

CHAPTER 7:

ELECTION DAY

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I. INTRODUCTION

A number of events can mar elections during the hours the polls are open on Election Day, such as:

- polls can open late or close early,
- eligible voters can be turned away at the polls,
- long lines can form and lengthy waits can occur,
- conduct in or near the polling place can impede the voting process, or
- disasters or emergencies can strike and interfere with voting.

At the outset, one should note the paucity of published law case decisions dealing with Election Day disputes. Several circumstances explain this situation. First, Election Day irregularities often do not surface until after the polls have closed, such as when a voting machine malfunction is initially discovered when the votes are counted.¹

Second, local election boards, voter registrars, or the secretary of state may resolve Election Day problems, thus keeping them out of court. For example, a voter who was erroneously denied the right to vote because of poll workers' mistaken belief that only voters who had voted in the original primary election were eligible to vote in the run-off election brought the misunderstanding to the attention of the local election board. The election board clarified the rules with the poll workers, and the voter in question, as well as many other voters who had also been erroneously turned away, returned to the polls and voted.²

The third reason for the scarcity of reported Election Day cases is that Election Day court decisions may not be decided by courts of record.

Finally, published Election Day decisions are scarce because courts of record that hear and decide Election Day lawsuits may not issue a written opinion.

Courts can expect election day petitioners to ask for one of the following remedies:

- 1) an order that the polls open or reopen,
- 2) an order that the petitioner or a class of potential voters be allowed to vote,
- 3) an order extending polling hours,
- 4) an order enforcing proper conduct at the polling location, or
- 5) an order suspending or postponing--or reviewing a government official's decision to suspend or postpone-- the election.

In the absence of specific statutory authorization, courts may find their remedy options limited. In general, the court's power to fashion any Election Day relief is likely limited to its power to

¹ Consider the widely reported cases occurring in 2004 in Carteret County, North Carolina, and in 2006 in Tarrant County, Texas. In the North Carolina case, the voting machine lost more than 4,500 votes. Associated Press, *More than 4,500 North Carolina Votes Lost Because of Mistake in Voting Machine Capacity*, USA TODAY, Nov. 4, 2004, http://www.usatoday.com/news/politicselections/vote2004/2004-11-04-votes-lost_x.htm. (N28) In Texas, the voting machine recorded an additional 100,000 votes. Anna M. Tinsley & Anthony Spangler, *Vote Spike Blamed on Program Snafu*, FORT WORTH STAR-TELEGRAM, Mar. 9, 2006, at B1. If either of these failures had been known during the election, voters might have been able to sue to vote by paper ballots instead of using the voting equipment.

² *Whittington v. Mathis*, 324 S.E.2d 727 (Ga. 1985) (detailing election contest because not all turned away voters returned to the polls and voted).

issue injunctions and writs of mandamus.³ These remedies are not completely interchangeable. Injunctions are generally used to restrain action while mandamus is used to compel the performance of a specific legal duty. In addition, injunctive relief is commonly available against private parties as well as government officials, while election-related use of mandamus is usually reserved for government officials who refuse to perform an officially required duty.

This chapter begins with a discussion of the most common remedy requests courts receive on Election Day, as listed above, and concludes with brief discussions of two special considerations for courts as they hear and decide Election Day cases. The first special consideration involves the pressure courts experience by the sense of urgency attendant in Election Day disputes and the second is how to best communicate the court's decision so that the relief granted is actually implemented.

II. TYPES OF REMEDIES SOUGHT

A. ORDER TO OPEN OR REOPEN THE POLLS

State statutes establish the times that polls must open and close. Election officials must comply with these statutory opening and closing times. Despite these requirements, polls may fail to open on time or may close prematurely.⁴ Voters can be disenfranchised if their polling place is not open as legally required.

If the polls fail to open or close early, voters, candidates, or political parties have standing to file a lawsuit requesting that the court issue a writ of mandamus or an injunction to compel election officials to obey the statutory opening and closing times. Unless specific statutory remedies exist to address late, non-opening, or early-closing polls, courts should limit their remedies to ordering officials to act within the scope of their official duties.

Polls should not close while voters are waiting in line to vote, but election officials should not allow new voters to join the line after the statutory closing time. If election officials permit additional voters to join the existing line of voters after the poll's official closing time, petitioners may ask the court to issue a writ of mandamus or an injunction to halt this practice, which courts should issue unless state statutes explicitly authorize election officials to extend polling hours. If the court decides against issuing the requested relief, the court should strongly consider requiring late-coming voters to vote by provisional ballot so their votes can be discarded later as necessary.

³ Also referred to as a "mandate" or by the state code provision that authorizes it. See *infra*, Chapter 11: Extraordinary and Equitable Relief for more information on writs of mandamus.

⁴ During the September 12, 2006, primary election, almost 10% of the precincts in Baltimore, Maryland, opened more than an hour late. See Melissa Harris, *Baltimore Lagging in Preparation for Election*, BALTIMORE SUN, Oct. 22, 2006, at 1B.

B. ORDER DIRECTING ELECTION OFFICIALS TO PERMIT A VOTER TO VOTE

Some voters who go to the polls on Election Day expecting to vote will not be able to do so. Some voters may be prevented from voting because they cannot establish their eligibility and poll workers do not offer them provisional ballots.⁵ Other voters may be prevented from voting because the voting equipment is broken or malfunctioning and no alternate means of voting, such as paper ballots, exists.

The duty of election officials to ensure fair, honest, and lawful elections includes the responsibility to ensure that only eligible voters vote.⁶ Election officials have a duty to challenge suspected ineligible voters when these voters present themselves to vote.⁷ Voters deemed ineligible after they have been given an opportunity to defend their eligibility should not be allowed to cast a regular ballot although, as discussed below, they may be eligible to vote by provisional ballot.

A variety of circumstances prompt challenges to a voter's eligibility. The voter may, for example, fail to produce required identification. While voter identification requirements vary from state to state, almost half the states require *all* voters to show identification each time they vote.⁸ Moreover, the Help America Vote Act (HAVA)⁹ mandates that states require first time voters for federal office who registered by mail, but did not submit identification with their registration form, to vote in person and present identification when they do.¹⁰

A voter's eligibility may also be questioned if the voter's name does not appear in the voter registration database,¹¹ the voter registration database indicates the voter has already voted in the election,¹² or poll workers or partisan poll watchers believe the voter fails to meet one or

⁵ Provisional ballots are conditional ballots that allow voters to cast a ballot that is not counted until the voter's eligibility is established. Use of provisional ballots saves voters time because they no longer have to leave the polling place, locate proof of eligibility, and return to the polls with their proof before they can vote. See *infra*, Section II(B)(1): for additional information on voting with provisional ballots.

⁶ 29 C.J.S. *Elections* § 107 (2005).

⁷ 29 C.J.S. *Elections* § 329 (Supp. 2007).

⁸ See ELECTIONLINE.ORG, Voter ID Laws (as of 10/17/06), <http://www.electionline.org/Default.aspx?tabid=364> (last visited Feb. 1, 2007) (detailing state voter identification requirements). Several states' photo identification requirements have been held unconstitutional on the grounds they violated equal protection guarantees or amount to an unconstitutional poll tax, to limited success. Courts have upheld voter identification laws in Arizona, New Mexico, and Indiana. Voter identification laws have been blocked in Michigan and Missouri. For updated information on voter identification litigation, see ELECTION LAW @ MORITZ, 2006 Voter ID Litigation Nationwide, <http://moritzlaw.osu.edu/electionlaw/news/2006VoterIDLitigationChart4.php> (last visited Apr. 26, 2007).

⁹ Pub. L. No. 107-252, 116 Stat. 1666 (codified at 42 U.S.C. §§ 15301-15545 and 36 U.S.C. §§ 152601-611 (Supp. IV 2004)).

¹⁰ 42 U.S.C. § 15483(b) (Supp. IV 2004).

¹¹ Most states require voter registration. Several offer same day voter registration. North Dakota is the only state without a voter registration requirement.

