

# CHAPTER 6:

## ELECTION ADMINISTRATION

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### I. INTRODUCTION

States administer elections for local and state ballot measure elections and local, state, and federal offices. State election administration results in regulations that inevitably burden others' rights. Nonetheless, important state regulatory interests justify reasonable and non-discriminatory restrictions.<sup>2</sup>

State electoral interests include:

- combating fraud<sup>3</sup>,
- fostering an informed and educated electorate,<sup>4</sup>
- preserving the overall integrity of the electoral process,<sup>5</sup>
- avoiding overcrowded ballots,<sup>6</sup>

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<sup>1</sup> Candidates, voters and contributors.

<sup>2</sup> *Peace and Freedom Party v. Shelley*, 8 Cal. Rptr. 3d 497, 503 (Ct. App. 2004); *see also* *Bullock v. Carter*, 405 U.S. 134, 141 (1972) (holding the state's regulatory power must be exercised consistent with equal protection).

<sup>3</sup> *Burdick v. Takushi*, 504 U.S. 428, 440 n.9 (1992) (citation omitted).

<sup>4</sup> *Id.*

<sup>5</sup> *Munro v. Socialist Workers Party*, 479 U.S. 189, 194 (1986).

- avoiding voter confusion,<sup>7</sup> and
- being able to clearly identify the winner of each election.<sup>8</sup>

Among the responsibilities states undertake in election administration are:

1. ballot creation,
2. absentee voting,
3. polling place selection,
4. poll worker selection and training,
5. voting technology selection, and
6. as necessary, rescheduling an election because of a disaster or emergency.

States establish the requirements that must be fulfilled before candidates, political parties, and voters can participate in an election or ballot measures can appear on the ballot. Each of these topics is addressed in its own respective chapter elsewhere in this manual. Although states also establish campaign finance regulations, that topic is beyond the scope of this manual.

This chapter discusses some of the main areas of state election administration.

## II. BALLOT CREATION

Ballots are the means voters use to record and communicate their candidate and ballot measure preferences. States regulate ballots through statutes that govern the ballot's form, contents, and layout.<sup>9</sup> Ballot requirements may vary by state, depending on whether the ballot is used in a primary, general, special, or run-off election;<sup>10</sup> whether the ballot is paper or electronic;<sup>11</sup> or whether it is used for early or absentee voting, rather than for in-precinct voting on election day.<sup>12</sup> Statutes that do not themselves establish ballot criteria may delegate to certain state or local officials this responsibility.<sup>13</sup>

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<sup>6</sup> *Id.*

<sup>7</sup> *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 364 (1997).

<sup>8</sup> *Id.*

<sup>9</sup> See ALA. CODE § 17-6-24 (2007); see also MONT. CODE ANN. § 13-12-202 (2005) (directing the secretary of state to adopt uniform ballot form requirements).

<sup>10</sup> See, e.g., *Nikolits v. Nicosia*, 682 So.2d 663 (Fla. Dist. Ct. App. 1996) (noting statutory authorization for an incumbency designation on a ballot applied only to primary election and not general election ballots).

<sup>11</sup> See TEX. ELEC. CODE ANN. § 52.001 -.008 (Vernon 2003 & Supp. 2006) (paper ballots) and TEX. ELEC. CODE ANN. § 124.001 -.006 (Vernon 2003 & Supp. 2006) (electronic ballots).

<sup>12</sup> See VT. STAT. ANN. tit. 17, § 2535 (2007) (allowing for variations in the ballot for certain absentee voting purposes); see also ARIZ. REV. STAT. ANN. § 16-545 (2007) (requiring ballots used in early voting to be marked "early").

<sup>13</sup> See VT. STAT. ANN. tit. 17, § 2471 (2002) (stating circumstances under which the town clerk may become involved in determining the color or layout of a ballot); N.M. STAT. ANN. § 1-10-3 (West 2007) (authorizing the secretary of state to determine a uniform ballot layout); S.C. CODE ANN. § 7-13-320 (2006) (noting the ballot's size and color are set by the State Election Commission); ALASKA STAT. § 15.15.030 (2007) (requiring the director to prepare all official ballots).

This section discusses the most common types of state regulation of ballots and their associated legal challenges.

## A. BALLOT FORM REQUIREMENTS

Ballot form requirements may regulate the size, weight of paper, and ink<sup>14</sup> used for paper ballots. If the ballot is electronic, they may specify the whether the ballot scrolls or is presented as complete on a single screen. They may also specify the font size used on the screen.

## B. BALLOT CONTENTS REGULATIONS

*Ballot contents regulations* control the information ballots must or may contain. Depending on the state, these regulations may address the appropriate use of:

1. candidates' and political parties' names,
2. political party emblems, and
3. ballot measure descriptions.

