ballots to voters under specified circumstances during federal elections,<sup>92</sup> but state statutes govern whether provisional ballots are available for state elections or under expanded circumstances in any election. The state's statutory definition of a valid vote determines if the provisional vote is counted. For example, HAVA does not require states to count out-of-precinct cast ballots, even if they are cast within the larger "jurisdiction"—if state law would otherwise invalidate them.<sup>93</sup>

Courts may hear contests alleging that provisional ballots were not counted when they should have been. This area of election law is under development and a complete list of the circumstances under which provisional ballots may or must be counted has not yet been developed.

### 4. Write-In Votes

State laws govern write-in voting,<sup>94</sup> which occurs when voters vote for an individual whose name was not already included on the ballot. Voters commonly cast write-in votes by affixing a sticker, writing the name on a paper ballot, or typing the name into a computer. While some voters may write-in cartoon characters' or nonsensical names, the write-in vote disputes that typically occupy a court's time involve write-in candidates that have a chance to win or

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relic that dies with level voting equipment as many computer-based voting programs notify or will not allow voters to vote for more candidates than the office supports. Paper ballots may also support crossover voting.

<sup>91</sup> See *Smith v. Hendrix*, 219 S.E.2d 312 (S.C. 1975) (noting that when the tabulating software encountered a ballot in which the straight party ticket option as well as an individual candidate of the opposite political party were both selected, the vote was counted for the candidate individually selected rather than the party ticket candidate).

<sup>92</sup> 42 U.S.C. §§ 15482, 15483 (Supp. IV 2004).

<sup>93</sup> *Sandusky County Democratic Party v. Blackwell*, 387 F.3d 565 (6<sup>th</sup> Cir. 2004) (per curiam).

<sup>94</sup> The Constitution does not require states to provide a write-in voting option and states may ban it if their over-all candidate ballot access regulations are constitutional. See *Burdick v. Takushi*, 504 U.S. 428 (1992).

otherwise affect the election's outcome. Courts are often asked to decide if write-in votes sufficiently complied with statutory requirements to allow them to be counted. States regulate write-in candidacies. Some states allow candidates who lose their party primary to run as write-in candidates in the general election,<sup>95</sup> while others may permit write-in candidacies as an alternative to qualifying for ballot access through signature petition or party nomination requirements. States may require write-in candidates to provide notice to, or register their write-in candidacy with, election officials before votes will be counted for them.<sup>96</sup> Courts hearing write-in voting-related challenges may first need to decide whether extrinsic evidence is acceptable, and, if so, the nature of acceptable evidence. Courts may wish to use extrinsic evidence to ascertain which individual the voter intended to select.<sup>97</sup> If the voter's intent is apparent on the ballot, then it is accepted as cast and contrary extrinsic evidence is not accepted.<sup>98</sup> Extrinsic evidence assists in identifying the likelihood the voter meant to select the write-in candidate and not another person, but its utility varies depending on the uniqueness of the candidate's name.

Common write-in vote legal challenges require the court to determine whether the write-in vote can be counted when:

1. the write-in name incompletely or imperfectly matches the candidate's name, or
2. the write-in candidate's name was imperfectly placed or incorrectly marked.

a. Write-In Name Incompletely or Imperfectly Matches the Candidate's Name

When the written-in vote does not perfectly or completely match the write-in candidate's name, the court may be called upon to decide if and how to give effect to the voter's intent while also upholding the integrity of the election. Although general principles may apply, state statutes and case law provide courts with the most explicit guidance.

Even imperfectly expressed voter intent is not easily defeated if it is ascertainable.<sup>99</sup> Write-in votes are generally counted if they "fairly indicate" the voter's choice as long as they do not

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<sup>95</sup> In the fall of 2006, incumbent U.S. Senator Joe Lieberman was re-elected as a write-in candidate after losing his party's primary election.

<sup>96</sup> Registration also acts to narrow the pool of otherwise qualified individuals for whom the vote may have been meant instead of the candidate and may make a difference if the candidate lacks a unique name.

<sup>97</sup> *Meyer v. Lamm*, 846 P.2d 862, 877 (Colo. 1993) (en banc) (finding proper considerations included noting the candidate who claimed the vote was the only write-in candidate for the office, had campaigned extensively and publicly for it, had filed the required notice of intent to run, was the only person other than her opponent who was eligible to hold the position, and had received editorial endorsements from several newspapers).

<sup>98</sup> *Turner v. Judah*, 286 P.2d 317, 321 (N.M. 1955); *see also* *McCreery v. Burnsmier*, 127 N.E. 171, 174 (Ill. 1920) (explaining why votes cast for John Jones, who was not running, but was otherwise eligible for office, could not be counted as being cast for James Jones, who was a write-in candidate); *Meyer*, 846 P.2d 862 (finding votes listing an incorrect initial or first name are invalid and may not be counted).

<sup>99</sup> *Dayhoff v. Weaver*, 808 A.2d 1002, 1011 (Pa. Commw. Ct. 2002) (stating voter intent, when found, should not be defeated because the voter misspelled the name, wrote the wrong initials, or by another or slight variant name with the same or similar pronunciation rather than that of the intended candidate); *see also* *Devine v. Wonderlich*, 268 N.W.2d 620, 628 (Iowa 1978).

violate mandatory election requirements.<sup>100</sup> In some instances, even violations of mandatory requirements are excused, such as when the court found that election officials' failure to inform voters how to cast a valid write-in vote meant that votes that did not include the candidate's full name were valid.<sup>101</sup>

The following candidate name-related mistakes are among the most common ones write-in voters make:

- listing only the candidate's surname,
- using an incorrect first name or initials, or
- misspelling the candidate's name.

### (1) *Listing Surname Only*

Write-in votes that list only a candidate's surname are particularly challenging because of the difficulty in determining which individual with the particular last name the voter intended to select. Under these circumstances, some courts count surname-only write-in votes only when no other candidate for the same office or on the same ballot has the same surname,<sup>102</sup> while other courts consider how common the last name is in the community and how much publicity the write-in candidacy received.<sup>103</sup>

A more restrictive approach counts surname-only write-in votes only when no other individual within the same community with that surname was eligible to hold the office, even if the other individuals were not running for office.<sup>104</sup> Finally, state statutes may prevent a court from awarding write-in votes where only the candidate's surname is listed.<sup>105</sup>

### (2) *Incorrect First Name or Initials*

Courts may not be able to sufficiently ascertain the voter's intent to allow the vote to be counted when the write-in vote lists a wrong name or incorrect initials.<sup>106</sup> The candidate's initials are generally not required to validate a write-in vote, but they may become important. When the candidate's first name is omitted, the candidate's correct initials may save the vote and allow it to be counted. Likewise, if the candidate's name is otherwise correctly listed, an incorrect middle initial will generally not invalidate the ballot as long as no one with a corresponding

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<sup>100</sup> *Devine*, 268 N.W.2d at 623 (citation omitted).

<sup>101</sup> *Meyer*, 846 P.2d at 873.

<sup>102</sup> *Dayhoff*, 808 A.2d 1002.

<sup>103</sup> *Devine*, 268 N.W.2d 620 (allowing surname only votes to be counted for the candidate after determining that 1) the write-in candidacy was well-publicized, 2) the other individuals in the community with the same last name were all related to the candidate, and 3) none of the other individuals with the same last name were candidates for the disputed office or any other office).

<sup>104</sup> See *Turner v. Judah*, 286 P.2d 317 (N.M. 1955).

<sup>105</sup> *Paulsen v. Heustis*, 2000 MT 280, 302 Mont. 157, 13 P.3d 931 (2000).

<sup>106</sup> *Devine*, 268 N.W.2d at 628 (noting spelling variations were not similar to the candidate's real name or any known nicknames).

first name and initial lives in the election district.<sup>107</sup> When the write-in candidate shares a first name or initial and last name, but not a middle initial, with others in the community, the write-in vote may not be counted for the candidate if the voter did not include the candidate's correct middle initial because the otherwise perfect ballots are the exclusive evidence of the voter's intent.<sup>108</sup> One court applied this rule to determine that votes cast for J. A. and J. R. McCreery, individuals who were eligible for the elective office although they were not candidates, could not be counted for J. E. McCreery.<sup>109</sup>

Write-in voters sometimes list a last name that corresponds to the candidate's last name, but list a first name that does not. If the entire name corresponds to an individual who lives in the election district and is otherwise eligible for the office, it generally may not be counted for the candidate.<sup>110</sup> Extrinsic evidence, such as voter testimony, is generally inapplicable because the ballot is facially unambiguous.<sup>111</sup>

Write-in votes are commonly not counted for the candidate if spelling variations are not similar to the candidate's real name or to any of the candidate's known nicknames.<sup>112</sup> For example, in an election where Peggy Lamm was running as a write-in candidate, the court did not count votes cast for Dottie, Nancy, Patti, Pelly, Paula, Pat, or Pam Lamm.<sup>113</sup> Likewise, although the court admitted it suspected that voters intended to vote for write-in candidate Francis P. Devine, the court did not count votes cast for Dan Devine, Dan P. Devine, Jim Devine, P. Devine, Francis Levine, or Frances D. Levine because it was not persuaded the voters' adequately indicated their intent.<sup>114</sup>

### (3) Misspellings

The common law doctrine of *idem sonans*—or “sounds the same”—permits courts to count votes for write-in candidates when the voter's misspelling sufficiently approximates the spelling or pronunciation of the candidate's actual name.<sup>115</sup> Courts must sometimes analyze contested write-in votes to determine if *idem sonans* applies.<sup>116</sup> In one case, a court found *idem sonans* applicable and validated votes cast for “Telix Leleu” when the candidate's name was actually

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<sup>107</sup> See *McCreery v. Burnsmier*, 127 N.E. 171 (Ill. 1920).

<sup>108</sup> *Id.* at 174-75.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* (noting in an illustration that a write-in vote for John Jones, which corresponded to an individual living in the electoral district, could not be counted for James Jones, who was the candidate).

<sup>111</sup> *Id.*

<sup>112</sup> *Devine v. Wonderlich*, 268 N.W.2d 620 (Iowa 1978). *But see In re Jeffery*, 23 Misc.2d 707 (Oneida County Ct. N.Y. 1960) (holding although one candidate, whose name was Howard Chappell, had a nickname of “Pat,” a write-in vote for “Pat Chappell” would not be counted for him because Pat is not a recognized nickname for Howard).

<sup>113</sup> *Meyer v. Lamm*, 846 P.2d 862 (Colo. 1993) (en banc).

<sup>114</sup> *Devine*, 268 N.W.2d 620.

<sup>115</sup> *McCreery v. Burnsmier*, 127 N.E. 171, 174 (Ill. 1920).

<sup>116</sup> *Id.* (finding *idem sonans* inapplicable where the write-in name and the candidate's name “do not closely resemble each other in appearance when written, or in sound when pronounced.”). *See also In re Jeffery*, 23 Misc.2d 707 (Oneida County Ct. N.Y. 1960) (extensive analysis of write-in votes to determine which ones are valid, ultimately accepting misspellings of the last name).

Felix Leleu.<sup>117</sup> In another case, however, the court found *idem sonans* unavailable to allow a vote cast for “J. McMagr” to be attributed to candidate James McCreery because the write-in name neither looked nor sounded like the candidate’s name.<sup>118</sup>

#### b. Write-in Candidate’s Name was Imperfectly Placed or Incorrectly Marked

Courts are sometimes called upon to determine whether write-in votes are valid based on their placement on the ballot location or because the written-in name was not subsequently marked to indicate a vote.

In resolving ballot placement challenges, the *majority rule* counts write-in votes when the candidate’s name is placed close enough to the designated write-in space to demonstrate the voter’s intent.<sup>119</sup> The *minority rule* requires strict statutory compliance with a state write-in vote placement statute before the vote is considered validly cast for the listed candidate.

One court following the majority rule found that a write-in sticker<sup>120</sup> placed near, but not in, the space designated for write-in votes was validly cast for the write-in candidate.<sup>121</sup> The court referenced other courts that validated votes when the misplaced sticker:<sup>122</sup>

- was placed under rather than beside the name of the office,
- covered up printed material,
- was too wide for the space provided,
- was placed upside down, and
- extended over the ballot’s edge.<sup>123</sup>

Another majority rule court upheld the electoral board’s flexible application of a “use space provided” instruction to voters to uphold as valid write-in votes placed near the name of the office for which the candidate was running.<sup>124</sup> An important consideration was that the space provided was too small for many voters to use.<sup>125</sup>

<sup>117</sup> *McCreery*, 127 N.E. 171 (noting that no one named “Telix Leleu” lived in the village or neighborhood).

<sup>118</sup> *Id.*

<sup>119</sup> *Devine*, 268 N.W.2d at 626; see also *Dayhoff v. Weaver*, 808 A.2d 1002 (Pa. Commw. Ct. 2002) (considering the appropriate placement of write-in votes, whether the name plus a mark were both necessary to cast valid write-in vote, and how misspellings and initials would be counted in deciding a challenge of the tie-breaking lottery by the loser).

<sup>120</sup> To ensure their names are properly spelled, write-in candidates sometimes provide stickers to voters. While a sticker may ensure proper spelling, voters are sometimes take a haphazard approach to placing the sticker on the ballot, thus giving rise to some court challenges.

<sup>121</sup> *Devine*, 268 N.W.2d 620.

<sup>122</sup> To avoid their names being misspelled and to make write-in votes easier, write-in candidates sometimes supply their supporters with stickers (or “pasters”) that the voter affixes to the ballot. Stickers obviously require a hardcopy ballot for tabulating.

<sup>123</sup> *Devine*, 268 N.W.2d 620.

<sup>124</sup> *Dayhoff v. Weaver*, 808 A.2d 1002 (Pa. Commw. Ct. 2002).

<sup>125</sup> *Id.*

Minority rule jurisdictions require strict statutory compliance with write-in vote placement statutes before validating the votes. In these states, write-in votes have not been counted when the misplaced sticker:

- was in the wrong column,
- was under the wrong office, or
- covered up the opposing candidate's name.<sup>126</sup>

Another minority rule court held that a write-in vote was correctly excluded when it was written-in upside down because the required cross then appeared on the left side rather than on the right as statutes required.<sup>127</sup>

In any jurisdiction, the correct placement of the write-in candidate's name becomes more important when more than one office is on the ballot because a random placement may only demonstrate an intent to vote for the candidate for *some* office and fail to demonstrate to a reasonable certainty the voter's intent to vote for the candidate for the candidate's preferred office.<sup>128</sup> The court may be unable to validate the vote under these circumstances because the voter's intent cannot be reasonably ascertained and it is the voter's intent—and not the candidate's intent—that controls how the vote should be counted.<sup>129</sup> A voter's incorrect identification of the write-in candidate's party affiliation is generally not fatal to the write-in vote, however, because a mistake about the candidate's party affiliation is not a mistake about the candidate's identity.<sup>130</sup>

Finally, courts may be asked to determine if write-in statutes require the voter to both write-in the candidate's name and place a vote mark next to it, or if the written-in name is sufficient to validate the vote without any additional markings. Under these circumstances, a write-in vote's validity may depend on whether the vote is manually or machine tabulated because the controlling statutes may vary based on the type of ballot and tabulation method. For example, in addition to listing the candidate's name, valid machine-tabulated write-in votes may need to be separately marked so the vote tabulating machinery will read them, while manually-tabulated votes may be counted as valid without additional markings.<sup>131</sup>

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<sup>126</sup> *Id.*

<sup>127</sup> *McCreery v. Burnsmier*, 127 N.E. 171 (Ill. 1920).