¹² *White v. Blackwell*, 418 F. Supp. 2d 988 (N.D. Ohio 2006) (granting an injunction against the state after a voter who requested, but did not receive an absentee ballot, was subsequently denied a ballot when she appeared at the polls to vote in person). Note in the Maryland primary election on November 12, 2006, at least one election judge reported that when the registration database froze as the voting card was being

more voter qualification standards. Each state establishes its own voter qualification standards,¹³ subject to certain constitutional limitations.¹⁴ Common state qualification standards include requirements that the voters:

- live in the precinct where they vote,¹⁵
- be at least 18 years old,
- not be a convicted felon,¹⁶ and
- be a United States citizen.¹⁷

For primary elections, states can also require that voters be a registered member of the political party holding the primary, or an independent, if party rules allow independents to participate.¹⁸

Although some states allow partisan poll watchers to initiate voter eligibility challenges, the decision on whether or not the voter meets qualification standards resides solely with election officials. Before election officials decide if a voter satisfies the requisite qualification standards, the voter must have an opportunity to establish her qualifications. A voter who claims eligibility to vote in the face of a challenge may need to take an oath or make an attestation.

Before seeking judicial relief, a voter who has been denied the opportunity to vote may be able (or required) to pursue administrative remedies. Alternately, the voter may be able to speak with or visit the local voter registrar or board of elections workers to resolve the situation that led to the voter being turned away.

1. Provisional Voting in Federal Elections

The federal Help America Vote Act (HAVA) requires local election officials to proactively offer provisional ballots to voters in federal elections when the voter claims to be registered and eligible to vote in the election, but:

- the voter's name does not appear on the precinct's voter registration list,
- the voter's name appears on the voter registration list, but the voter's eligibility is nonetheless challenged by an election official,¹⁹

formatted, the rebooted database reflected the voter as having voted and the voter could only vote by provisional ballot. See Avi Rubin's Blog, <http://avi-rubin.blogspot.com/2006/09/my-day-at-polls-maryland-primary-06.html> (Sept. 12, 2006, 11:18 EST).

¹³ See *supra* Chapter 5: State Regulation of Voters for additional information on voter eligibility standards.

¹⁴ The Constitution prohibits denial of voting based on race, gender, or age if the individual is at least 18 years old.

¹⁵ Some states may allow recent voters who have moved out of their old precinct within a given time before the election to vote in their old precinct.

¹⁶ In some states, any felony conviction disqualifies a voter, while in other states, only certain felonies operate to disenfranchise the voter. In addition, many states offer an automatic or petition process for restoring voting rights.

¹⁷ Citizenship is not a federal constitutionally mandated voting requirement.

¹⁸ See *Clingman v. Beaver*, 544 U.S. 581 (2005) (holding that the state can prevent party from opening its primary to other party-affiliated voters).

¹⁹ 42 U.S.C. § 15482 (Supp. IV 2004).

- the voter is a first-time federal election voter *in that state*, registered to vote by mail, and neither included identification with the mail registration nor brought identification to the polls,²⁰ or
- the voter arrived at the polling place after the normal statutory poll closing time, but the polling place was still open because a court or other order extended its hours.²¹

If a voter who falls into one of the above categories signs an affirmation of eligibility, then HAVA allows the voter to cast a provisional ballot. Hence, few voters should be turned away from the polls during a federal election.

In addition to the above listed reasons, in 2004, a federal court held that HAVA required election officials to provide a provisional ballot to a prospective in-precinct voter whose absentee ballot never arrived. Election officials prevented the voter from voting because the voter registration book noted the absentee ballot application. The court issued a temporary injunction (later made permanent) requiring election officials to offer a provisional ballot to the voter and others similarly situated.²²

Prospective voters in federal elections, including primary elections, are ineligible for provisional ballots if (1) they refuse to sign the necessary affirmation, or (2) they do not claim they are eligible to vote in the precinct, even if they claim eligibility to vote elsewhere in the jurisdiction.²³

Although HAVA provides a voter the opportunity to cast a provisional ballot, each state ultimately determines whether the voter has met the state's eligibility requirements to be canvassed.²⁴

2. Provisional Voting in State Elections

HAVA sets provisional ballot eligibility for federal elections only. State law *may* also authorize or require the use of provisional ballots in state and local elections,²⁵ but states have no obligation to do so. Prospective voters may, therefore, be turned away from the polls for their apparent failure to meet voter eligibility requirements when only state and local offices are on the ballot if state election law does not provide for provisional voting.²⁶ Even if state law authorizes provisional balloting, the circumstances under which it is available for state elections may differ from HAVA. Therefore, states are only required to offer provisional ballots for

²⁰ 42 U.S.C. § 15483 (Supp. IV 2004).

²¹ 42 U.S.C. § 15482 (Supp. IV 2004).

²² *White v. Blackwell*, 418 F. Supp. 2d 988 (N.D. Ohio 2006).

²³ See *Sandusky County Democratic Party v. Blackwell*, 387 F.3d 565 (6th Cir. 2004) (per curiam).

²⁴ Unless the number of provisional ballots cast is larger than the margin of victory, they may go uncounted.

²⁵ See OHIO REV. CODE ANN. § 3505.181 (LexisNexis 2007) (detailing a number of circumstances in which voters qualify for provisional ballots, including those who requested absentee or armed forces absentee ballots but appear at the polls and those whose signatures do not match the signature on file).

²⁶ Sometimes referred to as "conditional" ballots.

federal elections, but are permitted to offer separate state provisional ballots with separate state eligibility requirements.

3. Remedies for Denial of a Provisional Ballot

When a court finds a provisional ballot-eligible voter was denied the right to vote provisionally under applicable federal or state law, the court should issue a writ of mandamus to order election officials to provide the voter a provisional ballot. The court may also be able to issue an injunction to prevent election officials from denying provisional ballots to similarly situated voters.

Power failures or problems with voting equipment or voting registration books or databases may also prevent prospective voters from voting. Where state statutes authorize paper back-up ballots, courts should issue a writ of mandamus to compel election officials to offer them when voting equipment problems prevent voters from using it.

C. ORDER EXTENDING POLLING HOURS

Long lines at polling places may result in prospective voters leaving the polling place without voting, particularly if their family and job commitments require them to leave. Although some states have statutes that require employers to provide their employees time off to vote,²⁷ the waiting time to vote may exceed the employee's time off.

Long lines and lengthy waits occur for a number of reasons. These include:

- higher than anticipated voter turnout,
- lengthy or confusing ballots,
- unfamiliarity with new voting equipment,
- power or equipment failures, and
- voter eligibility challenges.

Lengthy waits to vote can lead to lawsuits by political parties, candidates, or individuals who ask courts to extend polling hours.

Absent explicit statutory authority granting courts the ability to extend polling place hours, courts should generally refrain from ordering the polls to stay open longer than their statutorily set closing time. Most, if not all, states have statutes that permit voting by voters waiting in line at the statutory closing time. These statutes prevent the disenfranchisement of voters because of unexpected delays and long waits.²⁸ Judicial orders extending polling places hours without

²⁷ See Beth Gaudio, *Time Off to Vote*, NFIB, Nov. 1, 2006, http://www.nfib.com/object/IO_31227.html (listing time off to vote statutes by states).

²⁸ See VA. CODE ANN. § 24.2-603 (West 2003) (“At 6:45 p.m. an officer of election shall announce that the polls will close in fifteen minutes. The officers of election shall list the names of all qualified voters in line before the polling place at 7:00 p.m. and permit those voters and no others to vote after 7:00 p.m.”).

explicit legislative authority are typically²⁹ reversed on appeal on grounds that the court exceeded its jurisdiction,³⁰ particularly if state law permits voting by those persons already in line at the statutory poll closing time.³¹

If requested, courts can issue injunctive relief or writs of mandamus requiring election officials to obey state statutes that permit voting by voters in line at the poll's normal closing time. Also if requested, courts can issue injunctive relief or writs of mandamus to prevent election officials from allowing additional voters to join the line after the official poll closing time.

If a court does decide to extend polling hours, voters in a federal election who arrive at the polls after the normal closing time must vote by provisional ballot, and those ballots must be kept separate from other provisional ballots.³² State statutes may contain similar provisional ballot requirements if judges extend polling hours for state and local elections.³³ Segregating these late-cast provisional ballots facilitates voiding them if the court order extending the polling hours is vacated or overturned on appeal.