Ballot contents regulations may also specify whether any mandatory additional language, such as certifications,<sup>15</sup> voter instructions,<sup>16</sup> or voter options in judicial retention elections should be included on the ballot.<sup>17</sup> Ballot contents statutes may also address the information that can be omitted from the ballot, such as uncontested offices.<sup>18</sup>

Finally, jurisdictions covered by the Section 203 minority language provisions of the Voting Rights Act must provide ballots using the required additional languages.<sup>19</sup>

### 1. Candidate and Political Party Names

As for candidate names, commonly known derivations of a candidate's given name are usually acceptable,<sup>20</sup> while misleading and deceptive names may be kept off the ballot.<sup>21</sup> Some states may allow, but not require, a candidate's nickname to be listed.<sup>22</sup>

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<sup>14</sup> See VT. STAT. ANN. tit. 17, § 2471 (2002) (requiring black ink).

<sup>15</sup> See S.C. CODE ANN. § 7-13-320(C)(b) (2006) (requiring an identified facsimile of the State Election Commission Executive Director's signature to be printed at the bottom of the ballot); TEX. ELEC. CODE ANN. §52.064 (Vernon 2003) (requiring "Official Ballot" to be printed on ballots); IND. CODE § 3-11-2-7 (West 2007) (requiring a "cautionary statement" that it is a crime to falsify the ballot or violate election laws); see also VT. STAT. ANN. tit. 17, § 2472 (2002) (listing the font sizes that must be used).

<sup>16</sup> See N.J. STAT. ANN. § 19:14-4 (West 1999).

<sup>17</sup> ALASKA STAT. § 15.15.030 (2007).

<sup>18</sup> Sometimes only one candidate runs for the office or the only the primary election is contested. In those instances, some states do not include the office on the general election ballots. If the office is a Congressional seat, however, the candidate's name must appear on the general election ballot even though the election is a foregone conclusion, because omitting the candidate's name violates uniform Federal Election Day requirements. See *Foster v. Love*, 522 U.S. 67, 73 (1997).

<sup>19</sup> 42 U.S.C. § 1973aa-1a (1975).

Unless expressly authorized by statute, professional or courtesy titles and other characterizations or designations generally are not permitted on an official ballot,<sup>23</sup> even if they appeared on the nominating certificate.<sup>24</sup> Exceptions are frequently made when two or more candidates have indistinguishable names or when additional information is necessary to avoid voter deceit, deception or confusion,<sup>25</sup> such as distinguishing between father and son candidates.<sup>26</sup>

In addition to ballot regulations governing candidates' names, state statutes commonly regulate political party names. For example, similar or confusing party names can be prohibited.<sup>27</sup> If different candidates or groups of candidate claim the same party affiliation, the order in which the potential nominees file the required papers may determine which candidate gets to use the party name.<sup>28</sup>

## 2. Political Party Designations and Emblems

Some states allow party designations and emblems to appear on the ballot, although their use may be restricted to specific elections.<sup>29</sup> Where party emblems are allowed, they must usually satisfy the following criteria:

- be a proper symbol,<sup>30</sup>
- not be misleading,<sup>31</sup>
- not be words or phrases,<sup>32</sup> and

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<sup>20</sup> *Stevenson v. Ellisor*, 243 S.E.2d 445 (S.C. 1978) (upholding decision allowing a candidate with a given name of "Ferdinan" to use "Nancy" because "Nancy" was a properly acquired derivative name the candidate had been using in good faith for honest purposes).

<sup>21</sup> *None Of The Above v. Hardy*, 377 So.2d 385 (La. Ct. App. 1979) (holding that despite meeting other qualifications to run for governor, the candidate's new legal name— "None Of The Above"—could be kept off the ballot because it was misleading and deceptive).

<sup>22</sup> *State ex rel. Sterne v. Bd. of Elections of Hamilton County*, 252 N.E.2d 641 (Ohio 1969) (requiring a showing that election officials abused their discretion in not printing a candidate's nickname on the ballot before the court will order it included).

<sup>23</sup> *Sooy v. Gill*, 774 A.2d 635 (N.J. Super. Ct. App. Div. 2001); *Lewis v. N.Y. State Bd. of Elections*, 678 N.Y.S.2d 809 (App. Div. 1998); *Douville v. Docking*, 501 P.2d 778 (Kan. 1972); *People ex rel. Richter v. Telford*, 242 N.E.2d 464 (Ill. App. Ct. 1968).

<sup>24</sup> *Tiogo v. Columbia Bd. of Elections*, 273 N.Y.S.2d 781 (Sup. Ct. 1966) (prohibiting the use of a candidate's title and academic degree).