<sup>128</sup> *Meyer v. Lamm*, 846 P.2d 862, 878 (Colo. 1993) (en banc) (detailing other state cases that discuss how to count votes).

<sup>129</sup> See *Nagel v. Kindy*, 591 N.E.2d 516 (Ill. App. Ct. 1992) (holding vote could not be counted when voter only listed the candidate's name and did not indicate whether the voter preferred the candidate for the 2-year or 4-year term of office; the candidate's choice of term of office did not control because the voter's intent, and not the candidate's, controlled).

<sup>130</sup> *Devine v. Wonderlich*, 268 N.W.2d 620, 629 (Iowa 1978) (stating the candidate's identity and preferred office was clear because the candidate's name was written in under two party labels).

<sup>131</sup> *Dayhoff v. Weaver*, 808 A.2d 1002 (Pa. Commw. Ct. 2002).

## D. ELECTION ADMINISTRATION FAILURES

In addition to contests based on individual votes or vote categories, courts hear election contests that allege election administration failures. State statutes may authorize election contests based on election officials' errors, malconduct, or misconduct, as exhibited by their alleged failure to follow affirmative statutory requirements—such as swearing in all poll workers—turning away qualified electors, or rejecting qualified voters' ballots. In general, election officials' failure to precisely follow every election regulation is not, by itself, malconduct,<sup>132</sup> unless they fail to follow affirmative statutory requirements.<sup>133</sup> Courts may be called upon to determine if non-conforming ballots resulting from an official's error can be counted, or if errors attributable to election officials necessitate voiding the election.<sup>134</sup>

Irregularities committed by election officials that do taint the election or result in a failure to complete statutory pre-election duties are less likely to result in voided votes than irregularities committed by voters. This policy is expressed as "ignorance, inadvertence, mistake, or even intentional wrong on the part of election officials will not be permitted to disenfranchise voters."<sup>135</sup> Courts adopt this approach because they do not want to require electors to police election officials' actions to ensure the latter do not compromise the vote.<sup>136</sup>

In general, when election officials fail to comply with election codes, the statutes are evaluated as directory<sup>137</sup> unless the officials' committed fraud,<sup>138</sup> the statute expressly declares noncompliance fatal, or the noncompliance changed or muddied the result.<sup>139</sup>

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<sup>132</sup> *Noble v. Ada County Elections Bd.*, 20 P.3d 679, 687 (Idaho 2000).

<sup>133</sup> See *Johnson v. Tanka*, 154 N.W.2d 185, 187 (Minn. 1967). Here, election officials dealt with more votes than voters by randomly withdrawing ballots equal to the excess cast rather than following statutory provisions requiring them to first remove any non-conforming ballots. When election officials proceeded as both the statute and the court required, a different candidate won. See also *In re the 1984 Gen. Election Office Council Township Maple Shade, County Burlington*, 497 A.2d 577, 590 (Super. Ct. N.J. Law Div. 1985).

<sup>134</sup> *In re the General Election of November 5, 1991 for Office of Township of Maplewood, Essex County*, 744, 605 A.2d 1164, 1191 (N.J. Super. Ct. Law Div. 1992) (setting aside the election due to "commissions and omissions of the officials, non-officials and others who acted or failed to act" that colored the election).

<sup>135</sup> *Pullen v. Mulligan*, 561 N.E.2d 585, 607 (Ill. 1990) (citation omitted) (finding whether a ballot marked with the wrong precinct number was to be counted or discarded depended on whether the voter erred by voting in the wrong precinct, in which case the vote would be discarded because it implicated the voter's qualifications to vote, or whether the election officials mistakenly provided an incorrectly labeled ballot, in which case the ballot would be counted and no effect would be given to the precinct label as it was an honest mistake of the election officials); see also *Gracey v. Grosse Pointe Farms Clerk*, 452 N.W.2d 471, 478 (Mich. Ct. App. 1989) (stating voters should not suffer by their agent's default). See also *In re Durkin*, 700 N.E.2d 1089, 1093 (Ill. App. Ct. 1998) ("[The] equitable principle of disenfranchisement avoidance" means that absentee ballots cast by applicants who indicated they need to vote absentee because of a physical infirmity but who did not list the specific physical infirmity as required by law were valid and would be counted when the absentee ballot application neither instructed the applicants to list their infirmity nor provided a space for them to do so.).

<sup>136</sup> *Pullen*, 561 N.E.2d 585.

<sup>137</sup> See *infra*, Section III(B), this chapter, for additional information on the distinction between mandatory and directory statutory construction.

While voters may disenfranchise themselves by failing to follow election statutes applicable to them,<sup>140</sup> their compliance with personally applicable statutes generally inoculates their votes from being voided because of election officials' actions or omissions.<sup>141</sup> Election officials' errors will nonetheless disenfranchise voters if the voter had the opportunity to notice and correct the officials' errors, yet failed to do so. For example, one court invalidated votes cast in-precinct because election officials failed to initial them, but did not invalidate absentee ballots although those, too, were uninitialled.<sup>142</sup> The court justified this result because the in-precinct voters had the opportunity to notice that their ballots lacked initials and could have requested them, but absentee voters lacked this opportunity because their ballots should have been initialed only after the voters completed and returned them.<sup>143</sup>

If election officials' failure to abide by election code requirements intended to safeguard the election's integrity results in compromised ballot secrecy, voter disenfranchisement, or fraud, then the affected votes may be invalidated, even if voters were unaware of the officials' wrongdoing. For example, election officials' (1) failure to provide voters with a private place to mark their ballots, and (2) use of an expressly prohibited method to forward the ballots to the election board, meant that the seventy-nine paper ballots cast after the sole voting machine broke were invalid.<sup>144</sup>

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<sup>138</sup> *Fitzgerald v. Morlock*, 120 N.W.2d 339, 345 (Minn. 1963).

<sup>139</sup> *Att'y Gen. ex rel. Miller v. Miller*, 253 N.W. 241, 243 (Mich. 1934); *Pyron v. Joiner*, 381 So.2d 627, 629 (Miss. 1980) (en banc) (quoting authorities that stated that elections held at the proper time and place and under the supervision of competent persons will not be overturned for irregularities in the manner the election was conducted unless the contestant proves that legal votes were rejected, illegal votes were allowed, or a combination in a number sufficient to change the results or render them uncertain). Note that election officials' who fail to follow directory election code provisions can still be punished. *Id.*

<sup>140</sup> *Fitzgerald*, 120 N.W.2d at 345.

<sup>141</sup> *Id.*; see also *McCavitt v. Registrars of Voters of Brockton*, 434 N.E.2d 620, 626 (Mass. 1982) ("A voter who has cast his ballot in good faith should not be disenfranchised 'because of the failure of a ministerial officer to perform some duty imposed upon him by law.'" (citation omitted); *Hester v. Kamykoski*, 150 N.E.2d 196, 199-200 (conditioning that outcome on the ability to determine the voter's intent, no voter disenfranchisement, no fraud, and ballot secrecy was upheld because of a concern that "[i]rregularities invite and conceal fraud").

<sup>142</sup> *McDunn v. Williams*, 620 N.E.2d 385 (Ill. 1993).

<sup>143</sup> *Id.*

<sup>144</sup> *In re the 1984 General Election Office Council Township Maple Shade, County Burlington*, 497 A.2d 577, 591 (N.J. Super. Ct. Law Div. 1985). After the voting machine broke and the truck carrying the replacement broke down, the poll workers began issuing the emergency paper ballot supply. State statutes required voters to vote in secret and screened from others' observation or be guilty of a misdemeanor carrying fines and jail time, an environment the polling place could not provide. State statutes also required paper ballots to be cast into a ballot box but, as the polling place was without a ballot box, poll workers placed them in the prohibited envelope instead.

## 1. Voter Disenfranchisement by Election Officials' Actions

Demonstrated instances of voter disenfranchisement can support a court's decision to void an election for unfairness,<sup>145</sup> sometimes even if the disenfranchisement did not affect the results.<sup>146</sup> Courts generally use a totality of the circumstances review to determine if the election officials' failures led to a doubtful outcome.<sup>147</sup> The election may be upheld if under the totality of the circumstances the actions were excused.

## 2. Election Officials' Compliance with Absentee Ballot Statutes

Contestants sometimes challenge election officials' actions involving absentee ballots. They may allege that officials erroneously supplied absentee ballots, improperly changed the rules governing absentee ballots, improperly rejected valid absentee ballots, or failed to comply with other governing statutes.

The specific circumstance underlying the absentee ballot violation may play an important role in determining the appropriate remedy. For example, although election officials violated state law in issuing absentee ballots for a primary election, the court held that absentee voters' constitutional rights were violated when officials voided the absentee ballots rather than the entire election.<sup>148</sup> Voiding only the absentee ballots disenfranchised those absentee voters who could have and would have voted in-person on election day had the state not enticed them to vote absentee instead.<sup>149</sup>

A post-election change in absentee ballot vote canvassing policies can violate the constitutional rights of other voters and disenfranchise some non-voters as well. For example, election officials who implemented a new and previously unannounced policy that counted, rather than invalidated, absentee ballots that did not comply with statutory notarization and attestation requirements, diluted the votes of lawful and compliant voters and disenfranchised non-voters who would have voted by absentee ballot if they had known the stringent requirements would not be enforced.<sup>150</sup> Neither an equal protection nor a due process violation occurs, however, when the majority of the non-compliant absentee ballots are not counted, even if a few of them were counted in error.<sup>151</sup>

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<sup>145</sup> *Ury v. Santee*, 303 F. Supp. 119 (N.D. Ill. 1969) (finding the officials' intentional reduction in the number of available precincts from thirty-two to six even though turnout was expected to be greater than usual amounted to an Equal Protection violation).

<sup>146</sup> See *McNally v. Tollander*, 302 N.W.2d 440 (Wis. 1981) (voiding an election over whether the county seat should be moved because 40% of voters were disenfranchised even though the results would not have changed if all the disenfranchised voters had voted against the measure).

<sup>147</sup> *In re the 1984 General Election Office Council Township Maple Shade, County Burlington*, 497 A.2d 577, 592 (N.J. Super. Ct. Law Div. 1985).

<sup>148</sup> *Griffin v. Burns*, 570 F.2d 1065 (1<sup>st</sup> Cir. 1978).

<sup>149</sup> *Id.*

<sup>150</sup> *Roe v. State of Alabama*, 43 F.3d 574, 581 (11<sup>th</sup> Cir. 1995) [hereinafter *Roe I*].

<sup>151</sup> *Roe v. State of Alabama*, 68 F.3d 404, 407-08 (11<sup>th</sup> Cir. 1995) (per curiam) [hereinafter *Roe III*].

Election officials' actions in rejecting absentee ballots are sometimes the focus of an election challenge. Election officials' rejections of absentee ballots are presumptively valid when the rejection substantially complies with governing procedures. For example, officials' rejection of absentee ballots that were segregated in an envelope reserved for challenged ballots rather than individually marked as "rejected" as required by statute was valid because the officials substantially complied with statutory requirements.<sup>152</sup>

### 3. Vote Tabulation or Voting Machine-related Challenges

Courts sometimes hear allegations that voting equipment-related irregularities and problems affected an election. The three primary categories of voting machine-related claims that arise during election contests are as follows:

- *voter disenfranchisement* occurred because of malfunctioning or an inadequate supply of voting machines,
- *voting equipment problems* resulted in lost or switched votes, or
- *others' interactions with the voting machines* led to problems.

#### a. Voter Disenfranchisement

Contestants sometimes allege that an inadequate number of polling stations or malfunctioning voting equipment directly or indirectly disenfranchised voters, which in turn lead to the election's changed or uncertain outcome. Direct voter disenfranchisement is alleged to occur when the voting equipment broke or malfunctioned. Indirect disenfranchisement is alleged to occur when the long lines that developed as a result of too few voting stations or broken voting equipment dissuaded prospective voters from voting because they could not or did not want to wait.

Although lengthy waits may discourage voters and dampen their enthusiasm, in general, lengthy waits by themselves do not equate to voter disenfranchisement.<sup>153</sup> Instead, voter disenfranchisement occurs when, after waiting in line, the voter is actually denied the opportunity to vote.<sup>154</sup> Thus disenfranchisement is measured as a complete inability to vote for some time, and not merely a slow moving voting line.

Under a "totality of the circumstances" approach, however, different facts may support voter disenfranchisement. For example, one court voided an election to move a county seat because forty percent of the voters were disenfranchised, even though the election's outcome would not have changed had all of them voted for the losing side.<sup>155</sup> Another court found that legal votes

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<sup>152</sup> Huber v. Reznick, 437 N.E.2d 828, 837 (Ill. App. 1982).

<sup>153</sup> See D'Amico v. Mullen, 351 A.2d 101, 103 (R.I. 1976); see also *In re the 1984 Gen. Election Office Council Township Maple Shade, County Burlington*, 497 A.2d 577, 595 (N.J. Super. Ct. Law Div. 1985) (noting that voter who fails to vote because "instant access" to a polling booth is not available cannot claim to have had his vote rejected under state statute).

<sup>154</sup> See *D'Amico*, 351 A.2d at 103.

<sup>155</sup> McNally v. Tollander, 302 N.W.2d 440 (Wis. 1981) (finding the election unfair even though the disenfranchisement did not affect the results).

were rejected (that is, the voters were disenfranchised) when a comedy of errors left the polling place's sole voting machine unavailable for more than three hours, during which time more than fourteen voters—a number sufficient to change the election's outcome—left the polls without voting.<sup>156</sup> In this case, the court considered that the prospective voters who left the polls had no alternative means of voting and received no information on when the voting machine would be working again.<sup>157</sup> Because the voter disenfranchisement was limited to a specific voting district, the court voided the election only in that district and ordered a new election in it.<sup>158</sup>

#### b. Voting Equipment Problems

Some contestants allege that voting equipment breakdowns or malfunctions affected the election's outcome by changing the results or leaving the true winner unknowable.<sup>159</sup> Unless special election code provisions govern election contests premised on voting equipment failures, courts usually evaluate these claims under the same standards the state election code sets for other claims that an irregularity or impropriety affected the outcome or rendered the election's results uncertain.<sup>160</sup>

Because case law develops over time and governing statutes do not always keep pace with changes in voting technology, judges hearing election contests premised on malfunctioning or broken voting equipment must sometimes struggle to apply rules developed for previous generations of voting methods.