If a court believes voters warrant relief from long polling place lines, the court's equitable powers may permit it to order election officials to offer voters the option of voting by paper ballots rather than forcing them to wait to vote on voting equipment. A federal district court opted for this remedy during the 2004 election when voters in several Ohio counties experienced lengthy waits in line because the number of voters exceeded the capacity of the voting equipment.³⁴ State statutes may also authorize paper ballot voting when voting machines malfunction or experience other problems,³⁵ and judges may be able to order the statute's implementation when election officials have refused to do so.

D. ORDER ENFORCING PROPER CONDUCT AT THE POLLING LOCATION

One aspect of the state's regulatory power over elections involves the regulation of polling place conduct. Although such regulations vary by state, they are generally designed to:

- guard against disruptions to an election and

²⁹ Only a few cases address this situation.

³⁰ See *State ex rel. Bush-Cheney 2000, Inc. v. Baker*, 34 S.W.3d 410 (Mo. Ct. App. 2000) (holding that lower court must follow and apply the law as written by the legislature, which acted within its legislative power when it specified polling hours); *Republican Party of Ark. v. Kilgore*, 250 Ark. 540, 98 S.W.3d 798 (Ark. 2002) (per curiam) (holding that the court exceeded its jurisdiction in extending polling hours because state law does not authorize this court action).

³¹ See *Bush-Cheney 2000, Inc.*, 34 S.W.3d 410 (extending the polling hours only benefited individuals who were not entitled to vote because they did not come to the polls during the voting hours set by the legislature because state statutes already allowed those already in line at the poll closing time to vote).

³² 42 U.S.C. § 15482(c).

³³ WYO. STAT. ANN. § 22-13-117 (2007); MO. ANN. STAT. § 115.407 (2007).

³⁴ *Ohio Democratic Party v. Blackwell*, No. C2 04 1055, slip op. (S.D. Ohio Nov. 2, 2004) (ordering paper ballots be offered to voters who waited in hours-long lines because of too few voting machines).

³⁵ See MO. ANN. STAT. § 115.265 (West 2007) (allowing voting by paper ballots if inoperable voting machine cannot be replaced or repaired).

- prevent voter intimidation, harassment, coercion, and bribery from threatening the integrity of an election.

States attempt to regulate polling place conduct by limiting both the types of activities allowed and the proximity to the polling place wherein these activities are permitted. The regulated area adjacent to polling place entrances or exits is commonly called an “electioneering-free” or “contact-free” buffer zone. States may also limit the circumstances under which non-voting individuals may be present inside the polling place.

Election Day challenges to polling place conduct regulations typically involve:

1. disputes over electioneering activities,
2. poll watchers’ and election officials’ conduct inside the polling place, and
3. restrictions on the media’s ability to interact with voters.

Courts must consider the First Amendment’s protections for political speech when they evaluate constitutional challenges to state regulations of polling place speech. Thus, the next section provides an overview of the general principles used to evaluate First Amendment speech protections. Specific application of the First Amendment to the issues presented during election day—electioneering activities, speech inside the polling place, and media interactions with voters—is evaluated following the discussion of First Amendment principles.

1. First Amendment Principles

The First Amendment protects political speech,³⁶ but does not bar all speech regulations. A court hearing a First Amendment-based challenge to a state’s speech regulations first determines the nature of the forum—the public place in which the speech occurs—which controls the appropriate level of scrutiny to apply to the state regulation.

Public speech occurs in one of the follow three types of fora:

- a. a traditional public forum,
- b. a designated public forum, or
- c. a nonpublic forum.

a. Traditional Public Forum

A *traditional public forum* is an area devoted to public assembly or debate by long tradition or government fiat.³⁷ Public streets, parks, and sidewalks are the most common examples of traditional public fora.³⁸

³⁶ *Burson v. Freeman*, 504 U.S. 191, 198 (1992).

³⁷ See *Marlin v. D. C. Bd. of Elections and Ethics*, 236 F.3d 716, 718 (D.C. Cir. 2001).

³⁸ Courts have generally agreed that the outside of the polling place is a public forum and conducted their analysis accordingly. Justice Scalia, in his concurring opinion in *Burson*, and the United Food & Commercial Workers Local 1099 v. City of Sidney, 364 F.3d 738 (6th Cir. 2004) court have said that, at least under some circumstances, the sidewalks and parking areas outside of polling locations may be considered nonpublic forum space.

Usually *content-based* speech restrictions, including those targeting election-related speech in a *traditional public forum* receive strict scrutiny analysis. Under strict scrutiny, the state generally must *prove*, rather than merely assert, that its speech regulation is narrowly tailored and necessary to serve a *compelling* state interest,³⁹ such as protecting electoral integrity. Even in a traditional public forum, when polling place speech restrictions target speech that interferes with “the act of voting itself,”⁴⁰ the strict scrutiny analysis utilizes a more state-friendly burden of proof. Under this lower burden of proof, restrictions on Election Day speech that targets voters at the polls immediately before they vote—polling place electioneering, in other words—are permitted if the speech regulation does not “significantly impinge on constitutionally protected rights.”⁴¹

Content-neutral restrictions on election-related speech occurring in a *traditional public forum* are constitutional if they are *reasonable time, place, and manner* restrictions that are narrowly tailored to support a *significant* government interest *and* the restrictions leave ample alternative channels for communication.⁴²

b. Designated Public Forum

A *designated public forum*⁴³ is a public place where public speech is not the area’s primary function, but the government nonetheless decides to allow it, at least occasionally. Having once opened the area to speech does not obligate the government to continue to allow speech.⁴⁴ Examples of designated public fora include state fairgrounds, libraries, and the state capitol grounds.

Court evaluation of the constitutionality of a state’s regulation of speech in a designated public forum is the same or similar to the evaluation used for state regulation of speech in a traditional public forum. For example, *content-based* speech restrictions are evaluated in an identical fashion: they receive strict scrutiny, unless the regulation targets speech that interferes with “the act of voting itself,”⁴⁵ in which case the regulation is constitutional if it does not “significantly impinge on constitutionally protected rights.”⁴⁶

³⁹ *Burson*, 504 U.S. at 199.

⁴⁰ *Id.* at 209 n.11.

⁴¹ *Id.* at 209 (quoting *Munro v. Socialist Workers Party*, 479 U.S. 189, 195-96 (1986) (emphasis omitted)). This modified burden of proof means that in some instances involving state regulation of First Amendment protections, the state does not need to empirically demonstrate that the boundary is perfectly tailored to counter voter intimidation or election fraud. The modified burden applies only when the First Amendment rights themselves threaten to interfere with voting itself, as when a voter is confused by an overcrowded ballot or when electioneering activities can physically interfere with voting. The modified burden prevents a state’s political system from being damaged before the state legislature can act to protect it by establishing a buffer zone.

⁴² Jerome A. Barron & C. Thomas Dienes, *FIRST AMENDMENT LAW IN A NUTSHELL*, 209 (2d ed. West 2000) (citing *Perry Educ. Ass’n v. Perry Local Educators’ Assn.*, 460 U.S. 37 (1983)).

⁴³ Also called a limited public forum.

⁴⁴ See *Marlin v. D. C. Bd. of Elections and Ethics*, 236 F.3d 716, 718-19 (D.C. Cir. 2001).

⁴⁵ *Burson*, 504 U.S. at 209 n.11.

⁴⁶ *Id.* at 209.

Likewise, *content-neutral* restrictions on election-related speech occurring in a *designated public forum*, like those regulating speech that occurs in the traditional public forum, are constitutional if they are *reasonable time, place, and manner* restrictions that are narrowly tailored to support a significant government interest *and* the restrictions leave ample alternative channels for communication.⁴⁷

c. Nonpublic Forum

A *nonpublic forum* is public property whose premises are not primarily devoted or dedicated to speech, and where the government does not intend to create a public forum. As long as the government does not intend its creation, then allowing the public free access to the area for non-speech purposes will not transform the space into a public forum.⁴⁸ The government can discriminate between speakers and messages in a nonpublic forum as long as the distinctions are viewpoint neutral.⁴⁹ Nonpublic fora include jailhouse grounds and military bases. The voting room inside the polling place has also been held to be a nonpublic forum.⁵⁰

Regulations on speech in *nonpublic* fora must be viewpoint neutral and reasonable given the property's normal use.⁵¹ Nonpublic forum speech regulations do not need to be the most reasonable ones, the only reasonable ones, nor must the restrictions be narrowly drawn before they can satisfy the "reasonableness" test.⁵²

2. Electioneering Activities

Restrictions on polling place electioneering activities are the primary method states use to regulate voter-targeted activities on Election Day.