<sup>25</sup> *Sooy*, 774 A.2d. 635.

<sup>26</sup> *Foley v. Donovan*, 144 N.W.2d 600 (Minn. 1966).

<sup>27</sup> *McCarthy v. Lawley*, 314 N.Y.S. 2d 626 (App. Div. 1970) (holding "Conservation Party" too similar and confusing to "Conservative Party").

<sup>28</sup> *Fenerty v. Lawrence*, 27 Pa. D. & C. 640 (Ct. Com. Pl. 1936).

<sup>29</sup> Some states will not allow party emblems to be used in general elections for judicial offices, even if the emblems are available for use in judicial primary elections. See *State ex rel. MacHale v. Ayers*, 105 P.2d 686 (Mont. 1940) and *Suessman v. Lamone*, 862 A.2d 1 (Md. 2004).

<sup>30</sup> *Steinberg v. Meisser*, 314 N.Y.S.2d 717 (Sup. Ct. 1970) (holding that a picture of a skyscraper, surrounded by a circle with a slash through it, was not a proper symbol).

<sup>31</sup> *In re Ingraham*, 201 N.Y.S. 765 (Sup. Ct. 1923) (holding a pointing hand was not a proper emblem and gave the candidate an unlawful advantage).

- not constitute electioneering.<sup>33</sup>

In general, intra-party disputes over which faction is entitled to use the official emblem should be settled within the party and should not involve the courts.<sup>34</sup>

### 3. Ballot Measure Descriptive Language

State statutes may require that ballot measures be limited to one question and that voters be provided sufficient information on the ballot measure to know what they are being asked to decide. See Chapter 4: State Regulation of Ballot Measures for more information on ballot measure requirements.

## C. BALLOT LAYOUT

Although the concept is simple—place the names of the candidates on the official ballot so that voters may select among them—the laws governing ballot layout are detailed, complex,<sup>35</sup> and varied. Ballot layout statutes regulate the order in which the elective offices and political parties appear on the ballot,<sup>36</sup> the order in which political parties appear under each elective office,<sup>37</sup> the order in which candidates' names appear,<sup>38</sup> and the location and order in which ballot measures appear.<sup>39</sup>

Ballot order requirements vary not only between states, but may also vary depending on whether an election is a primary<sup>40</sup> or general election, and whether the ballots are paper or machine-based. Common statutory methods of determining the order in which the candidates'

<sup>32</sup> *Sadler v. State ex rel. Sanders*, 811 N.E.2d 936 (Ind. Ct. App. 2004) (finding that the phrase "The A Team," was not a proper party emblem).

<sup>33</sup> *McNulty v. May*, 387 N.Y.S.2d 489 (App. Div. 1976); *Sadler*, 811 N.E.2d 936; *Schiff v. Griffin*, 639 N.W.2d 56 (Minn. Ct. App. 2001); *Robinson v. Hare*, 145 N.W.2d 254 (Mich. Ct. App. 1966). See *infra*, Chapter 7: Election Day for additional information on electioneering.

<sup>34</sup> *Am. Indep. Party of Michigan (Morse-Smith Faction) v. Sec. of State*, 247 N.W.2d 17 (Mich. 1976).

<sup>35</sup> Yet sometimes they are not complex enough given the political climate. See *Brown v. DeGrace*, 751 N.Y.S.2d 150 (Sup. Ct. 2002) (deciding a ballot order deadlock where the state law permitted overlapping minor party endorsements which resulted in a ballot that did not conform to "tradition" that the court decided was not "legally sacrosanct...[and] not of legal moment).

<sup>36</sup> Two common ballot formats exist. Under the "Indiana" or "party-column" format, party affiliation constitutes the first grouping, with all offices for which the party is running a candidate appearing underneath the party column. This arrangement facilitates voting by party. The second common ballot format is the "Massachusetts" or "office block" format, in which candidates are grouped based on the offices they seek. See *Sadler*, 811 N.E.2d at 939.

<sup>37</sup> See VA. CODE ANN. § 24.2-613 (2003) (requiring in non-primary elections, political party order determined by lot with "recognized political parties" order determined before independent candidacies).

<sup>38</sup> See MONT. CODE ANN. § 13-12-205 (2005).

<sup>39</sup> See MONT. CODE ANN. § 13-12-207(4) (2005).