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<sup>156</sup> See *In re the 1984 General Election Office Council Township Maple Shade, County Burlington*, 497 A.2d 577 (N.J. Super. Ct. Law Div. 1985). Not only did the single voting machine break, but initial attempts to fix it were unsuccessful; a truck carrying a replacement machine broke down; voters were not advised that paper ballots were available until the machine had been broken for forty minutes; once paper ballots were offered, the scant supply of emergency paper ballots was quickly exhausted; and, a courier bringing replacements paper ballots got lost, leaving no means to vote for an hour. *In re the 1984 General Election Office Council Township Maple Shade, County Burlington*, 497 A.2d 577, 589 (N.J. Super. Ct. Law Div. 1985). As noted above, the votes cast on the emergency paper ballots were invalid for failure to follow statutory requirements for voter privacy and because they were transmitted to county election officials in an envelope, which was prohibited.

<sup>157</sup> *In re the 1984 Gen. Election Office Council Township Maple Shade, County Burlington*, 497 A.2d 577, 592 (N.J. Super. Ct. Law Div. 1985).

<sup>158</sup> *Id.* at 592-93.

<sup>159</sup> See *Duncan v. County Court of Cabell County*, 75 S.E.2d 97 (W.Va. 1953) (voting machine failure meant votes not recorded for one candidate, a circumstance not discovered until one hundred voters had voted, some of whom said they had intended to vote for this candidate).

<sup>160</sup> See *In re the General Election of November 5, 1991 for Office of Township of Maplewood, Essex County*, 605 A.2d 1164, 1190 (N.J. Super. Ct. Law Div. 1992) (noting that a "cloud hangs" over the election due to equipment malfunctions but that preponderance of the evidence did not demonstrate that votes were actually lost).

### c. Others' Interactions With the Voting Machines

Election contests sometimes allege that voting officials' or third parties' actions or omissions created voting equipment problems, such as improperly programmed voting machines, and the possibility of tampering. Contestants may allege that ballots were improperly programmed leading to undervotes or votes mistakenly cast for a candidate the voter did not prefer. Procedures election workers follow have a significant impact on the security of elections conducted on electronic voting machines.<sup>161</sup> Tampering with voting equipment can change the election's outcome.<sup>162</sup> Even minor changes in a voting machine's software can potentially simplify and magnify election fraud.<sup>163</sup>

Courts may also hear election contests that claim that sloppy or inadequate back up procedures implemented when the voting equipment malfunctioned injected irregularities into the election. In states that require election officials to provide paper ballots to voters when voting machines break, malfunction, or the precinct loses power, officials' failure to provide them can result in a claim of voter disenfranchisement. In general, unless the failure to provide paper ballots had a demonstrated impact or possible impact on the election, as would occur if more voters were unable to vote than the eventual margin of victory, this failure by itself provides insufficient grounds to void the election or declare a new winner.<sup>164</sup>

Rather than file an election contest,<sup>165</sup> a losing school board candidate filed an ultimately successful lawsuit seeking to void an election because of election officials' "constructive fraud."<sup>166</sup> In the election at issue, one of the two voting machines in use tabulated only 9 votes for the contestant and 172 for the contestee, although the public vote counter indicated 432 votes had been cast.<sup>167</sup> The constructive fraud, which the court found sufficient to meet statutory requirements, was election officials' breach of their legal duty to provide voting machines that would properly tabulate the results with a reasonable degree of certainty as evidenced by the fact that more than 50% of the votes cast on one machine and 25% of the votes in the precinct as a whole were unallocated.<sup>168</sup>

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<sup>161</sup> Ted Selker, *Fixing the Vote*, SCI. AM., October 2004, at 90, available at

<http://www.sciam.com/article.cfm?articleID=00018DD5-73E7-1151-B57F83414B7F0000&sc=I100322>.

<sup>162</sup> See Anthony Di Franco, Andrew Petro, Emmett Shear & Vladimir Vladimirov, *Small Vote Manipulations Can Swing Elections*, 47 COMMUNICATIONS OF THE ACM 43 (2004) (finding that manipulating one vote per voting machine would have changed the outcome of the 2000 presidential election).

<sup>163</sup> *Id.*

<sup>164</sup> *Ginsberg v. Heffernan*, 60 N.Y.S.2d 875, 881-82 (N.Y. Sup. Ct. 1945) (finding no voter disenfranchisement when paper ballots were not used after the voting machine broke because no evidence was presented that any voter had requested one); *Files v. Hill*, 594 S.W.2d 836, 838 (Ark. 1980), (finding irregularities not sufficient to change election outcome where voter denied paper ballot when he requested one because the voting machine was not set up to record a write-in vote).

<sup>165</sup> State statutes in effect at that time did not allow the court to hear and decide election contests.

<sup>166</sup> *Wood v. Kirby*, 566 S.W.2d 751 (Ky. 1978).

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

## E. CANDIDATE ISSUES

Contestants sometimes challenge the election's outcome based on irregularities surrounding a fellow—usually winning—candidate. In these instances, the contestant may seek to disqualify the winner or void the winner's votes, and ask that the court name the contestant the true winner. In general, legal challenges to a candidate's eligibility for office should be brought before the election. The failure to do so can foreclose an election contest based on the winner's purported ineligibility<sup>169</sup> unless the state's contest statutes explicitly authorize those grounds. Some states, however, consider candidate eligibility requirements to be ongoing and will allow contests on those grounds. Courts also hear election contests that dispute whether votes cast for a deceased, withdrawn, or disqualified candidate should be counted. Finally, a court may need to determine if an election contest or contest appeal survives the death of one of the parties.

### 1. Candidacy Qualification Challenges

Challenges to a candidacy generally must be filed pre-election or the opportunity to do so may be lost, waived or barred by laches.<sup>170</sup> Contestants sometimes base their challenges on a fellow candidate's supposed ineligibility. The alleged ineligibility may be the winner's failure to meet personal qualifications, such as age, residency, or qualified elector status,<sup>171</sup> or they may be based on alleged problems with the candidate's nomination.

States vary in whether alleged candidacy defects are grounds for election contests. In some states, a candidate who won in a full, fair, and free election will not be kept from office because of defects in the candidate's candidacy papers,<sup>172</sup> but in states that consider a candidate's eligibility to be an ongoing process, challenges to a candidate's eligibility may be filed after the election.<sup>173</sup> Post-election eligibility challenges reflect a policy preference for only allowing eligible individuals to hold office.

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<sup>169</sup> See *Tate v. Morley*, 153 S.E.2d 437 (Ga. 1967) (holding post-election challenge to a candidate's certificate of nomination failed to state a claim upon which relief could be granted); *Thurston v. State Board of Elections*, 392 N.E.2d 1349 (Ill. 1979) (holding objections to the now-victorious candidate's nomination should have been filed pre-election because the general election acted to "dissolve" them).

<sup>170</sup> Even if an election contest is unavailable to them, a challenger may be able to pursue a *quo warranto* action in which the office holder is ousted as a usurper.

<sup>171</sup> *Freund v. Hastie*, 537 P.2d 804 (Wash. Ct. App. 1975) (holding winning candidate was ineligible for office because he was not a qualified elector).

<sup>172</sup> See *Tate v. Morley*, 153 S.E.2d 437 (Ga. 1967) (defective certificate of nomination).

<sup>173</sup> *Freund*, 537 P.2d 804 (finding that laches did not bar a post-election challenge to a candidate's eligibility because the state considered candidacy qualifications to be continuing requirements, thus challenges were not limited to before the election).

## 2. Legal Effect of Votes Cast for a Dead, Withdrawn, or Disqualified Candidate

A candidate's name may appear on the ballot even though the candidate died,<sup>174</sup> withdrew,<sup>175</sup> or was disqualified before the election. This circumstance may occur because state statutes do not allow the removal of the candidate's name from the ballot<sup>176</sup> or because deadlines for doing so have passed.<sup>177</sup> In addition, candidates occasionally die on election day<sup>178</sup> or after the votes have been counted but before the results have been certified. If the votes received by the now ineligible candidate could affect the election's outcome,<sup>179</sup> the candidate who finished second to a deceased winner may sue to be declared the winner.<sup>180</sup>

State election statutes may specify the legal effect to give to votes cast for a candidate who was no longer eligible for office.<sup>181</sup> In some instances, state statutes do not address every possible scenario under every type of voting method in use. In these cases, the court may need to determine if it can borrow statutory language from one part of the election code and apply it to another. For example, one court decided that statutory language that directed paper ballots "marked" for dead, withdrawn, or disqualified candidates not be counted applied equally to

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<sup>174</sup> *Tellez v. Super. Ct. in and for County of Pima*, 450 P.2d 106 (Ariz. 1969) (victorious candidate died two-and-a-half weeks before the election); *Evans v. State Election Bd. of State of Okla.*, 804 P.2d 1125 (Okla. 1991) (candidate who died three months before the election nonetheless received 90% of the vote)

<sup>175</sup> In the 2006 election, former-Congressman Tom DeLay's name appeared on the ballot although he withdrew his candidacy. See Jonathan Weisman, *Ruling Keeps DeLay on Ballot; Judge Sides With Democrats, Says Former Lawmaker Can't Quit*, WASHINGTON POST, July 7, 2006, at A5.

<sup>176</sup> See e.g., *Dead Candidate Shakes Up Oklahoma's U.S. Senate Race*, CNN.COM, (Sept. 11, 1998), <http://www.cnn.com/ALLPOLITICS/1998/09/11/ap/dead.candidate.ap/> (discussing situation where state statute permitted candidates to withdraw after the primary, but that was impossible here because only the candidate him or herself may file to withdraw and the candidate here died shortly after filing her candidacy papers and noting that the legislature made no provisions in its substitution code for this situation). Note that normally a candidate can withdraw from a race after the primary.

<sup>177</sup> See e.g., Weisman, *supra* note 175.

<sup>178</sup> *Barber v. Edgar*, 294 A.2d 453 (Me. 1972) (winning candidate died at noon on election day).

<sup>179</sup> The ineligible candidate does not always have to win to affect the election's outcome. In *Jones v. Norris*, 421 S.E.2d 706 (Ga. 1992), one candidate withdrew from the school superintendent election two weeks before the primary, which was too close to the election to reprint the ballots. Although he received fewer votes than the other two candidates, no candidate received a majority of the total votes cast. Because election to office required a majority of the votes cast, the legal effect given to the votes cast for the withdrawn candidate would determine if a run-off election was necessary. In this case, the court decided the votes cast for the withdrawn candidate should not count.

<sup>180</sup> See *Tellez v. Super. Ct. in and for County of Pima*, 450 P.2d 106 (Ariz. 1969) (claiming the dead winner was ineligible for office because he was no longer a "person"); *Evans v. State Election Bd. of State of Okla.*, 804 P.2d 1125 (Okla. 1991) (claiming dead candidate no longer satisfied the "qualified elector" candidacy requirement as demonstrated by the fact his name had been removed from the voter registration list upon his death).

<sup>181</sup> See *Bates v. District of Columbia Board of Elections and Ethics*, 625 A.2d 891 (D.C. 1993) (finding that the state statute requires the candidate with the most legal votes to be certified the winner, even if she is no longer eligible to hold office, operates to deny election to the second place finisher and results in the vacancy filled by a special election). See also *Evans*, 804 P.2d at 1127 (noting that the statutory requirements for candidacy, which the now deceased candidate met, were separate from the his ability to take office after his victory).

cardboard ballots “marked” by a voting machine for such candidates even though the voter recorder statutes were silent on the matter.<sup>182</sup>

If state statutes do not indicate the legal effect of ballots cast for a now ineligible candidate, case law may establish a precedent. The legal effect of votes cast for a deceased, withdrawn, or ineligible candidate is dictated by one of two competing philosophies: the majority, or American Rule, and the minority, or English Rule.<sup>183</sup>

The *American Rule* counts votes cast for dead, disqualified, or withdrawn candidates to determine if the living candidate with the most votes received enough votes—the majority or plurality, depending on the jurisdiction—to be declared the winner. Under the American Rule, votes cast for a dead, disqualified, or withdrawn candidate are considered affirmative votes for leaving the office vacant and filling the vacancy as statutes direct rather than allowing the second place finisher to take office,<sup>184</sup> regardless of whether the voter knew his chosen candidate was dead or ineligible. In American Rule jurisdictions, the votes received by the dead or ineligible candidate are ineffective to elect the candidate to office, but are effective to prevent the election of a candidate who received fewer votes.<sup>185</sup> Thus, if the dead or ineligible candidate receives the most votes, the office is vacant and filled as statutes direct.<sup>186</sup>

A substantial minority of jurisdictions follow the *English Rule*, which treats votes cast for known dead or withdrawn candidates as nullities because of the candidate’s ineligibility. The null votes affect the election’s outcome only if they were intentionally cast as protest votes.<sup>187</sup> Otherwise, they are treated as if the voter deliberately threw them away.<sup>188</sup> In English rule jurisdictions, courts must consider the voter’s intent in casting a vote for a dead or withdrawn candidate before deciding if the vote should count as a vote for the dead or withdrawn candidate or not.

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<sup>182</sup> Jones v. Norris, 421 S.E.2d 706 (Ga. 1992).

<sup>183</sup> See *Tellez*, 450 P.2d 106 (overturning trial court’s use of the English rule in favor of the American rule and declares a vacancy in the office).

<sup>184</sup> *Evans*, 804 P.2d at 1129. See also *Highton v. Musto*, 452 A.2d 487 (N.J. 1982) (holding votes cast for an ineligible candidate denied victory to the next highest vote getter and office would remain vacant until a special election could be held to fill it).

<sup>185</sup> *Highton*, 452 A.2d 487.

<sup>186</sup> See *Evans*, 804 P.2d at 1129; *Highton*, 452 A.2d at 492 (finding office is vacant until a special election is held); *Barber v. Edgar*, 294 A.2d 453 (Me. 1972) (holding death of primary election winner means the political party gets to select its general election nominee); *Tellez*, 450 P.2d 106 (overruling the trial court’s use of the English Rule in favor of the American Rule, therefore the second place finisher was not elevated to victor status; instead, the political party could designate a nominee for the general election because the primary winner was ineligible).

<sup>187</sup> Washington Attorney General Opinion 5 (June 21, 1999), available at <http://64.233.167.104/search?q=cache:GXKWsDUbjrAJ:atg.wa.gov/opinion.aspx%3Fsection%3Darchive%26id%3D9224+%22attorney+general%22+washington+dead+candidate+votes&hl=en&ct=clnk&cd=1&gl=us>

<sup>188</sup> See *Evans*, 804 P.2d at 1129 (listing cases that apply the English Rule).