Electioneering, which seeks to persuade voters to vote for or against a particular candidate or ballot measure, usually consists of:

- displaying or waving signs,
- distributing campaign literature or partisan sample ballots,
- exhorting arriving voters to vote a particular way, and
- demonstrating support for a particular candidate or ballot measure by wearing campaign-related clothing, buttons, or other paraphernalia.

Electioneering activities also include circulating petitions to gather the necessary support to place a candidate or ballot measure on the ballot in a future election.

⁴⁷ See Barron & Dienes, *supra* note 42, at 209 (citing Perry Educ. Ass'n v. Perry Local Educators' Ass'n., 460 U.S. 37 (1983)).

⁴⁸ *Id.* at 208.

⁴⁹ *Id.* at 212.

⁵⁰ See Marlin v. D. C. Bd. of Elections and Ethics, 236 F.3d 716 (D.C. Cir. 2001).

⁵¹ *Id.* at 719.

⁵² See *id.* at 716.

States typically regulate electioneering activities by statutes that establish electioneering-free buffer zones around the polls in which all electioneering activity is prohibited. States also define the activities they consider electioneering. Some states also limit the types or presence of campaign-related materials that can be carried or worn inside the polling place.

Election Day electioneering-related lawsuits can come before the court as challenges to the statute's (1)enforcement or (2)constitutionality.

a. Enforcement Challenges

Officials may be accused of overzealous enforcement, such as when the delineated buffer zone is larger than the state's statutory requirement. Officials may also be accused of lax enforcement if the delineated buffer zone is smaller than the statute specifies or if supporters of some candidates or ballot measure positions are campaigning inside the electioneering-free zone.

Under either enforcement-related scenario, petitioners, who may be voters, candidates, or political parties, may file lawsuits asking a court to order election officials to ensure the electioneering regulations are enforced as required, without excess or lax enforcement.

If election officials are enforcing an incorrect size electioneering-free zone, the court should order the election officials to enforce a buffer zone corresponding to the size set by state statutes. The court may be able to accomplish this through an injunction that prohibits election officials from enforcing an improper size zone, or through mandamus that orders them to enforce a zone of the proper size as a part of their official duties.⁵³

At a petitioner's request, and with the proper showing, courts may also be able to issue a restraining order or temporary injunction applicable to the individual campaigners who are violating the electioneering statute that prohibits them from conducting electioneering activities within the buffer zone.

b. Constitutional Challenges

Except for "as applied" constitutional challenges brought by individuals who were asked to refrain from wearing or carrying campaign-related materials inside the polling place or who denied entry if they refused to comply with the request, constitutional challenges to state electioneering regulations generally occur well before the election. Constitutional challenges may attack the regulation in its entirety or they may attack the regulation's applicability to the specific circumstances of the election. In addition to a federal constitutional challenge, the state's constitution may support a constitutional challenge.⁵⁴

⁵³ If election officials do not enforce the buffer zone size themselves, they can be ordered to contact the individuals who are responsible for its enforcement to request enforcement as appropriate.

⁵⁴ See *Picray v. Sec'y of State*, 916 P.2d 324 (Or. Ct. App. 1996) (overturning electioneering statute on state constitutional grounds).

Constitutional challenges to electioneering-free buffer zone statutes frequently attack the size of the buffer zone. The essence of the claim is that the size of the buffer zone is so large that it restricts too much protected speech.

The Supreme Court has found that some buffer zone in which electioneering activities are prohibited is necessary to protect voters from intimidation and to preserve the election's integrity.⁵⁵ State-imposed restrictions on speech in the buffer zone usually receive strict scrutiny.⁵⁶ Because polling place electioneering interferes with the "act of voting," the state's electioneering-free buffer zone satisfies the constitution if it does not "*significantly impinge* on constitutionally protected rights."⁵⁷ At some unspecified size,⁵⁸ the buffer zone will significantly impinge on constitutional rights and become unconstitutional.

Although states may establish an electioneering-free buffer zone, courts evaluate whether or not the zone's size "significantly impinges" on constitutionally protected rights on a case-by-case basis. In conducting this evaluation, an important consideration is the state's reason for establishing the buffer zone's size, particularly whether the state sought to prevent voter fraud and intimidation or acted out of a desire to eliminate the nuisance of electioneering.⁵⁹ For example, one court upheld a state electioneering statute that *expanded* the buffer zone size from 300' to 600' because the state demonstrated the smaller zone was ineffective in alleviating voter fraud and intimidation.⁶⁰ Another court struck down a 500' buffer zone because the totality of the circumstances indicated the state selected the distance not because it was necessary to eliminate fraud and intimidation, but because it offered voters an unimpeded trip from parking lot to polling place.⁶¹ Finally, electioneering statutes that severely restrict speech and lack sufficient state justification are unconstitutional. Examples of unconstitutional restrictions include buffer zones that restrict speech in private homes and businesses⁶² or on adjacent streets and sidewalks.⁶³

⁵⁵ *Burson v. Freeman*, 504 U.S. 191, 206 (1992) (plurality).

⁵⁶ *Id.* at 196-97. *But see, id.* at 214 (Scalia, J., concurring in result) (opining that the area outside the polling place was not a traditional public forum because of longstanding restrictions on permitted activities, hence strict scrutiny analysis not necessary); *United Food & Commercial Workers Local 1099 v. City of Sidney*, 364 F.3d 738 (6th Cir. 2004) (stating that use of private property as a polling place did not convert the areas adjacent to the polling place into a traditional public forum, thus petition circulation could be banned).

⁵⁷ *Burson*, 504 U.S. at 209 (emphasis in original) (noting the state's burden of proof was relaxed compared with the traditional requirements applicable to strict scrutiny) (quoting *Munro v. Socialist Workers Party*, 479 U.S. 189, 195-96 (1986)).

⁵⁸ *Id.* at 210-11 (noting that at some "measurable distance" the burden would be impermissible, but also noting the Court's general reluctance to establish "litmus-paper tests" separating valid from invalid state regulation of elections) (citations omitted).

⁵⁹ See *Schirmer v. Edwards*, 2 F.3d 117 (5th Cir. 1993).

⁶⁰ *Id.* While the size of the buffer zone is important, by itself, it has no constitutional significance because *a buffer zone of any size burdens speech*.

⁶¹ *Anderson v. Spear*, 356 F.3d 651 (6th Cir. 2004).

⁶² *Clean-up '84 v. Heinrich*, 759 F.2d 1511 (11th Cir. 1985).

⁶³ See *Fla. Comm. for Liab. Reform v. McMillan*, 682 F. Supp. 1536, 1541 (M.D. Fla. 1988). Note that speech on streets and sidewalks can be restricted, but the state interest has to be compelling and the restriction narrowly drawn, or the restriction has to be a content-neutral reasonable time, place, and

In an “as applied” challenge, the petitioner does not challenge the statute’s underlying constitutionality. Instead, the challenger claims the electioneering regulation cannot constitutionally restrict the action against, or the circumstances in which, it was enforced. For example, voters have challenged electioneering statutes’ applicability to voters who wear campaign-related clothing inside the polling place. In one case, the court first determined that the inside of a polling place was a nonpublic forum because long-standing limitations on speech within it meant it did not qualify as a traditional public forum.⁶⁴ The restrictions also demonstrated that the government had not designated the space as a site for public speech. Instead, the state chose to reserve the inside of the polling place for the voter’s use of a secret ballot to communicate the voter’s preferred candidates and ballot measures positions.⁶⁵ The court upheld the statute as applied to the voter because the state demonstrated its restrictions were reasonable to support its interests in:

- preventing polling place altercations over contentious issues by establishing a neutral zone inside the polling place,
- preventing voter intimidation, and
- avoiding eleventh hour smear campaigns.⁶⁶

c. Remedies for Electioneering Violations

Regardless of the nature of the constitutional challenge to the electioneering statutes, courts may prefer to enjoin its continued Election Day enforcement if the petitioner meets the criteria for temporary injunctive relief and has requested that remedy rather than declare the statute or its application unconstitutional.⁶⁷ A temporary injunction, rather than a hasty declaration of unconstitutionality prevents additional immediate harm while postponing the final decision until after a full evidentiary hearing and time for thoughtful reflection.