<sup>40</sup> See CAL. ELEC. CODE § 13112 (West Supp. 2007) (requiring three separate drawings for a randomized alphabet to held per year, with provisions for additional randomized drawings as necessary to accommodate special elections).

names will be placed on the ballot are by random drawing of names<sup>41</sup> and alphabetical order.<sup>42</sup> Once the initial ballot order has been determined, all ballots may retain that order,<sup>43</sup> the order of the names may rotate throughout the list,<sup>44</sup> or new drawings may be held to randomly select the order of the names in other voting areas.<sup>45</sup> Election officials may need to hold a new drawing to affix the candidates' name order on run-off election ballots.<sup>46</sup>

State statutes may explicitly list the order in which offices should appear on the ballot.<sup>47</sup> In general, ballots list the elections for political offices in descending order based on the size of the political jurisdiction.<sup>48</sup> Thus, in state elections, a gubernatorial election is listed before a state legislative election, which is listed before a mayoral election, and so on through all available local offices.<sup>49</sup> States may allow candidates with similar political beliefs to group themselves together, "bracket[ing]," on the ballot.<sup>50</sup>

## D. BALLOT CREATION DEADLINES

State statutes or administrative regulations may establish a deadline by which the ballot must be finalized,<sup>51</sup> and may require sample ballots<sup>52</sup> be made available for public inspection prior to the election.

If the election includes a federal office, then absentee ballots must be made available to absent uniformed military or overseas voters thirty days before the election or the state must accept a standardized federal write-in ballot.<sup>53</sup>

Statutory deadlines to create and disseminate absentee ballots pressure the time frame for, and limit a court's ability to hear, many pre-election lawsuits.

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<sup>41</sup> See *Bradley v. Perrodin*, 131 Cal. Rptr. 2d 402 (Ct. App. 2003).

<sup>42</sup> See NEV. REV. STAT. ANN. §§ 293.256 - 2565 (LexisNexis 2007) (noting exceptions are allowed when the candidates have same or similar names).

<sup>43</sup> See NEV. REV. STAT. ANN. § 293.256 - .268 (LexisNexis 2007) (making no provision to rotate names).

<sup>44</sup> See CAL. ELEC. CODE § 13111 (West Supp. 2007).

<sup>45</sup> See *id.*

<sup>46</sup> *Guiliano v. Richardson*, 266 A.2d 154 (N.J. Super. Ct. Law Div. 1970) (holding clerk's failure to select new candidate designations and bracketing in a run-off election amounted to impermissible discretion).

<sup>47</sup> See VT. STAT. ANN. tit. 17, § 2471(a) (2002).

<sup>48</sup> See N.C. GEN. STAT. § 163-165.6 (2005).

<sup>49</sup> *Amarino v. Canary*, 480 N.Y.S.2d 920 (App. Div. 1984) (noting county officers are listed before candidates before town boards).

<sup>50</sup> *Gillen v. Sheil*, 416 A.2d 935, 938 (N.J. Super. Ct. Law Div. 1980) (citation omitted).

<sup>51</sup> See *e.g.*, N.J. STAT. ANN. § 19:14-1 (West 1999) (requiring a copy of ballot to be ready for the printer on or before the forty-third day before the election); see also N.J. STAT. ANN. § 19:14-18 (West 1999) (requiring county clerks to have the printed ballots on hand no later than noon on the fifth day preceding the general election); see also N.M. STAT. ANN. § 1-10-4 (West 2007) (requiring county clerk to prepare the ballot no less than forty-nine days before a primary or fifty-three days before a general election) and N.M. STAT. § 1-10-5 (West 2007) (requiring county clerks to have ballot labels no less than thirty days before the election).

<sup>52</sup> See N.C. GEN. STAT. § 163-165.2 (2005).

<sup>53</sup> 42 U.S.C. § 1973ff-1(a)(3) (Supp. IV 2004).

## E. LEGAL CHALLENGES

Ballot-related challenges include claims of statutory non-compliance<sup>54</sup> or violations of a candidate's constitutional rights.<sup>55</sup> Ballot-related objections should be filed before the election. Pre-election challenges are time-critical because of looming statutory deadlines governing ballot printing<sup>56</sup> or set up, posting sample ballots,<sup>57</sup> and mailing absentee and military ballots.<sup>58</sup>

### 1. Compliance-Based Challenges

In designing the ballot and placing candidates, ballot measures, and political parties on it, election officials perform non-discretionary<sup>59</sup> ministerial duties.<sup>60</sup> Ballot-related compliance lawsuits allege that election officials did not follow statutory or administrative requirements when creating the ballot. Election officials may have approved an incorrect party emblem, listed the candidate's name improperly, placed a candidate or political party's name in the wrong location, or failed to follow candidate name order statutes. In addition, the descriptive language used for initiatives, referenda, and amendments, bond or debt authorizations, and judicial retention elections may be challenged. Before filing a ballot order-based court challenge, aggrieved candidates or registered voters may be first required to pursue certain administrative remedies.