### 3. Survival of Election Contest After Death of One Party

State statutes may address a surviving party's ability to maintain an election contest after the other candidate's death. The ability to do so may depend on which party died, at what point in the contest proceedings the death occurred, or how far along the election certification process was at the time of the death.<sup>189</sup> For example, statutes may allow the contest to survive if the contestee dies, but fail to mention survival when the contestant dies.<sup>190</sup> In another case, the court allowed a realtor to stand in for a contestee who died after the election ended in a tie, but before the tie could be broken by lot.<sup>191</sup> In this instance, the realtor's victory would lead to a vacancy to be filled in a special election whereas the contestant's victory would result in his taking office.<sup>192</sup>

## F. ELECTION FRAUD

Fraud sometimes mars an election. Unlike irregular votes that upon closer inspection comply sufficiently with governing statutes to be considered validly cast, fraudulent votes are never valid and should always be invalidated. One problem facing both contestants and courts alike, however, is that fraudulent votes are not always individually identifiable, thus it may be difficult to single out the ballots that should be invalidated.

Fraud in any form is troubling; fraud that implicates candidates or their supporters is especially so. The participation of candidates or their supporters in vote or election fraud can affect the remedy the court uses. For example, if the winning candidate encouraged illegal voting and the number of illegal votes exceeds the margin of victory, then the court can declare the contestant the winner.<sup>193</sup> Sometimes a court will void the election to send a message to the cheater and to deter future fraud when the winning candidate is implicated in the fraud, even if the number of fraudulent votes is less than the margin of victory.<sup>194</sup>

A contestant's selective allegations of fraud despite sufficient evidence of fraud and irregularities to justify voiding the election can affect the court's decision. For example, in one case, the court upheld the original election results because the contestant did not seek to void the entire election, but, instead, sought to invalidate the election returns only in the districts and

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<sup>189</sup> See *Fiegenbaum v. McFarlane*, 77 N.E.2d 816, 818 (Ill. 1948) (holding statute that allowed for survival of contest after contestee's death does not extend to permit filing a contest suit after the winner's death, but before he qualified for office).

<sup>190</sup> *Hargett v. Parrish*, 21 So. 993 (Ala. 1897).

<sup>191</sup> *The People v. Deboice*, 37 N.E.2d 337 (Ill. 1941).

<sup>192</sup> *Id.*

<sup>193</sup> *Developments in the Law-Voting and Democracy, VI. Deducting Illegal Votes in Contested Elections*, 119 HARV. L. REV. 1155, 1157 (2006).

<sup>194</sup> *Id.* See *In re The Protest of Election Returns and Absentee Ballots in the Nov. 4, 1997 Election for the City of Miami*, 707 So.2d 1170 (Fla. Dist. Ct. App. 1998) (per curiam) (basing the election's outcome on in-precinct cast votes only when the fraud was concentrated in absentee ballots).

wards that he lost and uphold the returns in the districts and wards he won even though evidence indicated the entire election suffered from pervasive fraud and irregularities.<sup>195</sup>

Fraud may not be the only explanation when votes are cast for a candidate in numbers that exceed the expected results based on party registration. In one instance, the court refused to void precinct results for apparent fraud when an unusually large number of votes were cast for the candidate of the minority-registered party because the candidate's family was heavily concentrated in the area and the evidence suggested that his family members crossed party lines to vote for their relative.<sup>196</sup>

### 1. Absentee Ballot Fraud

As with any identifiable fraudulent ballots, courts should deduct fraudulent absentee ballots from the known recipient's vote totals. Compared to fraud that infects in-precinct voting, courts may have more options available to address absentee ballot fraud. This situation arises because:

- in many elections, absentee ballots are distinguishable from in-precinct ballots and
- absentee voting is an accommodation that receives no *per se* federal constitutional protections.<sup>197</sup>

In the face of absentee ballot fraud that affects the election's outcome, some courts will invalidate the election without conclusive proof of the fraud's actual effects. For example, one court held that clear and convincing proof that absentee ballot fraud had affected a multi-seat school board election's outcome was sufficient to void the election even without specific proof of which candidates received the fraudulent votes.<sup>198</sup> Another court found that a new election was proper when the contestant was able to prove "beyond a reasonable certainty" that absentee ballot fraud affected only twelve ballots.<sup>199</sup> Although the number of fraudulent ballots was insufficient to change the election's outcome or cast it in doubt, the court found a new election was warranted because the election code was violated in a willful and fraudulent fashion.<sup>200</sup>

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<sup>195</sup> *Nelson v. Sneed*, 83 S.W. 786 (Tenn. 1904) (refusing to accept the contestant's claim that the election was partly valid and partly invalid and noting that although sufficient evidence existed to invalidate the entire election, the court could not order that remedy because the contestant did not ask for it).

<sup>196</sup> *Hall v. Martin*, 208 S.W. 417 (Ky. Ct. App. 1919).

<sup>197</sup> *Harpole v. Kemper County Democratic Executive Committee*, 908 So.2d 129, 139 (Miss. 2005) (noting lesser protections apply to absentee ballots because voting by this means is a privilege and not a constitutional right). State constitutions or statutes may protect absentee voting.

<sup>198</sup> *Gooch v. Hendrix*, 851 P.2d 1321 (Cal. 1993) (en banc) (finding wholesale (40 – 72% of the votes cast were invalid) absentee ballot fraud including soliciting absentee ballots, listing an organization headquarters as the address where ballots were to be mailed, and using partisan political staff to supervising the delivery, voting, and return of the absentee ballots); *see also* *Rogers v. Holder*, 636 So.2d 645 (Miss. 1994) (holding that a new election was appropriate when even limited absentee ballot fraud occurred).

<sup>199</sup> *Rogers*, 636 So.2d 645.

<sup>200</sup> *Id.*

Candidates and their campaign staff are sometimes implicated in absentee ballot fraud.<sup>201</sup> Courts can invalidate fraudulent absentee ballots even when the absentee voters were unaware that the campaign's involvement was illegal.<sup>202</sup> Although less common, courts have sometimes opted to invalidate *all* absentee ballots and determine the winner based solely on in-precinct cast votes rather than invalidate only the absentee ballots tainted by a campaign's illegal actions, or order a new election.<sup>203</sup> A court that made this decision when the fraudulent voting was concentrated in the absentee voting and did not affect the in-precinct results, explained it by noting that if it had only ordered a new election, then it would have signaled that the worst that would occur if one's fraud was discovered was a new election with the concomitant opportunity to win.<sup>204</sup> This remedy may be appropriate, however, only when the trial court finds that "but for" the absentee ballot fraud, the candidate who garnered the majority of the machine-cast ballots would have been the actual winner.<sup>205</sup>

## G. BALLOTS AND VOTER TESTIMONY

When an election contest includes disputes over whether a particular ballot should be counted because of the ballot's facial attributes,<sup>206</sup> the individual ballots are the best evidence of voter intent. Sometimes, however, contestants challenge votes as illegal, not because of the ballot's own facial non-conformity, but because of the *voter's* non-conformity.<sup>207</sup> To prove their case, contestants sometimes seek to introduce cast ballots or voter testimony into evidence.

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<sup>201</sup> *Qualkinbush v. Skubisz*, 826 N.E.2d 1181, 1190 (Ill. App. Ct. 2005) (quoting the trial court, which found the campaign "targeted the sick, the infirm and the confused"). See also *Gooch v. Hendrix*, 851 P.2d 1321 (Cal. 1993) (en banc).

<sup>202</sup> *Id.* (noting the potential for intimidation).

<sup>203</sup> *Compare In re The Protest of Election Returns and Absentee Ballots in the November 4, 1997 Election For the City of Miami*, 707 So.2d 1170, 1173-74 (Fla. Dist. Ct. App. 1998) (per curiam) (overturning trial court's decision that ordered a new election because holding new election would send the signal that the worst thing that would happen in the face of voter fraud would be a new election) *with Marks v. Stinson*, 1994 WL 146113 (E.D. Pa. Apr. 26, 1994) (declaring the contestant the winner after using expert testimony to determine that the contestant would have won "but for" the illegal votes).

<sup>204</sup> *Compare In re The Protest of Election Returns and Absentee Ballot*, 707 So.2d at 1174 (per curiam) (noting that separate election code provisions for absentee voting supported its conclusion that absentee voting was a privilege and not a constitutional right, thus they could be invalidated while sparing the disenfranchisement of in-precinct voters whose votes were constitutionally protected and unchallenged for irregularities) *with Marks*, 1994 WL 146113 (invalidating illegally cast absentee votes and attempting to determine how some voters would have voted at the polls had they not been enticed to vote absentee).

<sup>205</sup> *Marks v. Stinson*, 19 F.3d 873 (3d Cir. 1994) (overturning district court order certifying the results based only on machine totals after invalidating absentee ballots for fraud because a "but for" finding was not made).

<sup>206</sup> Similar considerations are made regarding absentee ballots, specifically the information or attestations required on the outer envelope.

<sup>207</sup> The ballot, which is now indistinguishable from other ballots, might have been cast by a non-resident, by a non-registered member of the political party holding the primary election, or by a registered member of the political party who was nonetheless disqualified from voting in the primary election because the voter signed a petition supporting a third party candidacy.

As with a recount, the party seeking to introduce the ballots must demonstrate that the ballots were not subject to post-election tampering before they can be accepted into evidence. Contestants meet this burden by showing that the method of storing or preserving the ballots precluded any reasonable opportunity for tampering.<sup>208</sup> Ballot tampering need not have been impossible, only improbable.<sup>209</sup> After the court receives the ballots into evidence, ballot preservation ceases to be a consideration and the court's focus shifts to the alleged illegality of the challenged ballots.<sup>210</sup>

Courts may be allowed to evaluate direct as well as circumstantial evidence on how illegal votes were cast,<sup>211</sup> thus, contestants sometimes ask the court to allow or compel voters to testify about how they voted or how they would have voted if they had not been prevented from doing so. When the identity of the voter who cast an illegal ballot that affected the election's outcome is known, but the beneficiary of the illegal vote is not,<sup>212</sup> the court must determine if voter testimony is permitted, much less required.<sup>213</sup> Without the benefit of voter testimony, contestants who must demonstrate that illegal votes changed the election's result might find it difficult or impossible to prevail.<sup>214</sup>

In general, public policy favors protecting the right to ballot secrecy and this preference may be enshrined in a state's constitution or election code as well.<sup>215</sup> Some states consider the secret ballot privilege automatically waived for illegal voters,<sup>216</sup> others consider the privilege waivable,<sup>217</sup> some will not allow good faith voters to waive,<sup>218</sup> others never permit waiver,<sup>219</sup> and at least one state applies different rules in primary and general election contests.<sup>220</sup>

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<sup>208</sup> *McConnell v. Salmon*, 141 So. 73, 74-75 (La. 1932).

<sup>209</sup> *Id.*

<sup>210</sup> *Pullen v. Mulligan*, 561 N.E.2d 585, 608 (Ill. 1990).

<sup>211</sup> *Developments in the Law-Voting and Democracy, VI. Postelection Remedies*, 88 Harv. L. Rev. 1298, 1321 (2006).

<sup>212</sup> This situation arises when the identity of the illegal voter is known, but the candidate or ballot measure position that received the voter's vote is not known.

<sup>213</sup> State constitutions may protect the right to a secret ballot. Courts must consult both the state election code and state constitutional provisions in election cases. See *Developments in the Law-Voting and Democracy, VI. Deducting Illegal Votes in Contested Elections*, 119 HARV. L. REV. 1155, 1159 (2006). Not all states allow voters to testify as to how they voted, although some states make an exception for fraudulently cast votes.

<sup>214</sup> *Huggins v. Superior Court County of Navajo*, 788 P.2d 81, 83 (Ariz. 1990) (noting that the more illegal votes tainted the election, the tougher the challenger's burden of proving for whom they were cast becomes and the less likely it is for the contestant to have the wrong redressed); see also *State v. Boehner*, 119 N.W.2d 147, 151 (Neb. 1963); see *Developments in the Law: Elections, VI. Postelection Remedies*, 88 Harv. L. Rev. 1298, 1318-19 (April 1975) (addressing the practical difficulties in identifying illegal voters in the limited time in which an election contest must be filed); *State v. Boehner*, 119 N.W.2d 147 (Neb. 1963) (leaving certified election results undisturbed when contestant could not identify the recipient of invalidly cast absentee ballots).

<sup>215</sup> See *In re General Election of Nov. 4, 1975* (No. 2), 71 Pa. D. & C.2d 83 (Pa. Ct. Com. Pl. 1975) (holding state constitutional grant of a right to vote in secrecy means it is unwaivable).

<sup>216</sup> *Id.* at 325; *Carlson v. Oconto County Bd. of Canvassers*, 2001 WI App 20, ¶ 16, 240 Wis.2d 438, 447, 623 N.W.2d 195, 199 (Ct. App. 2000).

<sup>217</sup> *In re Petition to Contest General Election for District Justice in Judicial District 36-3-03 Nunc Pro Tunc*, 670 A.2d 629 (Pa. 1996) (finding voter secrecy was not violated when testimony was not coerced).

Even when voter testimony is permitted or compelled, logistical considerations make it rare because identifying and securing testimony from each voter who allegedly cast an illegal vote is difficult given contest time constraints. Additionally, courts are frequently skeptical of the reliability of voter testimony because the voter knows the outcome at stake.<sup>221</sup> In one case, after deciding the non-resident voter's testimony about which candidate he voted for was untrustworthy, the court subtracted a vote from the *other* candidate.<sup>222</sup>

The contestant may challenge an individual ballot's validity—perhaps based on information gleaned during a recount. Voter testimony is unnecessary when the ballot's validity is facially ascertainable, but when it is known that a particular individual cast an illegal vote, but not how the illegal vote was cast, voter testimony can become critically important.

Finally, when legal voters have been disenfranchised or their votes have been rejected, courts may also need to determine if the disenfranchised voters may testify about how they would have voted if permitted.

Courts vary about whether a voter who cast an illegal or irregular ballot can testify for whom he voted so the vote can be deducted from that candidate's total. Public policy--and sometimes state statutes--favor the protection of ballot secrecy. Public policy may yield to a competing public policy preference for installing properly and legally elected officials to public office.<sup>223</sup> Courts should determine constitutional, policy, and statutory protections for voter secrecy and when, if ever, they can be waived.

Even when voter testimony is permitted or compelled, logistical and other considerations make it rare. Identifying and securing testimony from each voter who allegedly cast an illegal vote is logistically difficult given contest time constraints. Additionally, courts are skeptical of the

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<sup>218</sup> *McCavitt v. Registrars of Voters of Brockton*, 434 N.E.2d 620, 629-30 (Mass. 1982) (holding that in the absence of allegations of fraud or intentional wrongdoing, good faith absentee voters who fail to follow directions do not have to testify how they voted); *Huggins v. Superior Court County of Navajo*, 788 P.2d 81, 84 (Ariz. 1990) (deciding that independent and non-partisan voters who voted in a Democratic primary would not be called to testify how they voted because the state constitution explicitly provided for secret voting and the voters voted in good faith, even if illegally).