Unconstitutional statutes should be struck down and their enforcement prohibited. If otherwise qualified voters were disenfranchised through the unconstitutional application of a statute, the court can order officials to allow the affected voters to vote.

manner restriction. The proffered state interest was not compelling, the restriction was not narrowly drawn nor was it content-neutral.

⁶⁴ *Marlin v. D. C. Bd. of Elections and Ethics*, 236 F.3d 716 (D.C. Cir. 2001) (challenging the Election Board’s enforcement of anti-electioneering statute against voter who wore a campaign bumper sticker on his shirt).

⁶⁵ *Id.* at 719 (citing *Burson v. Freeman*, 504 U.S. 191 (1992)).

⁶⁶ *Id.* at 720.

⁶⁷ Injunctive relief includes temporary restraining orders, temporary injunctions, and permanent injunctions. A temporary restraining order or temporary injunction may be available if the petitioner demonstrates (1) a likelihood of success on the merits, (2) more harm will accrue to the petitioner by denying the order than will accrue to the defendant by granting it, and (3) the public will not be harmed if the order is issued. *See Am. Broad Co., Inc. v. Blackwell*, No. 1:04 750, slip. op. (S.D. Ohio Nov. 2, 2004) (adding the additional requirement that the injunction serve the public interest to the requirements listed above).

3. Conduct Inside the Polling Place

Election officials have a duty to ensure the election is fair, honest, and orderly, and that voters' rights are safeguarded. To these ends (and among their other responsibilities) election officials' have a responsibility to:

- guard the integrity of the election by excluding ineligible voters and
- protect legitimate voters from intimidation and harassment.

These duties are sometimes in tension. The duty to safeguard the election's integrity means election officials should ensure that only legal voters vote. Voters with apparent suspect qualifications should be challenged when they present themselves to vote and *before* they are allowed to cast a ballot. Although state statutes may allow partisan poll watchers⁶⁸ to initiate voter eligibility challenges, poll watchers who wish to do so must comply with all applicable state and federal laws, including Voting Rights Act prohibitions on voter intimidation and harassment.⁶⁹

Election officials must also safeguard voters from intimidation. Election officials must ensure that eligibility challenges are based on bona fide voter qualification concerns—such as failure to meet citizenship, residency, age, or applicable non-felon status requirements—and do not target prospective voters because of their race or assumed political affiliation. Voters whose eligibility is challenged must be allowed to demonstrate that they are eligible to vote and, if successful, may cast a regular ballot. If challenged voters are unable to demonstrate their eligibility, federal law permits them to cast a provisional ballot in a federal election⁷⁰ in certain circumstances.⁷¹ If the election is for purely state or local offices or ballot measures, state law may allow the challenged voter to ask a judge to issue an order requiring election officials to permit the voter to vote.⁷² Alternately, state law may permit the voter to cast a provisional ballot. Election officials, as opposed to the person bringing the challenge, are solely responsible for determining the outcome of voter eligibility challenges.

Aggressive voter eligibility challenges blur the line between election officials' proper fulfillment of their duties and illegal voter intimidation and harassment.

Courts become involved in polling place conduct-related lawsuits when petitioners allege that election officials failed to perform their duties as required. The failure may result from

⁶⁸ Depending on what a state's statutes permit, poll watchers may represent political parties, independent candidates, or they may represent the proponents or opponents of a ballot measure. Some states permit poll watchers inside the polling place to monitor the election's conduct for fairness, observe and note voter trends for their colleagues to use in "get out the vote" efforts. See *Coray v. Ariyoshi*, 506 P.2d 13 (Haw. 1973) (noting that partisan poll watchers who did not interfere with officials' duties when the poll watchers kept their own tally of voters and communicated it to their colleagues off-site did not violate anti-electioneering or anti-loitering statutes). For ease in describing them, when this section uses the phrase "partisan poll watcher" it means either candidate, party, or ballot measure supporters or opponents.

⁶⁹ 42 U.S.C. § 1971(b) (2000).

⁷⁰ 42 U.S.C. § 15482 (Supp. IV 2004).

⁷¹ See *supra*, Section II, Subsection B: An Order Directing Election Officials to Permit a Voter to Vote.

⁷² See N.J. STAT. ANN. §§ 19:15-18.3 (West 2007).

overzealous enforcement or from lax or no enforcement,⁷³ including failure to maintain order at the polls and failure to stop biased or aggressive voter eligibility challenges by poll watchers. In short, election officials must not only comport themselves appropriately, they must also referee others' actions to ensure they do not violate the law.

A court may use its injunctive power to order election officials to conform their conduct to their authorized duties. The court may also be able to enjoin third parties, such as partisan poll watchers, from disruptive behavior. Finally, a writ of mandamus may be appropriate to order officials to fulfill their legally required official duties if they are not doing so.

Election officials and poll watchers who harass or intimidate voters are potentially subject to state and federal punishment. Also, when local authorities implement voter eligibility challenges in a racially discriminatory fashion or fail to comply with other provisions of the Voting Rights Act, their acts or omissions may lead to federal election observers monitoring polling place conduct in future elections.⁷⁴

4. Media Access to Voters

For national or high profile elections, media organizations⁷⁵ frequently hire polling firms to poll voters who have finished voting. An exit poll's validity depends on the pollster's ability to ask a random, but standardized, sample of voters if they are willing to fill out a questionnaire. To achieve their goals, pollsters must be close enough to the polling place exit to contact the targeted voters before they leave the grounds or intermingle with non-voters. When "no voter contact" buffer zones are enforced as voters leave the polling place, pollsters cannot conduct exit polls.

The state's interest in protecting the election's integrity by limiting third-party contact with voters is weaker after the voter has voted because opportunities to commit vote fraud or intimidate voters diminish significantly once voters have cast their ballots.

⁷³ The compliance failures may be designated as misfeasance or nonfeasance. Misfeasance is likely to involve overzealous enforcement while nonfeasance is failure to perform their official duties.

⁷⁴ See, e.g., *United States v. City of Hamtramck*, 2000 WL 34592762 (E.D. Mich. 2000) (finding Voting Rights Act violations where city officials failed to stop known discriminatory voter challenges targeting Arab-American voters in a municipal election). Under a subsequent consent decree, federal observers would monitor future elections for several years. During the November 2005 elections, federal observers and Justice Department personnel monitored elections in San Diego and Ventura counties, California; Boston, Massachusetts; Hamtramck, Michigan; Kings, Suffolk, Westchester, and New York counties, New York; Reading, Pennsylvania; and, Ector County, Texas. See also Press Release, Department of Justice, Justice Department to Monitor Elections in States Across the Nation (Nov. 7, 2005), www.usdoj.gov/opa/pr/2005/November/05_crt_596.html (listing jurisdictions where Justice Department employees planned to monitor elections; San Francisco county, California; Lawrence and Lowell, Massachusetts; Edison, New Jersey, and Queens and Richmond counties, New York).

⁷⁵ Newspapers, television networks, and wire services are consumers of exit polling data. Other groups, such as educational institutions, may also conduct exit polls.

Some states have attempted by statute to restrict pollsters' contact with voters who are leaving the polling location because of concerns that

- voters do not like to be interviewed,
- voter turnout is reduced if exit polls are used to project the election results before the polls close, and
- exit polling is disruptive.