Litigation over whether candidate order has complied with statutory requirements is motivated by concerns that undecided voters are more likely to vote for the first candidate listed, thus the first ballot position potentially provides that candidate an unfair advantage.<sup>61</sup>

<sup>54</sup> *Mochary v. Caputo*, 494 A.2d 1028 (N.J. 1985); *Brown v. DeGrace*, 751 N.Y.S.2d 150 (Sup. Ct. 2002) (noting that "case law suggests that where the Board of Elections is claimed to have made an error in establishment of the ballot, an aggrieved candidate may challenge the manner in which the Board constituted the ballot") (citation omitted).

<sup>55</sup> *DeNardo v. Municipality of Anchorage*, 105 P.3d 136 (Alaska 2005) (holding plaintiff's political associational rights were not violated by the randomly drawn, non-rotated order of candidates' names on the ballot).

<sup>56</sup> See *supra* note 51.

<sup>57</sup> See VT. STAT. ANN. tit. 17, § 2522 (Supp. 2006) (requiring sample ballots to be posted no later than twenty days prior to any primary or general elections and no later than ten days before municipal elections); ARIZ. REV. STAT. ANN. § 16-503 (2007) (requiring sample ballot to be available to the public at least ten days before general elections and five days before city or town elections).

<sup>58</sup> *Austin v. City of Alice*, 193 S.W.2d 290 (Tex. Civ. App. 1946); *Brown v. DeGrace*, 751 N.Y.S.2d 150 (Sup. Ct. 2002) (indicating that the mailing of military ballots had already been delayed and the timely mailing of absentee ballots was jeopardized).

<sup>59</sup> *State ex rel. Smith v. Kozer*, 229 P. 679 (Or. 1924); *Burr v. Voorhis*, 128 N.E. 220 (N.Y. 1920); *Stuart v. Carr*, 106 N.E. 158 (Ill. 1928).

<sup>60</sup> See *State ex rel. Gengo v. Cudden*, 168 S.E.2d 541 (W.Va. 1969) (finding that ministerial capacity lies with the board of elections); *Stuart*, 106 N.E. 158 (holding that ballot printer does not operate in a ministerial capacity); *Sadler v. State*, 811 N.E.2d 936 (Ind. Ct. App. 2004) (finding that voting technology vendor does not operate in a ministerial capacity).

<sup>61</sup> See Daniel E. Ho and Kosuke Imai, *The Impact of Partisan Electoral Regulation: Ballot Effects from the California Alphabet Lottery, 1978-2002*, Princeton Law & Public Affairs Paper No. 04-001; Harvard Public Law Working Paper No. 89 (2004) (discussing the supposed effects of ballot order on election results and

Plaintiffs generally ask the court to order election officials to create ballots that remedy the deficiencies the plaintiffs' identified. They may also ask the court to enjoin the election until the ballot is reworked.<sup>62</sup> The court's ability to do so may be limited, especially when the electoral board did not abuse its discretion or exceed its statutory authority.<sup>63</sup>

A court may decline to order corrective action unless it is satisfied that acceptable changes can be made within the time available and at a reasonable cost, considering how egregious the administrative error is.<sup>64</sup> In general, trial courts order non-compliant ballots reprinted when their form violates statutory requirements and sufficient time exists to reformat and distribute them.<sup>65</sup>

Finally, where ballot-related statutes have not kept pace with changes in voting technology, the court may be asked to interpret the statutory ballot requirements in light of the existing capabilities.<sup>66</sup>

## 2. Constitutional Challenges

In general, most courts have not found constitutional violations when ballot order statutes did not require rotation of a candidate's name.<sup>67</sup>

### III. ABSENTEE VOTING

Absentee voting, which the Constitution does not require the states to offer,<sup>68</sup> allows registered voters to cast their ballots early, by mail or in person, when the voter will be unable to vote in

finding some ballot order affect for first two candidate positions in primary elections); R. Michael Alvarez, Betsy Sinclair, Richard L. Hasen, *How Much is Enough? The "Ballot Order Effect" and the use of Social Science Research in Election Law Disputes*, 5 ELECTION L. J. 40 (2006) (finding little evidence that candidates systematically benefit from their name being placed first on the ballot).

<sup>62</sup> *Sadler*, 811 N.E.2d 936 (enjoining an election because the electoral board violated state law by changing the ballot's format without first determining that the voting equipment would not support the prescribed format).

<sup>63</sup> *Sooy v. Gill*, 774 A.2d 635 (N.J. Super. Ct. App. Div. 2001) (finding failure to do more than place the candidate's name on the ballot was not subject to judicial review).

<sup>64</sup> *Mattson v. McKenna*, 222 N.W.2d 273 (Minn. 1974).