<sup>219</sup> See *In re General Election of Nov. 4, 1975* (No. 2), Pa. D. & C.2d 83, 92 (Ct. Com. Pl. 1975) (finding public policy does not permit a voter to waive her state constitutional right to a secret ballot and give oral testimony as to how she voted).

<sup>220</sup> *Wood v. Kirby*, 566 S.W.2d 751 (Ky. 1978) (determining voter testimony can be compelled in a primary election contest although it is prohibited in a general election contest except in instances of fraud or illegality).

<sup>221</sup> See *Huggins v. Super. Ct. County of Navajo*, 788 P.2d 81, 83, 84 (Ariz. 1990) (discussing in general problems inherent in requiring voter testimony, including from voters casting fraudulent votes).

<sup>222</sup> *In re the Gen. Election of November 5, 1991 for Office of Township of Maplewood, Essex County*, 605 A.2d 1164 (N.J. Super. Ct. Law Div. 1992).

<sup>223</sup> *Lambeth v. Levins*, 702 P.2d 320, 325 (Kan. 1985); but see *In re General Election of Nov. 4, 1975* (No. 2), 71 Pa. D. & C.2d 83, 92 (Ct. Com. Pl. 1975) (finding public policy does not permit a voter to waive her state constitutional right to a secret ballot and give oral testimony as to how she voted).

reliability of the voter's testimony given that these voters recognize the effect their testimony will have on the election's outcome.<sup>224</sup>

Some states hold that voter secrecy protections do not apply to voters who cast illegal votes.<sup>225</sup> In addition to the voter, *any* qualified person with knowledge of how the disqualified elector voted may be required to disclose it.<sup>226</sup> Exceptions may be available for good faith, but technically irregular, votes.<sup>227</sup>

The court uses the voter testimony to deduct votes from one of the candidates. If non-attributed votes are still sufficient to change the outcome, the court may next turn to proportional reduction. A court using vote reduction must select the reduction method. Of the three models used--proportional reduction, party-affiliation, or a combination--proportional reduction is the most common. These models are discussed in detail in the next section.

#### IV. CONTEST OUTCOMES

The court's primary role in election contests is to ensure the rightful winner takes office. Election contests are not appropriate vehicles for courts to punish an individual candidate or party because other proceedings are established for those purposes.<sup>228</sup>

Once the plaintiff has demonstrated the number and nature of the invalid votes, the presence of fraud, and election administration failures that tainted the election, the court must decide how the election's outcome—that is, the contestant's and the contestee's vote totals—was affected. Election contests result in one of the four following outcomes:

1. the court upholds the original results,
2. the court overturns the original results and names the contestant the winner,
3. the court voids the election with state statutes determining if a new election is held or if the vacant office is filled by appointment, or
4. the election ends in a tie, which is broken as statutes dictate.

If at all possible, the trial court should determine, and declare elected, the candidate that actually received the most legal votes. Generally, courts seek to uphold the results of the original election if any reasonable basis exists to do so, and will only void them if they cannot be

<sup>224</sup> See *In re the Gen. Election of Nov. 5, 1991 for Office of Township of Maplewood, Essex County*, 605 A.2d 1164 (N.J. Super. Ct. Law Div. 1992) (determining non-local voter's testimony was unreliable and subtracting a vote from a different candidate than the one the voter specified). *But see Lambeth*, 702 P.2d 320 (remanding the case to the trial court finding, in a tied sheriff's election with the result hinging on an absentee ballot that was cast in the name of a disabled voter by his spouse who voted the same way, to determine if the vote was a legal reflection of the disabled voter's choice marked by the spouse at the voter's direction or was an illegal double vote by the spouse who cast it on her own accord).

<sup>225</sup> *Lambeth*, 702 P.2d at 325; *Carlson v. County Bd. of Canvassers*, 2000 WI App 20, ¶ 16, 240 Wis.2d 438, ¶ 16, 623 N.W.2d 195, ¶ 16 (Ct. App. 2000).

<sup>226</sup> *Lambeth*, 702 P.2d at 325 (citation omitted).

<sup>227</sup> *Id*

<sup>228</sup> *Marks v. Stinson*, 19 F.3d 873, 888 (3<sup>rd</sup> Cir. 1994).

upheld.<sup>229</sup> Voiding<sup>230</sup> an election is a disfavored, imperfect remedy because second elections rarely recreate the first.<sup>231</sup> When the court knows which candidate(s) received the fraudulent or invalid votes, it may be able to adjust the vote totals accordingly, identify the candidate with the most legal votes, and declare that person the winner. When the number of invalid or fraudulent votes cannot be attributed to a particular candidate, however, it is more difficult to identify the winner. In many instances, the beneficiary of some invalid or fraudulent votes is known, while the beneficiary of other invalid or fraudulent votes is unknown. When this occurs, the known invalid or fraudulent votes are subtracted from their recipient's vote totals and the court must then determine how to offset the effects of the invalid or fraudulent votes cast for unknown recipients.<sup>232</sup>

Courts' focus on salvaging elections whenever possible has led to the development of several approaches designed to approximate the effects of unattributable invalid and fraudulent votes on the election's outcome.

## A. TESTS APPLIED

The most common tests states use to determine if and how irregularities or fraud affected an elections outcome can be classified as follows:

1. subtraction of the invalid votes from the winner's vote totals,
2. proportional deduction of irregular and invalid votes which are unattributable to either candidate, either in fact or as an analytical tool
3. probability analysis.

The results of the test(s) a court uses are measured against the proof the plaintiff must offer, as demonstrated by the pleadings required of the contestant. Thus, when contestants must allege that "but for" the irregularities and fraud, the contestant would have won the election, the court determines if the contestant had more votes—or *probably*<sup>233</sup> had more votes, if the less rigorous form of the "but for" test is used—once adjustments are made for the irregularities and fraud.

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<sup>229</sup> *Stebbins v. Gonzales*, 5 Cal. Rptr. 2d 88, 91 (Ct. App. 1992); see also *Matter of De Martini v. Power*, 262 N.E.2d 857 (N.Y. 1970) (finding a new election was unnecessary when no fraud was shown and only a slim possibility existed that the complained of issues actually changed the result); *Johnson v. Tanka*, N.W.2d 185 (Minn. 1967) (requiring the proper process to be followed before invalidating an election)

<sup>230</sup> An alternate term used is "avoiding."

<sup>231</sup> See *Developments in the Law-Elections, VI. Postelection Remedies*, 88 Harv. L. Rev. 1298, 1323 (1975); see also *Developments in the Law-Voting and Democracy, IV. Deducting Illegal Votes in Contested Elections*, 119 HARV. L. REV. 1155, 1158 (2006) (noting cons when an election is voided include the inability to replicate the circumstances of the original election absent the irregularities, disrupts the finality an election brings, replaces a focus on governing with a new campaign, favors better financed candidates, and generally results in lower voter turnout than multi-office and multi-issue elections).

<sup>232</sup> *Qualkinbush v. Skubisz*, 826 N.E.2d 1181 (Ill. App. Ct. 2005) (upholding trial court's decision to subtract illegally delivered absentee ballots from the vote totals of the candidate whose staff member delivered them while apportioning the irregular, non-fraudulent votes amongst all candidates).

<sup>233</sup> The court may also need to determine how to measure *probably*.

When contestants allege that the election fraud and irregularities left an uncertain outcome, the court will ascertain if this is the case after accounting for the problems' effects.<sup>234</sup> Contestants seeking to demonstrate the uncertainty of the outcome do not seek to be declared the winner; rather, results that indicate the contestant received the most votes are used as proof that the results are uncertain and a new election is necessary.

Finally, where an election contest was maintained on allegations that the election was unfair, the court must determine how much, if any, unfairness is excusable before a new election must be called. Case law may dictate a preferred approach and supply some of the missing measurements.

### 1. Subtract All Unattributable Votes from the Winner's Vote Totals

The quickest and crudest test courts use to ascertain the effects of unallocatable invalid and fraudulent votes, that is, those votes whose recipient is unknown, is to deduct them all from contestee's vote totals to see if the contestee still retains the lead. This test is most commonly used when the contestant bears the burden of demonstrating the election's problems rendered the outcome uncertain. The test is satisfied when, after deducting the unallocatable votes from the contestee's totals, the contestee and contestant's vote totals are tied or the contestant has more votes, resulting the court's voiding of the election.<sup>235</sup>

For example, if the contestee defeated the contestant by 128 votes, and there are 99 invalid or fraudulent votes that cannot be attributed to either candidate, then all 99 tainted votes would be subtracted from the contestee's vote totals. This would still leave the contestee with a twenty-nine vote margin of victory. Because the results have not changed, the outcome is not uncertain and the contestee's victory is upheld. Suppose, however, that instead of 99 invalid votes, 150 votes were tainted, but could not be attributed to either candidate. After subtracting all 150 votes from the contestee's vote totals, the contestant would win by 22 votes, changing the outcome. The changed outcome demonstrates that the true outcome is uncertain. The contestant prevails and the court will likely void the original election.

When the issue is the effect of voter disenfranchisement, the test calls for the addition of all the disenfranchised votes to the contestant's totals and to then compare the contestant's increased vote totals to the contestee's totals to see which candidate has the most votes.<sup>236</sup> For example, if the contestee defeated the contestant by 4 votes and 4 voters were disenfranchised, the 4 votes are added to the contestant's vote totals, resulting in a tied election. The election's outcome is likely to be considered uncertain and a new election will probably be ordered.

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<sup>234</sup> See *Developments in the Law-Elections, VI. Postelection Remedies*, 88 HARV. L. REV. 1298, 1324 (1975). The court may also need to determine how to measure uncertainty.

<sup>235</sup> *Creamer v. City of Anderson*, 124 S.E.2d 788, 790 (S.C. 1962) (extending to annexation elections a rule the jurisdiction had recognized for election to public office for more than 150 years).

<sup>236</sup> Even if it is unlikely that the outcome would have changed if all disenfranchised voters had the opportunity to vote, courts will sometimes order the election rerun because they are concerned with the appearance of unfairness in the original election.

The special nature of election contests may justify the use of statistical models, especially when their use is limited to confirming the original outcome or determining if a new election is warranted.<sup>237</sup> The two most common types of statistical analysis are proportional deduction and calculating a probability model.

Contestants who must meet a “but for” standard of proof may be required to demonstrate how each and every irregularity affected the election’s outcome. When invalid votes cannot be directly attributed to a particular candidate, the court might accept statistical evidence. The most common statistical approach involves proportional deduction. When non-fraudulent irregular votes are involved, a probability analysis is likely to provide the most specific answer as to how the election’s results were affected. Probability analyses can be helpful to determine if the election’s outcome was uncertain or if the lesser “but for” standard is met. Probability analysis is inapplicable when fraud taints an election’s results.

## 2. Proportional Deduction

Some courts use proportional deduction<sup>238</sup> to approximate voting irregularities’ or vote fraud’s effects on an election’s outcome. Proportional deduction assumes that candidates receive invalid and fraudulent votes in the same percentages as their overall vote totals, and attempts to counter their effects by allocating them to and subtracting them from candidates’ vote totals in the same proportion as the candidates’ overall vote totals. Thus, if a candidate received 47% of the overall votes cast for the office, then 47% of the otherwise unattributable invalid or fraudulent votes are subtracted from her vote total. Because candidates’ support varies from voting district to voting district, a more nuanced application of proportional deduction reduces votes on a voting precinct basis and not by candidates’ aggregate level of support.<sup>239</sup> After adjusting vote totals for each precinct with known invalid or fraudulent votes, the new totals are aggregated to determine the new results. Some courts use proportional deduction as an analytical tool or test to see if the original results are upheld.

Rather than prorating invalid or fraudulent votes based on the individual candidate’s vote percentage, some states prorate and proportionally deduct votes based on the precinct voters’

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<sup>237</sup> See *Developments in the Law-Elections, VI. Postelection Remedies*, 88 HARV. L. REV. 1298, 1327 n.141 (1975) (noting the applicability of statistical information in election cases because they differ from criminal cases because due process concerns are inapplicable and judges may be better able to understand and apply statistical probability evidence than juries).

<sup>238</sup> Sometimes called proportional reduction.

<sup>239</sup> See *Jordan v. Officer*, 525 N.E.2d 1067, 1074 (Ill. App. Ct. 1988) (reducing every primary candidates’ vote totals proportionately based on the number of voters who signed nominating petitions for independent candidates who had also voted in the party primary in violation of statute); *In re Contest of Election For Offices of Governor and Lieutenant Governor Held at Gen. Election on Nov. 2, 1982*, 444 N.E.2d 170, 182 (Ill. 1983) (holding unqualified voters’ votes that are not identifiable to a particular candidate are apportioned to the candidates in proportion to candidates’ votes to the whole in the precinct).

party affiliation as reflected by voter registration information.<sup>240</sup> One court stated that deducting votes based on party affiliation was preferable to asking voters to disclose for whom they voted or determining the winner after excluding the entire precinct's vote totals, even though cross-over voting and an erosion in party allegiance would dilute the method's accuracy.<sup>241</sup> Even where party affiliation-based proration is utilized, it may be inapplicable if independent candidates are on the ballot because some party-affiliated voters are likely to have voted for them. Under this circumstance, deducting votes from the party-affiliated candidates based on party registrations would likely disproportionately hurt party-affiliated candidates<sup>242</sup> because no votes would be subtracted from the independent candidates.

The use of proportional deduction carries advantages and disadvantages. Although proportional deduction is arbitrary because illegal votes are rarely cast in exact proportion to the candidates' overall vote totals,<sup>243</sup> it nonetheless appears facially neutral and fair.<sup>244</sup>

Use of proportional deduction brings the following advantages:

- it does not rely on voter testimony,
- it relieves the contestant from proving how all the invalid and fraudulent votes were cast,<sup>245</sup>
- it accommodates for officials' irregular actions while not disenfranchising valid voters,<sup>246</sup> and
- it spares the locality the time, effort, and expense of holding a new election when proportional deduction confirms the original election's results.

Use of proportional deduction is not without its limitations and disadvantages, including the following concerns:

- it is at best an estimate of voter behavior, based on century old assumptions about voter behavior that do not reflect today's less homogeneous voter pool,<sup>247</sup> and
- it may appear to substitute the court's judgment for the electorate's will.<sup>248</sup>

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<sup>240</sup> Occasionally, courts may combine party-affiliation proportional deduction with the general version. Under this approach, illegal votes are first allocated based on party affiliation with any remaining illegal votes allocated to all candidates proportionally. See *In re Durkin*, 700 N.E.2d 1089 (Ill. App. Ct. 1998).

<sup>241</sup> *Gribble v. Willeford*, 546 N.E.2d 994, 999 (Ill. App. Ct. 1989).

<sup>242</sup> *In re Durkin*, 700 N.E.2d 1089 (Ill.App.3d 1998).