Legal challenges to statutes that restrict media access at the polls tend to take one of two familiar forms. In the first, the petitioner alleges the state is over- or under-enforcing the statute, and asks the court to order election officials to perform their duties. In the second, the constitutionality of the statute itself, or its application to the specific circumstances, is challenged, and petitioners ask the court to declare the statute unconstitutional in whole or as applied to their specific situation.

a. Statutory Challenges

A court could hear challenges claiming over- or under- enforcement of the statute by election officials. Overly strict enforcement of the no-contact zone occurs when election officials prohibit exit polling in an area larger than the size specified by state statute. Lax enforcement of the no-contact zone occurs when election officials allow exit polling activities to occur closer to the polls than the distance permitted by statute. Under these circumstances, the court will likely be asked to order election officials to appropriately enforce the statute.

If the election officials have been enforcing a too large or permitting a too small no-contact zone, the court may order election officials to enforce the statutory zone size and no greater or lesser size zone. Courts can probably accomplish this in one of two ways. First, courts can probably issue a temporary restraining order to prohibit election officials from enforcing an oversized zone or require them to enforce the appropriate zone size if they are not enforcing any zone or are permitting contact inside an appropriately-sized zone. Second, courts may be able to issue writs of mandamus to compel appropriate enforcement of the electioneering-free zone.

Courts can also enjoin individuals who are conducting exit polling in violation of the law from continuing to do so.

b. Constitutional Challenges

Although it is unlikely courts will be asked to hear substantive constitutional challenges on Election Day because these types of lawsuits are usually filed in advance of the election,⁷⁶ it is possible the court could hear an Election Day constitutionally-based challenge, particularly one that claims that election officials are applying or interpreting the statute in an unconstitutional fashion.

⁷⁶ In addition, they are usually filed in federal court.

Some courts have determined that the areas outside *polling place exits* are traditional public fora,⁷⁷ thus strict scrutiny applies to statutory restraints on exit polling outside the exit area.

To survive strict scrutiny analysis, the state must demonstrate its speech regulations are narrowly tailored and necessary to uphold a compelling state interest or that they are narrowly tailored reasonable time, place, and manner restrictions. Although the Supreme Court has said the state's burden of proof is lessened when the challenged regulations restrict speech that interferes with the act of voting,⁷⁸ at least one court has held this lesser standard does not apply to state regulation of exit polling because exit polling occurs *after* the voter has voted and does not implicate the voting-integrity concerns that motivate electioneering restrictions.⁷⁹

Courts have not established a bright-line rule for determining if the size of a *post-voting* no-contact zone satisfies constitutional standards. In the fall of 2006, three separate federal courts⁸⁰ decided that the area within 100 feet of the polling place exit, where plaintiffs wished to conduct exit polling, was a traditional public forum and hence the state could not bar exit polling within this area. In an earlier case, a court declared both a 200-foot and a 25-foot boundary unconstitutional, but in dicta said that regulations prohibiting the media from contacting exiting voters while the voters were still inside the polling place would likely be constitutional.⁸¹ In yet another case, the court held that restrictions on exit polling were constitutional up to 25' outside the polling place exits, but unconstitutional if exit polling was restricted beyond that distance.⁸² Thus, restrictions on third-party non-electioneering speech directed towards voters who have already voted and who are outside the polling building are generally unconstitutional in the absence of demonstrated voter intimidation, harassment, or threats that cannot be addressed through statutes that prohibit disruptive conduct at the polls.⁸³

⁷⁷ See *CBS Broadcasting, Inc. v. Cobb*, 470 F. Supp. 2d 1365 (S.D.Fla. 2006); *Am. Broad. Co., Inc. v. Heller*, 2006 WL 3149365 (D. Nev. 2006).

⁷⁸ *Burson v. Freeman*, 504 U.S. 191, 214 (1992).

⁷⁹ *Id.*

⁸⁰ Southern District of Ohio (*ABC v. Blackwell*), District of Nevada (*ABC v. Heller*) and Southern District of Florida (*CBS Broadcasting v. Cobb*).

⁸¹ *Nat'l Broadcast. Co., Inc. v. Colburg*, 699 F. Supp. 241 (D. Mont. 1988) (holding the restricted areas were unconstitutional restrictions on the media's fundamental right to gather and deliver news of political importance). Note that when polls are located within much larger structures, such as shopping malls, prohibiting contact with the voter who has cast her ballot while the voter is still within the larger building may be overly broad.

⁸² *Nat'l Broad. Co., Inc. v. Cleland*, 697 F. Supp. 1204 (N.D. Ga. 1988).

⁸³ *Daily Herald Co. v. Munro*, 758 F.2d 350 (9th Cir. 1984); *Beacon Journal Publ'g Co., Inc. v. Blackwell*, 389 F.3d 683, 685 (6th Cir. 2004); see also *Nat'l Broad. Co., Inc.*, 697 F. Supp. 1204 (finding existing electioneering statutes would cover activities state wished to discourage). See *CBS Broadcasting, Inc. v. Cobb*, 470 F. Supp. 2d 1365 (S.D.Fla. 2006) (noting that the statute in question was not narrowly drawn because it only prohibited exit polling and interviews with voters, even if the voters wished to talk and did not prohibit interviews with non-voters within the same area, nor did it prohibit singing a college fight song within its borders).

State statutes that specifically target media activities at the polls generally fail strict scrutiny analysis.⁸⁴ Content-based regulations undergo strict scrutiny and must be narrowly drawn and necessary to serve a compelling state interest to survive. A state statute regulating third party contact with voters is not content-neutral if it restricts particular viewpoints or prohibits discussion of particular topics.⁸⁵ States do not have a compelling interest in preventing the media from projecting the election's outcome.⁸⁶ In addition, state regulatory statutes cannot be enforced against the media in an attempt to obviate purely speculative harms.⁸⁷ In short, the media has both a right to engage voters after they have voted and a right to publish the results.

One area of election law relating to third party conduct at the polls that appears to be underdeveloped is the extent that private landowners can restrict electioneering or media conduct on their properties as a part of election day activities. One Ohio court upheld the right of the private landowners to restrict access to petition circulators who were outside the statutory buffer zone but who remained on their private property.⁸⁸

To recap, state statutes that regulate media contact with voters after the voters have voted have been found unconstitutional when they:

- were based on speculative harm and not a compelling state interest,⁸⁹
- restricted activity in too broad an area, such as in a traditional public forum,⁹⁰ or
- were content-based and not content-neutral.⁹¹

Unless the statute prohibiting post-voting voter contact or its application is obviously unconstitutional, courts may prefer to grant temporary relief barring its continued Election Day enforcement if the petitioner meets the criteria for injunctive relief and has requested that remedy.⁹² Temporary injunctive relief, rather than a hasty declaration of unconstitutionality, prevents additional immediate harm while it postpones the final decision on the statute's facial or as applied constitutionality until after a full evidentiary hearing and time for thoughtful

⁸⁴ See *Daily Herald Co. v. Munro*, 758 F.2d 350 (9th Cir. 1984); *Beacon Journal Publ'g Co., Inc.*, 389 F.3d at 685; see also *Cleland*, 697 F.Supp. 1204 (N.D. Ga. 1988) (existing electioneering statutes would cover activities state wished to discourage).

⁸⁵ *Burson v. Freeman*, 504 U.S. 191, 197 (1992). See *Nat'l Broad. Co., Inc. v. Colburg*, 699 F. Supp. 241 (D. Mont. 1988) (striking down statute as an unconstitutional contest-based restrictions on exit polling because the only political or election-related speech prohibited within 200 feet of polling places were exit polls).

⁸⁶ *Daily Herald Co. v. Munro*, 758 F.2d 350 (9th Cir. 1984) (noting the lower court found the state's claimed interest in protecting polling place decorum was a pretext and the real goal was to prevent early release of election projections)

⁸⁷ *Beacon Journal Publ. Co. v. Blackwell*, 389 F.3d 683 (6th Cir. 2004). (prohibiting enforcement of an anti-loitering statute against exit pollsters when the disruption the statute allegedly addressed was purely speculative).

⁸⁸ See *United Food and Commercial Workers Local 1099 v. City of Sidney*, 364 F.3d 738, 750 (6th Cir. 2004) (holding limited use of the inside of the building as a polling place did not transform all the outside space into a public forum).