<sup>65</sup> *Johnston v. Ing*, 441 P.2d 138 (Haw. 1968) (holding that courts may leave the sample ballot uncorrected even if they order the official ballots reprinted); see *Millman v. Kelly*, 410 A.2d 283 (N.J. Super. Ct. Law 1979) (finding that paper-based ballots may be corrected through the use of stickers as an alternative to reprinting the ballot).

<sup>66</sup> *Axtell v. Caputo*, 204 A.2d 7 (N.J. Super. Ct. App. Div. 1964); *Sadler*, 811 N.E.2d 936; *Millman v. Kelly*, 410 A.2d 283 (N.J. Super. Ct. Law Div. 1979) (holding statute applied to paper ballots only in the face of uncontradicted testimony that the statutorily-specified "yes" and "no" block was not possible given the voting equipment in use).

<sup>67</sup> See *DeNardo v. Municipality of Anchorage*, 105 P.3d 136 (Alaska 2005) (holding plaintiff's political associational rights were not violated by the randomly drawn, non-rotated order of candidates' names on the ballot); see also *Sonneman v. State*, 969 P.2d 632 (Alaska 1998) (finding no Equal Protection violation in the statute that required name rotation).

<sup>68</sup> See *Griffin v. Roupas*, 385 F.3d 1128 (7<sup>th</sup> Cir. 2004).

person on election day because of out-of-town travel,<sup>69</sup> illness or disability, or other state-approved reasons.<sup>70</sup>

Absentee voting that occurs outside a polling location is usually unsupervised; thus it carries an inherent risk of election fraud. This increased fraud risk allows states to regulate absentee voting more extensively than in-precinct voting, including limiting its availability.<sup>71</sup> States frequently regulate some or all of the following aspects of absentee voting:

- eligibility requirements, including the information that must be included on an absentee ballot application,
- how, and by whom, absentee ballots are distributed to voters and how they are returned to election officials,
- who, if anyone, can assist an absentee voter in voting,
- whether and how an absentee ballot must be witnessed, and
- the postmark or receipt deadline for the returned ballot to be counted.

In addition to following state absentee voting regulations, elections officials must also comply with federal absentee ballot regulations. Federal statutes require states to:

- permit former residents who moved out-of-state less than thirty days before a presidential election to vote by absentee ballot for President and Vice-President only,<sup>72</sup>
- limit the amount of medical information voters must provide to qualify for absentee voting,<sup>73</sup>
- permit absentee voting by uniformed and overseas voters in general, special, primary, or runoff elections for federal office,<sup>74</sup>
- accept the standardized federal write-in absentee ballot in general elections for federal offices,
- notify federal election absentee ballot applicants if their applications are rejected and provide the reason for the rejection,<sup>75</sup> and
- accept as valid write-in votes for federal office candidates if the ballot meets UOCAVA criteria, including the standardized federal oath or affirmation if the state requires one of these.<sup>76</sup>

<sup>69</sup> See TEX. ELEC. CODE ANN. §§ 106.001 - .002 (Vernon 2003 & Supp. 2006) (creating provisions to permit person in space on Election Day the opportunity to vote).

<sup>70</sup> Some states offer “no excuse” absentee or early voting wherein any registered voter can vote by absentee ballot or in-person at designated precincts. See ELECTIONLINE.ORG, Early and Absentee Voting Laws (as of 7/26/06), <http://electionline.org/Default.aspx?tabid=474> (last visited Feb. 1, 2007) (detailing state absentee and early voting laws).

<sup>71</sup> See *Griffin v. Roupas*, 385 F.3d 1128 (7<sup>th</sup> Cir. 2004) (noting “working mother” is not a protected classification, thus no equal protection violation occurs when the states does not extend absentee voting eligibility to individuals meeting this description).

<sup>72</sup> 42 U.S.C. § 1973aa-1(e) (2000). The state must also allow the former resident meeting these criteria to vote in-person at their old precinct if the former resident prefers that to absentee voting. If the citizen moves to another state thirty or more days before the election, another VRA provisions requires his new state to register him to vote for the upcoming federal election.

<sup>73</sup> 42 U.S.C. § 1973ee-3 (2000).

<sup>74</sup> 42 U.S.C. § 1973ff (Supp. IV 2004).

<sup>75</sup> *Id.*

<sup>76</sup> 42 U.S.C. § 1973ff-1(a)(5) (Supp. IV 2004).