<sup>243</sup> *Huggins v. Superior Court County of Navajo*, 788 P.2d 81, 85 (Ariz. 1990) (noting that this doubt is why Massachusetts prefers to nullify rather than prorate when election irregularities place the outcome in doubt, but further noting that Alaska uses proration as an analytical tool to determine if the error magnitude were sufficient to change the outcome, though not deciding how to handle it if it finds so).

<sup>244</sup> *Id.* (noting that neutrality is a major consideration of fairness in an election contest); but see *State v. Boehner*, 119 N.W.2d 147, 153 (Neb. 1963) (noting application of proportional deduction would equal substituting the court's judgment for the electorate's in the absence of clear evidence that demonstrates what the election's results should be).

<sup>245</sup> *Huggins*, 788 P.2d at 86 (noting that the greater the fraud, the harder the contestant's task of proving for whom each fraudulent vote was cast).

<sup>246</sup> *Attorney General ex rel. Miller v. Miller*, 253 N.W. 241, 248-49 (Mich. 1934) (noting proportional deduction was applicable when the irregular, non-fraudulent votes were less than the margin of victory because it saved the votes cast by valid voters).

<sup>247</sup> See *Developments in the Law-Voting and Democracy, VI. Deducting Illegal Votes in Contested Elections*, 119 HARV. L. REV. 1155, 1156 (2006).

### a. Applying Proportional Deduction

Courts that have applied proportional deduction have usually made their own calculations.<sup>249</sup> That is, after the court decided that proportional deduction was an appropriate tool to use, the court applied the appropriate calculations to each candidate's vote totals. At least one court greeted expert witness testimony in favor of proportional deduction with skepticism, finding that the experts' approach did not satisfy the Frye standard.<sup>250</sup> Specifically, the court found the testimony did not involve an accepted theory in the relevant scientific community nor did it use a valid technique to implement the theory.<sup>251</sup> The court noted that the ecological inference used by the contestant's experts made unsubstantiated inferences about individual voting behavior using only information about average group behavior, such as assuming that illegal voters' voting behavior would mirror that of legal voters within their community.<sup>252</sup>

Depending on the requirements of state statutes governing election contests, the contestant may have to meet a specified burden of proof before courts can apply proportional deduction.<sup>253</sup> When a court applies proportional deduction, it generally first deducts any irregular or fraudulent votes from the known recipient's vote totals before proportionally deducting the irregular or fraudulent votes whose recipient is unknown. For example, a court properly deducted the fraudulent ballots from the vote total of a candidate whose staff broke absentee ballot requirements by 1) failing to disclose their assistance, and 2) improperly picking up and returning the absentee ballots, before proportionally deducting the remaining invalid, but non-fraudulent, votes from all candidates, after which a new winner was proclaimed.<sup>254</sup> Many courts that use proportional deduction apply it on a precinct-by-precinct basis.<sup>255</sup>

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<sup>248</sup> *Id.* at 1161 (noting that most courts who adopted proportional deduction did so more than a century ago, when voting population was more homogeneous). See also *State ex rel. Brogan v. Boehner*, 119 N.W.2d 147, 153 (Neb. 1963) (expressly overruling earlier precedent that held proportional deduction was appropriate and stating it would not "substitute its judgment" for the electorate's without evidence in the record that clearly demonstrates what the results should be and rejecting the "adopt[ion] and appl[ication] of] arbitrary rules [that] determine elections [based on] chance.").

<sup>249</sup> *Developments in the Law-Voting and Democracy, VI. Deducting Illegal Votes in Contested Elections*, 119 HARV. L. REV. 1155, 1162 (2006).

<sup>250</sup> *Borders v. King County*, 4 Election L.J. 418, 423 No. 05-2-00027-3 (Chelan County Superior Court, Wash., 2005).

<sup>251</sup> *Id.* at 423-24.

<sup>252</sup> *Id.* at 422 (noting the irregular votes the contestant challenged were overly weighted to include precincts in which the contestee prevailed).

<sup>253</sup> *Id.* at 424-25 (requiring clear and convincing evidence that improper conduct or irregular votes led to contestee's victory or a preponderance of evidence that they caused an uncertain outcome to apply proportional deduction).

<sup>254</sup> *Qualkinbush v. Skubisz*, 826 N.E.2d 1181, (Ill. App. Ct. 2005).

<sup>255</sup> *Huggins v. Superior Court County of Navajo*, 788 P.2d 81, 86 n.4 (Ariz. 1990) *In re Larsen*, 107 A.D.2d 809 (N.Y. App. Div. 1985) (per curiam) (noting that proration is fair only when more than one district has invalid votes, because its use in a single district would equate to ignoring invalid votes).

### b. Proportional Deduction as a Limited Screening Tool

Because proportional deduction is an estimate, some courts use it only as a screening tool to determine the impact of illegal votes.<sup>256</sup> When used as a screening tool, proportional deduction's value exists in its ability to confirm—or not—the election's original results.<sup>257</sup> If the original election results are not confirmed once courts apply proportional deduction, some courts may opt to void the election rather than announce a new winner.<sup>258</sup>

When courts are amenable to using proportional deduction to change an election's results, they may strictly apply it, which can result in precinct-level vote totals that are not whole numbers. For example, one court deducted 6.34 votes from one candidate and 8.66 votes from another, with some precinct deductions of as little as 1/3 of a vote, before rounding off the figures and finally deducting whole number votes from the candidates.<sup>259</sup> In this instance, the contestant received 3,585 votes and the contestee, who won by eight votes, received 3,593 votes in an election where sixteen acknowledged illegal votes were cast.<sup>260</sup> The state Supreme Court applied proportional deduction on a precinct-by-precinct basis,<sup>261</sup> which resulted in the invalidation of 8.66 (rounded to 9) of the contestant's and 6.34 (rounded to 6) of the contestee's votes.<sup>262</sup> After subtracting these invalidated votes, the contestee's lead increased from eight to eleven votes and the court upheld his election.<sup>263</sup>

Finally, the use of proportional deduction is generally limited to deducting votes because of vote irregularities or fraud. It should not be used to add votes to candidates' totals. For example, a reviewing court overturned a lower court's decision to subtract votes from one candidate's vote totals and add them to another's, which resulted in the recipient candidate being declared the winner, based on testimony positing the second candidate "lost" the votes because his name was second, and not first, on the ballot.<sup>264</sup>

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<sup>256</sup> *Huggins*, 788 P.2d 81 (Ariz. 1990).

<sup>257</sup> *Developments in the Law-Voting and Democracy, VI. Deducting Illegal Votes in Contested Elections*, 119 HARV. L. REV. 1155, 1160-61 (2006).; *see also* *Huggins*, 788 P.2d 81 (stating that it will not decide what action it will take if proportional deduction would change the election's results).

<sup>258</sup> *Developments in the Law-Voting and Democracy, VI. Deducting Illegal Votes in Contested Elections*, 119 HARV. L. REV. 1155, 1160-61 (2006) (disagreeing with this approach and refusing to adopt an arbitrary rule).

<sup>259</sup> *Huggins v. Super. Ct. County of Navajo*, 788 P.2d 81, 86 (Ariz. 1990); *but see* *Jordan v. Officer*, 525 N.E.2d 1067 (Ill.App.1988).

<sup>260</sup> *Huggins*, 788 P.2d at 87.

<sup>261</sup> *Id.*

<sup>262</sup> *Id.*

<sup>263</sup> Note that checking this result with the probability formula reveals a 2.28% chance that the invalid votes lead to the election of the wrong candidate, or a one in fourteen chance, assuming the votes were not fraudulent.

<sup>264</sup> *Bradley v. Perrodin*, 131 Cal. Rptr. 2d 402 (Ct. App. 2003).

### 3. Probability Analysis

A probability model is useful when a number of *invalid, but non-fraudulent*, votes have been cast, but the candidate who received them is unknown. The probability model can assist the court by presenting neutral, objective information on how the election's outcome might have been affected by irregular votes. The probability model is especially important because the effect of invalid votes on an election's outcome may be counter-intuitive. A probability model assumes that each voter has an equal chance of casting a non-fraudulent invalid vote.<sup>265</sup> Probability models are inapplicable when willful, fraudulent conduct infected the results because fraudulent conduct does not randomly distribute votes amongst the candidates.

Unlike proportional deduction, which assumes invalid votes were cast in the same proportion as valid votes, probability analysis calculates the likelihood that non-fraudulent invalid votes affected the election's outcome.

Probability models calculate<sup>266</sup> the likelihood that the percentage of invalid votes the contestee received was larger than the contestee's winning percentage, thus changing the outcome when the invalid votes are subtracted.<sup>267</sup> The contestee must receive a higher percentage of the invalid votes before they affected the election outcome. If the contestee received invalid votes

<sup>265</sup> Non-fraudulent invalid votes might include those cast in the wrong precinct, cast without following all the instructions, or cast in innocent violation of a mandatory statute.

<sup>266</sup> The probability the non-fraudulent irregular votes affected the outcome is figured by solving for "z," which is the standard normal variation. "Z's" value correlates to the probability that invalid votes changed the election's outcome.

$$z = d \sqrt{\frac{s-k}{sk}}$$

z = standard normal variation

d = winners margin of victory

s = combined total number of votes cast for the contestee and the contestant

k = combined total number of invalid votes cast for the office that could not be attributed to either the contestee or the contestant, but were cast for one or the other of them and not another candidate

See Michael O. Finkelstein & Herbert E. Robbins, *Mathematical Probability in Election Challenges*, 73 COLUMBIA L. REV. 241 (1973) for the above formula. Once "z" is found, its correlation to a probability number is ascertained by using a standard statistical look-up table, which may be found in a statistics book. Online calculators are also available, see e.g., <http://www.fourmilab.ch/rpk/experiments/analysis/zCalc.html> (last visited March 13, 2007). Other probability calculators can be found by searching "z score probability calculator" in an Internet search engine.

<sup>267</sup> It is helpful to consider the probability model in the following fashion. If all the votes cast for the contested office were represented by box of balls color-coded for each candidate—perhaps green for the contestee and yellow for the contestant—the probably formula calculates the likelihood that randomly drawing from the box the number of ball "votes" equaling the number of invalid votes would result in the contestee's pile of invalid vote balls being larger than his original margin of victory. Or to put it another way, that after all the "invalid vote balls" were randomly withdrawn from the box of total votes, what is the likelihood that the contestant now has more valid vote balls remaining in the box than the contestee has?

in the same proportion as valid votes, then the contestee's lead would remain, albeit at a much smaller absolute number. This result occurs because the contestant also would have received invalid votes in proportion to the contestant's vote totals.

When the margin of victory is small, irregular votes totaling twice the margin of victory can create a substantial likelihood the result was affected, but a large margin of victory may be unaffected and reflect the true outcome, even if invalid votes were four or five times larger than the margin of victory.<sup>268</sup> For example, in an election contest where the contestant received approximately 48.5% of the overall vote, the contestant also likely received 48.5% of the non-fraudulent, though irregular, votes. Thus, in an election with 1920 non-fraudulent, but irregular, votes cast out of a total of 29,567 votes, and an 890 vote margin of victory,<sup>269</sup> the contestant could not have received more than 515<sup>270</sup> of the irregular votes cast (approximately 26.8%) for the irregular votes to have changed the outcome. If the contestant received 516 or more of the irregular votes, then the election's outcome would have been unaltered by the irregular votes. To put it another way, to have a greater than 5% chance that irregular votes altered the election's outcome given the winner's 890 vote in a two-person race with 29,567 votes were cast, the non-fraudulent irregular votes would have to have represented approximately 27,000 of the total.<sup>271</sup>

<sup>268</sup> Finkelstein, *supra* note 266. See the following, based on the facts from the election contested in *Ippolito v. Power*, 241 N.E.2d 232 (1968). The winning margin was 17 votes out of 2827 cast, with 101 invalid, but non-fraudulent votes. Applying the formula:

$$z = 17 \sqrt{\frac{2827 - 101}{(2827)(101)}} = 1.6 \quad \text{A } z \text{ of } 1.6 \text{ corresponds to a } 5.4\% \text{ probability, or about } 1 \text{ in } 18 \text{ chance, that}$$

the invalid votes changed the election's outcome.

<sup>269</sup> This information comes from *Loenstein v. Larkin*, 40 A.D. 2d 604 (N.Y. App. Div. 1972) in which the court ordered a new primary election after saying the irregularities altered the outcome, but which Finkelstein and Robbins showed the probability model showed otherwise. Applying the formula, we get

$$\text{the following: } z = 890 \sqrt{\frac{29567 - 1920}{(29567)(1920)}} = 19.64$$

Using a lookup table, *see supra* note 266, a  $z$  of 19.64 correlates to a 0% chance (1 in infinity) that the election's outcome was affected by the non-fraudulent irregular votes. Note that this election suffered from other defects that may have justified voiding it, if statutes provided the grounds, but the irregular vote's impact on the outcome was not one of them.

<sup>270</sup> If the contestant could not have received more than 515 of the irregular votes, then the contestee must have received at least 1405 of them. If the contestee received 1405 irregular votes, then he received more than 73% of all irregular votes although he only received 51.5% of the overall votes.

<sup>271</sup>

Number of invalid, non-fraudulent votes cast out of a total of 29,567	Probability the invalid, non-fraudulent votes altered the election's outcome given the 890 vote margin of victory	Probability the outcome was altered by the irregular votes expressed in "odds" language
1,920	0%	1 in infinity
10,000	0%	1 in infinity
20,000	.0172%	1 in 5816
25,000	1.35%	1 in 74
26,000	2.74%	1 in 36

The likelihood the contestee received a higher percentage of invalid votes than the contestee's overall vote percentage is always less than a one-in-two likelihood (<50%).<sup>272</sup> Even at a less than fifty percent probability, however, a changed outcome might be possible and the court may need to decide what level of uncertainty is sufficient to justify voiding the election.<sup>273</sup>

Probability models are easiest to implement in simple two-person races, but can also be used in multi-candidate or multi-office races.<sup>274</sup> When irregular votes occur in more than one precinct, the most accurate results will occur if separate mathematical calculations are made at each and then aggregated.<sup>275</sup>

When more than two candidates run for the same office or when more than one office is on the ballot, some of the invalid votes will have been cast for the other candidates or offices and not for the candidates and office involved in the contest. In the absence of fraud or information on the specific race or candidate for whom the invalid votes were cast, courts should account for the presence of other candidates or races by first adjusting for their likely effects before applying the statistical model.<sup>276</sup> Likewise, courts should accommodate for the fact that in elections with multiple races and ballot measures, some voters will not make a choice for every available election.<sup>277</sup>

Candidates for the contested office who are not parties to the contest should be allocated invalid votes in proportion to their overall vote totals.<sup>278</sup> To account for "fall off," which occurs when

27,000	5.5%	1 in 18
28,000	11%	1 in 9
29,000	23.4%	1 in 4.3

Although the numbers at first seem unbelievable, it helps to picture the votes as balls in a box. Pretend that all 29,567 votes were color coded for the candidate for whom they were cast, so that the box holds 14,339 (48.5%) yellow "contestant" balls and 15,228 (51.5%) green "contestee" balls. Without looking in the box, randomly remove and set aside 1920 balls to correspond to the irregular non-fraudulent votes that were cast. Now, count the balls left in the box for each candidate as represented by their color. What is the probability and/or odds that the contestant has more balls (votes), thus demonstrating that the irregular votes likely altered the outcome? The above chart reflects these odds.