⁸⁹ *Beacon Journal Pub. Co.*, 389 F.3d 683.

⁹⁰ See *CBS Broadcasting, Inc. v. Cobb*, 470 F.Supp.2d 1365 (S.D.Fla. 2006); *Am. Broad. Co., Inc. v. Heller*, 2006 WL 3149365 (D. Nev. 2006).

⁹¹ *Heller*, 2006 WL 3149365.

⁹² See *supra* note 69 for the requirements.

reflection. If the court decides to evaluate the statute's constitutionality and declares it unconstitutional, the court should strike the statute down.

Regardless of the challenge's outcome, the court should order its decision be expeditiously communicated to election officials so they can make appropriate adjustments in their actions.

E. ORDER TO SUSPEND OR POSTPONE AND RESCHEDULE AN ELECTION DUE TO DISASTER OR EMERGENCY CONDITIONS

Natural disasters, terrorist attacks, or other emergencies may strike on Election Day. They may affect a limited area—such as a flash-flood that closes several precincts;⁹³ they may affect an entire city—such as a paralyzing blizzard that leaves all roads impassible;⁹⁴ or, they may affect an entire state—such as the September 2001 terrorist attacks that occurred during the New York primary election season and resulted in closed polls statewide.⁹⁵ In the wake of Election Day disasters or emergencies, courts may be asked to suspend or postpone an election. They may also be asked to review decisions made by state officials to suspend or postpone an election. Finally, postponed or suspended elections generally need rescheduling and courts may be asked to review these rescheduling decisions as well. This section addresses some of the issues that arise when disasters or other emergencies occur on Election Day.

Although there are few published decisions concerning suspended and postponed elections, the decisions suggest that four legal issues frequently arise under these circumstances:

1. Does the state have authority to suspend or postpone an election?
2. When and where should an election be suspended or postponed?
3. Who may suspend or postpone an election?
4. When should the postponed election take place?

⁹³ *In re* Gen. Election—1985 Beharry, 531 A.2d 836 (Pa. Commw. Ct. 1987) (upholding results in election that had been postponed and rescheduled in several precincts due to Election Day flood-related emergency conditions).

⁹⁴ *State v. Marcotte*, 89 A.2d 308 (Me. 1952) (upholding results from rescheduled election where Election Day blizzard paralyzed entire city and prevented polls from opening).

⁹⁵ Lithwick, Dahlia, *How Do You Cancel an Election?*, SLATE Sept. 12, 2001, <http://www.slate.com/id/1008278> (noting that following the previous day's terror attacks in New York City, primary elections throughout New York state were halted).

1. Does the State Have Authority to Postpone or Suspend an Election?

In many states, statutes or constitutional provisions address the question whether state or federal elections can be postponed or suspended because of an Election Day emergency.⁹⁶ If the state's authority to suspend or postpone an election is not explicitly addressed, the authority may nonetheless exist as a part of the state's general power and authority to respond to emergency situations and their aftermath.

No federal statute or constitutional provision allows any federal official, institution, or agency to suspend or postpone state-run elections.⁹⁷ Thus, state actors alone determine whether to postpone or suspend a federal election, even though the decision may have national political implications.

Federal courts have recognized a state's apparent authority to suspend or postpone and reschedule congressional elections when exigent circumstances occur before or on Election Day.⁹⁸ "Exigent circumstances" are construed broadly and include not only natural disasters, but also a state's congressional redistricting plan's failure to receive Voting Rights Act preclearance.⁹⁹

2. When Should an Election be Suspended or Postponed?

Although rare, elections have been suspended or postponed on Election Day because of natural disasters—such as flooding¹⁰⁰ and blizzards¹⁰¹—and because of terrorist attacks.¹⁰² In each instance, the natural disasters or terrorist attacks created conditions in which it was impossible for voters or election officials to get to the polls,¹⁰³ left the polls unsafe,¹⁰⁴ or made it impossible to fulfill mandatory prerequisites for valid elections, such as the necessary presence of election personnel.¹⁰⁵

⁹⁶ See *Part 7: Types of Elections, e-book on Election Law, Election Law @ Moritz*, Election Emergency Statutes for 25 Critical States in the November Election, at http://moritzlaw.osu.edu/electionlaw/ebook/part7/elections_pres06.html. Last viewed May 15, 2007.

⁹⁷ See MASKELL, JACK, CONGRESSIONAL RESEARCH SERVICE, CRS REPORT FOR CONGRESS: POSTPONEMENT AND RESCHEDULING OF ELECTIONS TO FEDERAL OFFICE 3-4 (2004) (noting lack of explicit federal authority to cancel state elections even when a federal office is on the ballot).

⁹⁸ *Busbee v. Smith*, 549 F. Supp. 494 (D.D.C. 1982).

⁹⁹ See *Busbee*, 549 F. Supp. 494 (noting that the Uniform Federal Election Day did not prevent the postponement of congressional elections in the face of a natural disaster). The Uniform Federal Election Day established the Tuesday after the first Monday in November in even numbered years as the date on which congressional elections are held. 2 U.S.C. § 7 (2000).

¹⁰⁰ *In re Gen. Election—1985 Beharry*, 531 A.2d 836 (Pa. Commw. Ct. 1987).

¹⁰¹ *State v. Marcotte*, 89 A.2d 308 (Me. 1952).

¹⁰² Lithwick, Dahlia, *How Do You Cancel an Election?*, SLATE Sept. 12, 2001, <http://www.slate.com/id/1008278>.

¹⁰³ *Marcotte*, 89 A.2d 308 (impossible to reach the polling places).

¹⁰⁴ *In re Gen. Election—1985 Beharry*, 531 A.2d 836 (Pa. Commw. Ct. 1987) (safety).

¹⁰⁵ Lithwick, *supra* note 103 (unavailability of required election officials and police officers).

If the disaster's effect on the election only becomes apparent after Election Day, state statutes may authorize an additional day of voting.¹⁰⁶ Unless state statutes specify the size of the area in which an election should be postponed or suspended in response to a disaster or emergency, this decision must be made by government officials. In making this decision, important considerations include the amount of resources committed to the election, the magnitude of the disaster or emergency, and whether continuing the election would divert necessary resources from responding to the disaster. In reviewing the decision of a lower court, one court determined that a flood that affected only a few precincts justified suspending the election in only those limited areas, but a more widespread emergency that affected a critical mass of voters and polling places could justify suspending or postponing the election throughout the voting district.¹⁰⁷

3. Who Has the Authority to Suspend or Postpone an Election?

The state officer authorized to suspend or postpone elections in the face of disaster or emergency conditions varies by state, but is generally a state executive branch official and possibly a judicial officer.

In some states, the governor has explicit statutory power to suspend or postpone elections, while in other states, the governor's power to act is a by-product of his power to declare a state of emergency.¹⁰⁸ In yet other states, the governor may suspend certain state operations if conducting them would interfere with or hinder disaster recovery.¹⁰⁹ Presumably, the latter

¹⁰⁶ See N.Y. ELEC. LAW § 3-108 (Consol. 1986) (empowering state board of elections to order an additional day of voting if a disaster situation caused fewer than 25% of eligible voters to vote in the original election).

¹⁰⁷ See *In re Gen. Election—1985 Beharry*, 531 A.2d 836, 839-40 (Pa. Commw. Ct. 1987) (holding that lower court acted reasonably in suspending the election only in the precincts affected by the flood and not countywide but noting a different approach might be warranted under other circumstances).

¹⁰⁸ See FLA. STAT. ANN. 101.733 (West 2002) (authorizing the governor to suspend or delay arises after an executive order declaring a state of emergency has been issued); LA. REV. STAT. ANN. § 18:401.1 (2006) (authorizing governor to suspend or delay any election after declaring a state of emergency and receiving certification from the secretary of state that an emergency exists); MD. CODE ANN., ELEC. § 8-103 (LexisNexis 2003) (enabling the governor to provide for the postponement of elections in an emergency proclamation); VA. CODE ANN. § 24.2-603.1 (West Supp. 2007) (allowing governor to postpone an election after declaring a state of emergency or if the federal government or another state's governor declares a state of emergency); Press Release, WTC Response Update: Governor Provides Latest Information on State Response as Rescue and Recovery Efforts Continue," Sept. 14, 2001. New York Governor George Pataki declared a state of emergency and used his emergency powers to suspend statewide primary elections after the September 11, 2001, terrorist attacks on New York City, see "WTC Response Update: Governor Provides Latest Information on State Response as Rescue and Recovery Efforts Continue," September 14, 2001, available at http://www.state.ny.us/governor/press/01/sept14_5_01.htm, last viewed September 22, 2006.