Courts become involved in absentee voting issues when a plaintiff challenges some aspect of the state's absentee ballot regulations. In addition, certain absentee ballot deadlines may affect a court's ability to grant relief in lawsuits involving other aspects of the election. For example, one court dismissed a challenge to a ballot measure in part because the deadline to mail absentee ballots had passed.<sup>77</sup>

Direct attacks on state absentee ballot processes and regulations occur in one of three forms. First, the plaintiff may claim that election officials failed to follow proper state or federal procedures in approving, issuing, or denying absentee ballots. As with other compliance-related election law claims, the initial challenge may need to be filed as an administrative complaint, with court review available only on limited grounds. Courts can issue writs of mandamus to compel election officials to grant absentee ballots to qualified individuals who were improperly denied them or may issue injunctions to prevent election officials from approving or distributing absentee ballots in contravention of governing statutes.

Second, plaintiffs may challenge the constitutionality—usually on equal protection grounds—of a state absentee ballot regulation. Federal constitutional challenges to state absentee voting regulations are reviewed under the rational basis test.<sup>78</sup> These challenges succeed when the plaintiff proves that no rational basis supports the state's distinctions. For example, state statutes that allowed absentee voting for county residents who were jailed out-of-the-county, but denied absentee voting to county residents who were jailed in-county even though the in-county inmates had no alternative means of voting, were arbitrary and without a rational basis.<sup>79</sup> Absentee ballot statutes that allowed absentee voters to vote a replacement ballot if the voter picked up the ballot from the election office or if the voter went to the polls to vote, but did not allow replacement ballots to be mailed to housebound absentee voters violated equal protection guarantees by treating similarly-situated voters differently without a rational explanation.<sup>80</sup>

The third way absentee voting directly affects courts occurs when a candidate dies, withdraws, or otherwise becomes ineligible after the absentee ballots have been mailed, but before election day itself.<sup>81</sup> Under these circumstances, courts may need to decide how to count, if at all, the ballots cast for the now ineligible candidate and the circumstances, if any, under which an absentee voter can void the original absentee ballot and cast a replacement.<sup>82</sup> If absentee ballots cannot be reissued with a replacement candidate's name, the court may be asked to consider

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<sup>77</sup> See *State ex rel. Newell v. Tuscarawas County Bd. of Elections*, 757 N.E.2d 1135 (Ohio 2001) (per curiam).

<sup>78</sup> *Erlandson v. Kiffmeyer*, 659 N.W.2d 724, 733 (Minn. 2003). Although, if a state constitution provides a right to cast an absentee ballot, a state regulation challenged on state constitutional grounds may receive more exacting scrutiny.

<sup>79</sup> *Id.* (citing *O'Brien v. Skinner*, 414 U.S. 524 (1974)).

<sup>80</sup> *Id.* at 731-32.

<sup>81</sup> See *id.* (discussing the effect of the death of incumbent Senator Paul Wellstone eleven days before the election).

<sup>82</sup> See *id.* (requiring absentee ballots returned before the candidate died to be counted as cast for all offices and issues).

whether an absentee voter can void his earlier ballot by appearing at the polls and voting in person.<sup>83</sup>

Absentee ballot considerations may play a role in many pre-election legal challenges, even when they are not the issue.<sup>84</sup> The deadline to print and mail absentee ballots, which may be as much as a month prior to election day, may operate as de facto deadline on court decisions that may directly affect the ballot or voting.<sup>85</sup>

#### IV. POLLING PLACE SELECTION

Local election officials should comply with state and federal laws when they select polling locations. Among other requirements, state law may set standards for how many voters should be allocated to vote at a facility<sup>86</sup> and may prohibit the use of some buildings as polling locations.<sup>87</sup> Federal laws require that polling locations be accessible to physically disabled voters, with some exceptions if alternative voting opportunities, such as curbside voting, are provided.<sup>88</sup>

Although court challenges to polling place selection are rare, they do occur.<sup>89</sup> In recent elections, complaints, but no legal challenges, have erupted over the following polling location-related issues:

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<sup>83</sup> See *id.*

<sup>84</sup> See *infra* Chapter 9: Election Contests for additional information on post-election challenges to absentee ballots.

<sup>85</sup> See *Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914 (9<sup>th</sup> Cir. 2003) (en banc) (per curiam) (holding the election could not be enjoined to hear challenge to voting technology because the election began when absentee voting started); *Campaign to Elect Larry Carver Sheriff v. Campaign to Elect Anthony Stankiewicz Sheriff*, 804 N.E.2d 419 (Ohio 2004) (denying candidate's petition to amend his challenge to another candidate's qualifications to run for office because the passing of the absentee ballot statutory deadline made laches applicable).

<sup>86</sup> See *Ury v. Santee*, 303 F. Supp. 119, 126 n.3 (N.D. Ill. E.Div. 1969) (citing existing state standard as no more than 500 voters per facility unless the election is uncontested).