<sup>272</sup> Finkelstein, *supra* note 266 at 245.

<sup>273</sup> *Developments in the Law-Voting and Democracy, VI. Postelection Remedies*, 88 HARV. L. REV. 1298, 1328 n.143 (1975) (noting that Finkelstein & Robbins article suggests that a 5% probability is too small to justify voiding an election but a 9% is not).

<sup>274</sup> In multi-office or multi-candidate races, the initial assumption is that the winner and contestant together received invalid votes in the same proportion of votes they received out of the total votes cast for all candidates and contests. This accounts for the fall off that occurs when some voters do not cast votes for every race on the ballot. Finkelstein, *supra* 266 at 243 n.9.

<sup>275</sup> *Id.*

<sup>276</sup> *Id.* (noting the distribution of invalid votes can also be calculated when more than two candidates vie for the same office although the calculations are more detailed).

<sup>277</sup> A voter's failure to make a selection for an office or ballot measure election is called an *undervote*.

<sup>278</sup> For example, in a four candidate race where the candidates received 38, 35, 21 and 6% of the votes respectively and 1000 non-fraudulent irregular votes were cast that could not be attributed to any candidate, the court can assume that 21% of the challenged votes were cast for the third place vote getter and 6% were cast for the fourth place vote getter. After subtracting 270 of the invalid ballots (210

voters skip some office or ballot measure elections, courts should proportionally reduce the invalid ballots to align with the percentage of ballots cast in the contested election compared with the total number of ballots cast.<sup>279</sup>

Probability analysis is inappropriate when fraud infects an election because intentional fraud is extremely unlikely to have an equal effect on each candidate's vote totals.

Courts using a probability analysis to assist in their determination of the likelihood that non-fraudulent irregular votes affected the outcome should consider issuing a thorough opinion that explains the results, including showing the calculations—especially when the result is counter-intuitive, such as when the margin of victory and the number of irregular votes are both large—lest the outcome appear motivated by considerations other than upholding the will of the electorate.

## B. NEW WINNER

Before the court may declare the contestant the winner of the election, the contestant must demonstrate that she actually received the most legal votes. If the contestant successfully demonstrates that but for errors and illegal and invalid votes, the contestant would have won, then the court generally must declare the contestant the winner.<sup>280</sup>

## C. VOIDING THE ELECTION

Whenever possible, courts generally try to salvage a contested election rather than void it. If a court voids an election, then state statutes control whether the resulting vacancies are filled by a

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presumptively cast for the third place finisher and 60 presumptively cast for the fourth place candidate), the court conducts its analysis of the impact of the invalid votes on the election's outcome on the remaining 730 irregular votes.

<sup>279</sup> For example, in an election with 4 races on the ballot, in which 10,000 voters participated, but only 8500 voters, or 85% of the total number of voters, cast ballots in the contested election, if 100 of the 10,000 votes are invalidated (and cannot be attributed to a particular race or candidate), a total of 10,000 voters voted total, but only 8500 voters cast ballots in the contested election, if 180 votes are challenged for irregularities (and can't be attributed specifically to a candidate), only 153 (85%) of the invalid votes should factor into the analysis of the impact of the invalid votes on the election's outcome.

<sup>280</sup> See *Stebbins v. Gonzales*, 5 Cal. Rptr.2d 88 (Ct. App. 1992) (requiring the contestant to be declared the winner when the disposition of the illegal votes was known and the true winner—the contestant—was ascertainable); see also *Forbes v. Bell*, 816 S.W.2d 716 (Tenn. 1991) (stating the court will declare the contestant the winner when the contestant overcomes the contestee's margin of victory after identifying each and every illegal or fraudulent ballot).

new election or through appointment.<sup>281</sup> Each option has drawbacks, and the drawbacks reinforce most courts' attempts to uphold the original election, if not the original outcome.<sup>282</sup>

The drawbacks of holding a new election include:

- the destabilization of the local political process that occurs as a result of the disruption in governance,
- the temporary disenfranchisement of voters who cast legitimate and valid votes in the original election,
- the advantage a new election gives to better financed and organized candidates,
- the cost,
- the second election will be decided by a different voter pool, and
- the possibility that the new election will suffer its own irregularities and illegalities, and thus might not be an improvement over the election it replaces.<sup>283</sup>

If the vacancy created when the original election is voided is filled through an appointment process, then voters who cast legitimate and legal votes in the first election are disenfranchised. In addition, the political views and preferences held by the appointed individual might reflect the political preferences of the person making the appointment rather than the electorate.

Despite the potential shortcomings with the method of filling vacancies after a voided election, voiding the election may be an appropriate remedy, especially when the contestant demonstrates that electoral irregularity or illegal or fraudulent votes left the election's true outcome uncertain. In general, courts appropriately void elections under the following circumstances:

1. the true winner of the election cannot be ascertained,<sup>284</sup>
2. the election's fairness or integrity is undermined by irregularities or illegalities, regardless of whether they affected the outcome,<sup>285</sup>
3. the original election failed to comply with mandatory prerequisites,<sup>286</sup> or
4. a statutory trigger is satisfied.

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<sup>281</sup> *E.g.*, *Moffat v. Township of Princeton*, 361 A.2d 74 (N.J. Super. Ct. App. Div. 1976) (state statute required the vacancy resulting from an election set aside because a malfunctioning voting machine stopped counting votes for one of the four candidates after the first vote was cast to be filled by appointment).

<sup>282</sup> *See Huggins v. Superior Court County of Navajo*, 788 P.2d 81, 83 (Ariz. 1990) (discussing the problems inherent in voiding an election and calling a new one).

<sup>283</sup> *Id.*

<sup>284</sup> *See Jordan v. Officer*, 525 N.E.2d 1067, 1074 (Ill. App. Ct. 1988) (noting that voiding an election is appropriate when serious electoral improprieties occurred and valid votes cannot be distinguished from invalid ones).

<sup>285</sup> *See e.g.*, *Bell v. Southwell*, 376 F.2d 659, 664 (5th Cir. 1967) (finding a new election was the appropriate remedy in the face of "gross, spectacular completely indefensible state-imposed unconstitutional discrimination at the polls").

<sup>286</sup> In this instance, the court is not so much voiding the election as announcing that the original election was void from the outset for failure to follow mandatory prerequisites. *See Robinson v. Ehrler*, 691 S.W.2d 200 (Ky. 1985) (finding a void election is the same as no election and the original election was void for failure to publish an order calling for it).

Of the above, the most prevalent reasons for voiding an election are the first two, which are discussed in more detail below.

### 1. True Winner Cannot be Ascertained

Before voiding an election, courts must generally determine that the true winner of the most legal votes is unascertainable.<sup>287</sup> If the court can determine which candidate won the most legal votes, then it must declare that candidate the winner.<sup>288</sup> If the court voids a contested election when it was possible to identify the true winner, then the subsequent election is void and its winner does not take office.<sup>289</sup> Instead, the candidate who received the most legal votes in the original election takes office.<sup>290</sup>

If the irregularities that obscured the true winner's identity are confined to a limited area or do not involve all seats in a multi-seat election, then the court may be able to void the results in the affected area or for the affected positions only. For example, one court ordered the election reheld only in the precincts where voting machine failures led to an undercount of votes for one candidate.<sup>291</sup> Another court voided the results, and ordered the election reheld, for the second and third place finishers only because the first place finisher was clearly elected and the only questionable race was for the second seat.<sup>292</sup>

### 2. Fairness or Integrity of the Election is Questioned

Courts sometimes void a contested election because the election's fairness or integrity is questionable. Although courts may not need to establish precise standards before determining

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<sup>287</sup> *Foulkes v. Hays*, 537 P.2d 777 (Wash. 1975) (en banc) (finding the combination of fraudulent and illegal votes made the outcome uncertain and justified a new election); *but see Graham v. Reid*, 779 N.E.2d 391 (Ill. App. Ct. 2002) (finding a new election inappropriate because lower court ordered it before the recount concluded and tied result after recount appropriately broken by lot per statute).

<sup>288</sup> *See Stebbins v. Gonzales*, 5 Cal. Rptr. 2d 88 (Ct. App. 1992) (requiring the contestant to be declared the winner when the disposition of the illegal votes was known and the true winner—the contestant—was ascertainable).

<sup>289</sup> *Id.*

<sup>290</sup> *Id.*

<sup>291</sup> *Buoananno v. DiStefano*, 430 A.2d 765 (R.I. 1981); *see also In re the 1984 General Election Office Council Township Maple Shade, County Burlington*, 497 A.2d 577 (N.J. Super. Ct. Law Div. 1985) (election reheld only where numerous irregularities occurred); *but see In re General Election of Nov. 4, 1975* (No. 2), 71 Pa. D. & C.2d 83 (Pa. Com. Pl. 1975) (calling for county-wide rather than single precinct special election to fill single office whose results were affected by a defective voting machine).

<sup>292</sup> *In re the General Election of November 5, 1991 for Office of Township of Maplewood, Essex County*, 605 A.2d 1164 (N.J. Super. Ct. Law Div. 1992). *See also Kirk v. French*, 736 A.2d 546 (N.J. Super. Ct. Law Div. 1998) (only the winner of the second school board seat was unknown).

an election should be voided for fairness concerns,<sup>293</sup> the court's failure to justify its decision in its findings can provide grounds for an appeal.<sup>294</sup>

The following are some circumstances under which courts voided contested elections because of fairness or integrity concerns:

- appropriate pre-election relief—here enjoining the election because of officials' failure to properly register voters—was denied,<sup>295</sup>
- extensive voter disenfranchisement occurred, sometimes even though the results would not have changed,<sup>296</sup>
- founded constitutional violations,<sup>297</sup>
- substantial failures to safeguard the election's integrity,<sup>298</sup>
- the election was conducted by prohibited methods,<sup>299</sup> or
- concerns that the election was not free and equal, perhaps because uniformed police officers and members of the armed forces were present in the polling places.<sup>300</sup>

The overall combination of irregularities may void an election, but the contestant may need to ask for that remedy.<sup>301</sup> Courts are generally wary of voiding elections if they believe the

<sup>293</sup> See *Scholl v. Bell*, 102 S.W. 248, 255 (Ky. Ct. App. 1907) (voiding election because numerous irregularities and illegalities left the election's fairness suspect).

<sup>294</sup> *In re* Petition to Contest the General Election for District Justice in Judicial District 36-3-03 Nunc Pro Tunc, 695 A.2d 476 (Pa. Commw. Ct. 1997). The trial court set aside an election because of tampering. Upon review, the state supreme court noted evidence of tampering, but insufficient proof to justify setting aside the election and remanded for more information, such as the degree of tampering, the identity of altered ballots, and an explanation of the lower court's conclusions. On remand, the trial court decided which candidate received the most legal votes and ordered him certified, leading to the instant case's appeal, which is both a recount and an election contest.

<sup>295</sup> *Hamer v. Campbell*, 358 F.2d 215 (5<sup>th</sup> Cir. 1966).

<sup>296</sup> *McNally v. Tollander*, 302 N.W.2d 440 (Wisc. 1981) (calling for new election when forty percent of the voters were disenfranchised in an election to decide if the county seat should be relocated; here, overwhelming support for the measure meant it would have passed even if the disenfranchised voters would have all opposed it).

<sup>297</sup> *Ury v. Santee*, 303 F. Supp. 119 (N.D. Ill. 1969) (finding an Equal Protection violation when the defendants failed to provide substantially equal voting facilities, specifically in precincts that should have consisted of no more than 500 voters were drawn for 1539 – 3939 voters each); *Marks v. Stinson*, 19 F.3d 873, 889 (3<sup>rd</sup> Cir. 1994) (voiding election appropriate for constitutional violation even though the violation's impact on the election's results is unknown).

<sup>298</sup> *Hall v. Martin*, 208 S.W. 417, 420 (Ky. Ct. App. 1919) (finding where one-third to one-half the electorate was not sworn in and was required to vote without privacy, voiding the election in the affected precincts was justified).

<sup>299</sup> *Sims v. Ham*, 271 S.E.2d 316 (S.C. 1980) (voiding an election because it was conducted using prohibited full slate voting rules, which make it more difficult for minority candidates to win office). Under full slate voting, the voter must vote for as many candidates as available offices in multi-seat elections or the vote will not be counted for any candidate. Thus if seven candidates are running for five vacant city council seats, all voters are required to vote for five candidates. If two of the seven candidates are minorities, a minority voter cannot vote for the two candidates only, but must also vote for three of the non-minority candidates. Non-minority voters, on the other hand, could vote for all five non-minority candidates and satisfy the full slate voting requirements.

<sup>300</sup> *Scholl v. Bell*, 102 S.W. 248, 259 (Ct. App. Kent. 1907).

contestant participated in or benefited from the irregularity or if the contestant would not have challenged the irregularity if the contestant had won. For example, a court refused to void an election based on the fact that a no-runoff statute was unconstitutional local legislation because the contestant had won under the same statute two years earlier and did not challenge it then or in the interim.<sup>302</sup> In another case, a court refused a primary contest premised on allegations that the candidates' agreement to allow any individual who wanted to vote to do so regardless of party affiliation converted the party primary into an unconstitutional open primary.<sup>303</sup> The court noted that the contestant had solicited votes from registered members of a different political party and thus was estopped using the irregularity to contest the results.<sup>304</sup>

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<sup>301</sup> *Nelson v. Sneed*, 83 S.W. 786, 797-788 (Tenn. 1904) (noting the evidence supported voiding the entire election, but the court would not grant contestant's request that amounted to voiding the results only in precincts where doing so would benefit him).

<sup>302</sup> *Ferguson v. Brick*, 652 S.W.2d 1 (Ark. 1983).

<sup>303</sup> *Maschari v. Tone*, 816 N.E.2d 579 (Ohio 2004) (per curiam) (limiting holding to the unique facts of the case).