¹⁰⁹ Language of these statutes is similar to that found in Illinois' Emergency Management Agency Act (20 ILL. COMP. STAT. ANN. 3305/7(a)(1) (West Supp. 2007)) that allows the governor "[t]o suspend the provisions of any regulatory statute prescribing procedures for conduct of State business, or the orders, rules and regulations of any State agency, if strict compliance with the provisions of any statute, order,

provisions offer governors a mechanism to suspend or postpone an election even without express authority to do so.

In some states, the state's top election official, such as the Secretary of State, has the power to cancel or postpone an election in the face of disaster or emergency. In Georgia, for example, the Secretary of State may postpone an election if the governor has declared a state of emergency,¹¹⁰ while Iowa's recognition of the Secretary of State's position as the state's commissioner of elections grants the office the authority to exercise emergency power over elections affected by natural or other disasters.¹¹¹

Other states allow one or more members of the State Board of Elections, or its equivalent, to suspend or postpone elections in the face of emergency. For example, New York grants this power to the State Board of Elections as a body,¹¹² while North Carolina vests the decision-making authority with the State Board of Elections' Executive Director.¹¹³

Petitioners may ask the court to issue an order suspending or postponing an election. Whether a court can do so depends on its statutory or constitutional authority to act. In a Pennsylvania case, a reviewing court determined that a lower court's order suspending an election in several flooded precincts was an appropriate exercise of the lower court's general supervisory power over the election's conduct.¹¹⁴ The reviewing court found the lower court had properly acted to uphold the general purpose of election law, which is to ensure fair elections and an equal opportunity for eligible voters to participate. The reviewing court further noted that if the election had not been suspended and rescheduled, some eligible voters would have been unable to vote because of circumstances beyond their control.¹¹⁵ A New York City court ordered a primary election suspended in the aftermath of terrorist attacks on the City because a mandatory condition of holding valid elections—the presence of certain government officials inside the polling places—became impossible to meet.¹¹⁶

Courts can also enjoin government officials who act outside their scope of authority in suspending or postponing elections. Because writs of mandamus only issue where a clear official duty to act exists, courts cannot issue it if suspending or postponing an election rests within the discretion of government officials.

The court's power to suspend or postpone an election, if available, does not extend to ordering unaffected jurisdictions to withhold their election results until the rescheduled election is held.¹¹⁷ Thus voters who go to the polls during the rescheduled election can have full

rule, or regulation would in any way prevent, hinder or delay necessary action ... in coping with the disaster."

¹¹⁰ GA. CODE ANN. § 21-2-50.1 (2003).

¹¹¹ IOWA CODE ANN. § 47.1 (West 2007).

¹¹² N.Y. ELEC. LAW § 3-108 (Consol. 1986).

¹¹³ N.C. GEN. STAT. § 163-27.1 (2005).

¹¹⁴ See *In re* Gen. Election—1985 Beharry, 531 A.2d 836 (Pa. Commw. Ct. 1987).

¹¹⁵ *Id.*

¹¹⁶ Lithwick, *supra* note 103.

¹¹⁷ Donna O'Neal, *Dade Waits While State Votes Today; Florida's High Court Agrees to Delay Dade County's Election but Allows Other Counties to Hold Their Primaries*, ORLANDO SENTINEL (Florida), Sept. 1, 1992, at A1.

knowledge of how their fellow citizens voted on Election Day and the impact their votes will have on the outcome.

4. When Should a Postponed Election Take Place?

State law may impose a deadline by which a suspended or postponed election must be resumed or rescheduled.¹¹⁸ For example, Florida requires the rescheduled election be held within 10 days—or as soon as possible thereafter—of the original election,¹¹⁹ Georgia allows up to forty-five days,¹²⁰ and Louisiana requires only that the suspended or delayed election is held as soon as “practicable.”¹²¹

In addition to state statutory requirements, courts may wish to consider how the Safe Harbor provision¹²² “deadline”¹²³ will affect a postponed and rescheduled election when it includes a presidential election. The Safe Harbor provision¹²⁴ requires Congress to grant official recognition to a state’s slate of presidential electors only if they were selected before the deadline and by the method the state legislature directed. If the state has not selected its official electoral slate by the Safe Harbor date and more than one electoral slate claims to be the official state slate, then Congress decides which slate receives official recognition. Therefore, if a suspended or postponed election includes a presidential election, either the rescheduled election must be held by the Safe Harbor date, the state legislature must select the state’s presidential electors, or else Congress as a whole will decide how to vote the state’s electoral votes, and the state’s voters are disenfranchised.

III. SPECIAL CONSIDERATIONS

A. SENSE OF URGENCY

Election Day lawsuits are stressful and frequently emotional. In addition to the limited remedy repertoire, Election Day lawsuits carry a sense of urgency. The urgency flows from the fact that Election Day relief may be the only relief available to the petitioner because the issue may be

¹¹⁸ FLA. STAT. ANN. § 101.733(2) (West 2002) (requiring rescheduled elections to be held within ten days of the original election or as soon as possible thereafter); GA. CODE ANN. § 21-2-50.1 (2003) (prohibiting an election from being postponed more than forty-five days); LA. REV. STAT. ANN. § 18:401.1 (Supp. 2007) (requiring suspended or delayed elections to resume or be rescheduled as soon as practicable).

¹¹⁹ FLA. STAT. ANN. § 101.733 (West 2002)

¹²⁰ GA. CODE ANN. § 21-2-50.1 (2003).

¹²¹ LA. REV. STAT. ANN. § 18:401.1 (Supp. 2007).

¹²² 3 U.S.C. § 5 (2000).

¹²³ See 3 U.S.C. § 7 (2000). The Safe Harbor provision “deadline” is not a true deadline in that it requires action by a certain date. Rather, it protects the state’s choice of presidential electors if they are selected by six days before the Electoral College meets, which by law is the Monday after the second Wednesday in December.

¹²⁴ 3 U.S.C. § 5 (2000).

moot once the election is over. Most states narrowly limit post-election relief and the conditions under which it may be granted. Circumstances that might qualify for individual relief on Election Day may not satisfy the statutory requirements for post-election redress.¹²⁵ Courts should be prepared to consider election day disputes.

Just because the situation seems urgent does not mean court intervention is possible or advisable. Election Day disputes frequently involve an underdeveloped record and offer little time for judicial reflection.¹²⁶

B. COMMUNICATING DECISIONS

Election Day remedies that impact more than a single voter or polling location must be quickly and clearly communicated to voters and election officials alike. Wide publication and dissemination increases the likelihood that potential voters who would benefit from the decision learn of it in time to get to the polls before they close. The court may be able to add notification provisions to its orders as an Ohio court did in 2004.¹²⁷ In that decision, in which the court ordered election officials to offer provisional ballot voting to voters who requested an absentee ballot but not did receive one, the court set a deadline of one-half hour after receiving the decision for the Secretary of State to tell all local election boards to advise their precinct workers of the court's decision.

¹²⁵ For example, a voter wrongly denied the opportunity to vote can seek an Election Day order that she be allowed to cast a ballot. Unless it appears her vote would have affected the outcome, such as when the election ends in a tie or a one-vote margin of victory, she is unable to receive post-election relief because she was unable to vote.

¹²⁶ See *State ex rel. Bush-Cheney 2000, Inc. v. Baker*, 34 S.W.3d 410, 412-13 (Mo. Ct. App. 2000) (acknowledging that in the heat of the moment, trial judges must make "difficult decisions with little time for deliberation).

¹²⁷ *White v. Blackwell* No. 3:04 CV 7689 (N.D. Ohio 2004) (requiring the county Board of Elections to immediately notify the local precincts to issue provisional ballots to those who qualify).