<sup>304</sup> *Id.*

### 3. New Election Considerations

When the vacancies created by a voided election are filled by a new election, the court may be able to structure the new election so that its parameters closely match the original election. For example, in rescheduling an election wherein the results were voided in several precincts because of numerous irregularities, the court attempted to have the new election echo the old as much as possible by specifying the offices that would appear on the ballot, the candidates who would be permitted on the ballot, the precincts where the election would be held, and the voters who would be allowed to participate.<sup>305</sup>

### 4. Appointment Process Considerations

If, after an election is voided, the vacant offices are filled through the appointments process, and more than one office is vacant, then court may need to specify the order in which the offices are filled. For example, following the voiding of an election because of fraud, violence, and intimidation, statutes required the vacant offices to be filled by appointment.<sup>306</sup> The judge ordered the offices filled as follows:

The Governor...must appoint the judge of the county court, all justices of the peace, a mayor... all of the aldermen and councilmen... a judge of the city court, prosecuting attorney for the city court, and the three park commissioners. The judge of the county court...must appoint the county court clerk, county attorney, sheriff, surveyor, county jailer, county superintendent of schools, county treasurer, constables, assessor, and coroner. The mayor...must appoint a city treasurer, city auditor, city tax receiver, and bailiffs of the city court. The judge of the city court...must appoint a clerk of the city court.<sup>307</sup>

## V. BREAKING TIES

Elections occasionally end in ties. The state constitution or election statutes may specify how ties are broken. Drawing lots<sup>308</sup> and coin tosses<sup>309</sup> are common methods. The state legislature

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<sup>305</sup> *In re the 1984 General Election Office Council Township Maple Shade, County Burlington*, 497 A.2d 577 (N.J. Super. Ct. Law Div. 1985). See also *Buoananno v. DiStefamo*, 430 A.2d 765 (R.I. 1981) (limiting new election to those precincts where voting machine failures caused an undercount of some votes cast for one candidate).

<sup>306</sup> *Scholl v. Bell*, 102 S.W. 248, 262-263 (Ky. Ct. App. 1907).

<sup>307</sup> *Id.*

<sup>308</sup> *Lambeth v. Levins*, 702 P.2d 320, 327 (Kan. 1985) (holding that breaking the tie by lot was constitutional and not a lottery); *Dayhoff v. Weaver*, 808 A.2d 1002 (Pa. Commw. Ct. 2002).

<sup>309</sup> Len Maniace, *Irvington Moves Toward Runoff Law to Settle Ties*, THE JOURNAL NEWS, Nov. 1, 2005, available at <http://www.thejournalnews.com/apps/pbcs.dll/article?AID=/20051101/NEWS02/511010319/1026/NEWS10>.

may have exclusive authority to break ties for its seats.<sup>310</sup> If no statutory provisions exist for breaking a tied election, a new election may be necessary.<sup>311</sup>

Even when the tied results themselves are not challenged, the tie-breaking mechanism or process sometimes is. One court upheld, against a challenge, a circuit clerk's inept tie-breaking coin flip, stating it satisfied the statute's requirement for a decision made by lot.<sup>312</sup>

If one of the tied candidates dies before a tie is broken, the court may be able to order a substitute to take the dead candidate's place.<sup>313</sup> Under these admittedly unusual circumstances, the court specified that if the substitute won, the office would be vacant and filled per statute, but if the surviving candidate won, then he would take office.<sup>314</sup>

## VI. BALLOT MEASURE CONTESTS

The results of ballot measure elections—annexation proposals, public safety and school bond issues, changes to liquor sales policies, citizen-sponsored initiatives or referenda-- may also be contested. The circumstances under which and requirements for ballot measures contests might vary from those applicable to contests for elective office.

The different contest requirements may mirror other differences between candidate elections and ballot measure elections. For example, state statutes frequently require explanations or other information about ballot measures to be printed on the ballot itself. Disagreements over the sufficiency of the information provided to voters can form the basis of an election contest. One court upheld a ballot measure challenge based on the measure's description on the ballot.<sup>315</sup> Although the ballot information provided the measure's correct wording, the wording, standing alone, read as if it granted powers when a comparison with the then existing statutes would have demonstrated the ballot measure actually curtailed powers.<sup>316</sup> The court determined the defective language extended beyond mere non-compliance with the required form of the information because the chief purpose of the initiative was omitted.<sup>317</sup> In another case, the court held that statutes governing a liquor control measure required the measure to win a majority of the votes to pass; thus, an election ending in a tie defeated the measure and triggered the two-year statutory waiting period before the measure could be reintroduced.<sup>318</sup>

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<sup>310</sup> State constitutions may mirror the federal Constitution by stating that each house judges its own elections and its members' qualifications.

<sup>311</sup> See *Lambeth*, 702 P.2d at 327 (ordering new election when the original resulted in a tie and state statutes did not provide a means to break it); *Landwersiek v. Dunivan*, 147 S.W.3d 141 (Mo. Ct. App. 2004) (ordering new election because some voters were disenfranchised and the tied winners could not informally agree on how to break their tie).

<sup>312</sup> *Huber v. Reznick*, 437 N.E.2d 828 (Ill. App. Ct. 1982).

<sup>313</sup> *The People v. Deboice*, 37 N.E.2d 337 (Ill. 1941) (contestee died after the tie-breaking order was issued, but before the tie was broken).

<sup>314</sup> *Id.*

<sup>315</sup> *Wadhams v. Board of County Commissioners of Sarasota County*, 567 So.2d 414 (Fla. 1990).

<sup>316</sup> *Id.*

<sup>317</sup> *Id.*

<sup>318</sup> *Broadhurst v. Hawkins*, 3 S.E. 2d 905 (Ga. 1939).

Ballot measure contest statutes may limit judicial review to determining if the election complied with governing laws, with an election not saved by substantial compliance invalidated. For example, a liquor control election was invalidated for statutory non-compliance because the Chinese language translation—required by the Voting Rights Act<sup>319</sup>—transposed the precinct and electoral district numbers of the area affected by the measure.<sup>320</sup> In another liquor control election, the court found substantial compliance with petition requirements despite technical noncompliance that included inaccurately naming the targeted liquor licensees, omitting the time of the election, and inexactly describing the affected area’s boundaries.<sup>321</sup> Courts may be prevented from reviewing circumstances and considerations beyond statutory compliance, such as the motives behind a ballot measure.<sup>322</sup>

Ballot measure contests share some similarities with contests of elections for public office. As with the latter, ballot measure elections may be invalidated if illegal votes affected the outcome. One court ordered a new annexation election after determining that if all the illegal votes had been subtracted from the winning side, the results would have changed.<sup>323</sup>

Finally, although it is not a contest because it does not challenge the results of the election, ballot measure opponents may challenge the constitutionality of a ballot measure post-election.<sup>324</sup>

## VII. PRIMARY ELECTION CONTESTS

Primary elections are one means by which political party nominees are selected for the general election ballot. Because of this status, primary election contests may entail additional considerations not found in general election contests. First, primary election candidates sometimes suggest they have received the party’s endorsement when they have not.<sup>325</sup> Second, primary contests are conducted under the shadow of the impending general election, which intensifies the time pressures. Third, because primary elections select a political party’s nominee, voter participation is usually limited, leaving a greater opportunity for contestants to

<sup>319</sup> 42 U.S.C. § 1973aa-1a (West 2007).

<sup>320</sup> *Samour, Inc. ex rel. Patel v. Board of Election Com’rs of City of Chicago*, N.E.2d 1054 (Ill. App. 2005). See also *Padilla v. Lever*, 429 F.3d 910 (9th Cir. 2005) (holding the Voting Rights Act’s language translation requirements also applied to recall petitions circulated by private individuals).

<sup>321</sup> *Quarles v. Kozubowski*, 107 Ill.Dec. 439 (Ill. App. Ct. 1987).

<sup>322</sup> *Olson v. City of Hawthorne*, 45 Cal. Rptr. 48, 52 (Ct. App. 1965) (holding whether the city’s motives behind holding an annexation election were appropriate was not justiciable).

<sup>323</sup> *Creamer v. City of Anderson*, 124 S.E.2d 788 (S.C. 1962).

<sup>324</sup> As noted in Chapter 4: State Regulation of Ballot Measures, opponents may be prevented from filing a constitutional challenge *before* the election. See, e.g., *American Federal of Labor-Congress of Industrial Organizations v. Eu*, 686 P.2d 609 (Cal. 1984) (finding a federal constitutional violation to the extent the measure superseded the constitutional amendment process, but no federal violation if it only urged, and did not require, legislative action, and, under either scenario, the ballot measure violated the state constitution because it did not adopt a statute).

<sup>325</sup> See *In re the Contest of Election in DFL Primary Election Held on Tuesday, Sept. 13, 1983*, 344 N.W.2d 826 (Minn. 1984) (ordering a new primary election because contestee willfully circulated misleading sample ballots that suggested she was the party’s preferred nominee).

claim that voting by ineligible individuals affected the outcome. Fourth, state statutes may limit the court's participation in primary contests in favor of resolution by the political party.<sup>326</sup> Despite these additional considerations, the public has an important right to cast its general election ballot for a candidate who won the primary election, and tight time constraints should not violate this right.<sup>327</sup>

Election codes may limit the time to file primary election contests, but they do not limit the amount of time it takes to decide them.<sup>328</sup> Some courts have found it impossible or undesirable to resolve a primary election contest before the general election.<sup>329</sup> As a result, courts may need to decide how to handle the general election if the primary contest appears unlikely to be resolved before the scheduled general election. Under these circumstances, some courts have stayed the general election,<sup>330</sup> while others have allowed the general election to proceed,<sup>331</sup> with the purported primary winner's name on the ballot, after reserving the right to continue the contest after the general election is concluded.<sup>332</sup> When a court allows the general election to proceed even though the primary contest remains unresolved, it permits the other offices on the ballot to be filled and avoids the expense of a new election should the primary contestee win.<sup>333</sup>

Allowing the general election to proceed before resolving the primary election contest is not without potential pitfalls. If the contestant prevails in the primary contest after the contestee was elected in the general election, the court must fashion an appropriate remedy. For example, in a contested judicial primary election, the contestant was named the winner of the contest after the contestee had taken office. The court's remedy, upheld on appeal, was to name the contestant the official party nominee for the general election that took place two years *after* the contested election.<sup>334</sup>

If the court decides to continue a primary contest until after the general election, it should ensure it takes all necessary procedural steps to preserve its ability to do so.<sup>335</sup> For example, one court preserved the primary election contest while allowing both tied primary election judicial

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<sup>326</sup> See, e.g., S.C. CODE ANN. § 7-17-250 (2007).

<sup>327</sup> Redding v. Balkcom, 272 S.E.2d 324, 326 (Ga. 1980).

<sup>328</sup> McDunn v. Williams, 620 N.E.2d 385, 406 (Ill. 1993) (noting later that in the instant case, the delay did not result from a party's bad faith nor were no third party's rights adversely affected by it).

<sup>329</sup> See *id.* (resolving primary contest eighteen months after the general election).

<sup>330</sup> Sometimes a court will stay the general election because it ordered that a new primary election was required. See Griffin v. Burns, 570 F.2d 1065 (1<sup>st</sup> Cir. 1978) (finding state's refusal to count absentee ballots cast in violation of state statutes violated voters' constitutional rights because the state had induced voters to vote absentee).

<sup>331</sup> Redding, 272 S.E.2d 324 (allowing the general election to proceed, but staying the certification of the winner until the primary contest concluded).

<sup>332</sup> McDunn, 620 N.E.2d 385.

<sup>333</sup> *Id.* at 404-05.

<sup>334</sup> *Id.* (finding the primary contest was not mooted by the general election because the trial court forbid publication of the general election results, thus preserving the status quo).

<sup>335</sup> See Jordan v. Cook, 587 S.E.2d 52 (Ga. 2003) (dismissing appeal because contestant did not ask for a stay of the general election); Keane v. Smith, 485 P.2d 261 (Cal. 1971) (en banc) (continuing primary contest until after the general election where both candidates' names appeared on the ballot after primary resulted in a tie) and McDunn, 620 N.E.2d 385, 404-05 (ordering results of general election suppressed until primary contest could be determined).

candidates to have their names printed on the general election ballot.<sup>336</sup> Although another court allowed the general election for sheriff to proceed, it ordered the general election's certification withheld until the primary contest appeal was resolved.<sup>337</sup>

In other cases, the preference for pre-election resolution is so strong that a case may be dismissed when an appeal to a primary election contest's decision is not filed until after the general election, even though the general appeals statute of limitations has not run.<sup>338</sup> In one case, the appeal was filed within the civil statute of limitations, which would have extended beyond the general election date, but because the contestant/appellant did not request a stay of the general election during the appeal, the court held that the general election mooted the contest.<sup>339</sup>

Because primary elections exist to select a political party's general election nominees, voting can be restricted to party-affiliated or non-affiliated voters, the latter at the party's invitation. Thus, the pool of ineligible voters whose participation may provide grounds for a contest is greater in a primary election than in a general election and may include:

- unaffiliated voters,
- voters affiliated with a different political party, and
- voters who signed nominating petitions for a candidate not affiliated with the party holding the primary.<sup>340</sup>

Primary election contests also share commonalities with general election contests. For example, courts occasionally, though rarely, void and rerun primary elections. In one instance, the court voided the primary election because one candidate distributed a sample ballot that incorrectly implied the candidate had received the party's endorsement.<sup>341</sup> Another court ordered a new primary election after election officials committed a constitutional violation when they invalidated all absentee and shut-in ballots.<sup>342</sup> Finally, in another commonality with general

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<sup>336</sup> *Keane*, 485 P.2d 261.

<sup>337</sup> *Redding*, 272 S.E.2d 324.

<sup>338</sup> *Jordan*, 587 S.E.2d 52 (upholding dismissal of appeal ruling when one candidate met residency qualifications for position because the appeal was not filed until after the general election was held, though this was within the statutory time limits in which appeals may generally be filed; here intervening election mooted appeal. He should have requested a stay of the general election pending his appeal).

<sup>339</sup> *Id.*

<sup>340</sup> *Id.* (using proportional deduction to adjust candidate vote totals to account for votes cast by primary voters who were ineligible to vote because they had signed nominating papers for an independent candidate who was running for an office that appeared on the primary election ballot).

<sup>341</sup> *In re the Contest of Election in DFL Primary Election Held on Tuesday, September 13, 1983*, 344 N.W.2d 826 (Minn. 1984).

<sup>342</sup> *Griffin v. Burns*, 570 F.2d 1065 (1<sup>st</sup> Cir. 1978) (finding, although the absentee and shut-in ballots had been distributed in violation of the election code, election officials nonetheless committed an Equal Protection violation when they invalidated the ballots because it was their own campaign to encourage absentee voting that led voters to request and rely upon these ballots instead of traveling to the polls to vote in person and a new primary election was the appropriate remedy). A shut-in ballot is a ballot for those who are unable to leave their residence.

election contests, courts occasionally need to determine the legal effect of votes cast for a deceased primary election winner.<sup>343</sup>

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<sup>343</sup> See *Barber v. Edgar*, 294 A.2d 453 (Me. 1972) (holding that votes cast for primary candidate who died on election day were valid, thus the second place finisher was not the nominee, and upholding the governor's actions in letting party personnel fill the vacancy as statutes directed). See also *supra* Chapter 2: State Regulation of Candidacies and Candidate Ballot Access for additional information on candidate substitution.