<sup>87</sup> See *Van Lengen v. Town Bd. of Onondaga*, 253 N.Y.S.2d 865, 866 (Sup.Ct. 1964) (citing state law prohibiting polling locations on property owned or leased by candidates for public office in primary or general elections).

<sup>88</sup> See *N.Y. ex rel. Spitzer v. County of Schoharie*, 82 F. Supp. 2d 19 (N.D.N.Y. 2000); 42 U.S.C. § 1973ee-1 (2000) (requiring polling places to be accessible to handicapped and elderly unless its an emergency situation; if no polling place can be made accessible, even temporarily, then the locality must provide an alternative voting means on election day).

<sup>89</sup> See *Van Lengen v. Town Bd. of Onondaga*, 253 N.Y.S.2d 865 (Sup.Ct. 1964) (challenging the candidate's office selected as polling location); *Application of Held*, 363 N.Y.S.2d 205 (Sup. Ct. 1974) (challenging selection of polling place in contest of village incorporation election); *Ury v. Santee*, 303 F. Supp. 119 (N.D. Ill. 1969) (voiding election for federal constitutional rights violation in substantially unequal sized precincts when precincts reduced from thirty-two to six in village election); *Mirlisena v. Fellerhoff*, 463 N.E.2d 115 (Ohio Ct. Com. Pl. 1984) (finding no abuse of discretion in relocation of polling place in contest of councilmanic election); *Rabinowitz v. Anderson*, No. 06-81117 (S.D. Fla. filed Dec. 1, 2006) (alleging violation of the Establishment Clause over polling place located in church where religious imagery was on display around the voting booth).

- the selection of a church as a polling location for a precinct with a large Orthodox Jewish population,<sup>90</sup>
- the selection of a foreign automobile dealership as a polling location in a town with a large number of auto workers,<sup>91</sup>
- the use of an elementary school as a polling place when school was in session,<sup>92</sup> and
- the closing of a polling location in a church days before the election and dispersal of the precinct's voters to other locations over concerns the church would not comply with electioneering regulations.<sup>93</sup>

When election officials have clearly violated a statutory provision in the selection of a polling location, courts can order them to select a more appropriate location.<sup>94</sup> If election officials have not violated a statutory provision in selecting a polling location, then their choice is reviewed for abuse of discretion.<sup>95</sup> Generally, before the court can overturn a decision because it was an abuse of discretion, the decision must be "arbitrary, unreasonable, and capricious."<sup>96</sup> Finally, where the established precincts are of substantially unequal size, federal equal violations may occur if the size disparities led to a number of voters being unable to vote.<sup>97</sup>

## V. POLL WORKERS

Election officials select and train poll workers. State statutes may provide guidance in this area, as well as establish working hours, job responsibilities, pay scales, and training requirements. Where inadequate training of poll workers continues to occur in the face of known problems

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<sup>90</sup> Michael O'Malley, *Jewish voters object to new polling place, Move to church brings anti-Semitism charges*, THE PLAIN DEALER (Cleveland), Oct. 1, 2006, at B1; see Michael O'Malley, *Orthodox Jews Happy About Changed Poll Site*, THE PLAIN DEALER (Cleveland), Oct. 7, 2006 at B4, (moving the polling location to City Hall after complaints).

<sup>91</sup> Mark Puente, *Amherst's Premier Toyota to Remain a Polling Place*, THE PLAIN DEALER (Cleveland), Oct. 7, 2006, at B4 (polling location not changed).

<sup>92</sup> Tasha Flournoy, *Solon School Wants Polling Place Moved, Safety a Concern, Superintendent Says*, THE PLAIN DEALER (Cleveland), Oct. 11, 2006 at B3 (polling location not changed).

<sup>93</sup> See The Journal Editorial Board, *Drop Investigation of Auditor*, RAPID CITY JOURNAL, Nov. 16, 2006, <http://rapidcityjournal.com/articles/2006/11/16/news/opinion/opin01.htm>.

<sup>94</sup> *Van Lengen v. Town Bd. of Onondaga*, 253 N.Y.S.2d 865, 870-71 (Sup. Ct. 1964) (finding an error of law in the town board's selection of a polling location and ordering them to call a meeting, attend the meeting, and designate another polling place).

<sup>95</sup> See *Application of Held*, 363 N.Y.S.2d 205 (Sup. Ct. 1974); *Mirlisena v. Fellerhoff*, 463 N.E.2d 115 (Ohio Ct. Com. Pl. 1984). See also, Jonathan Weisman, *Ruling Keeps DeLay on Ballot; Judge Sides With Democrats, Says Former Lawmaker Can't Quit*, WASHINGTON POST, July 7, 2006, at A5, and Marc Meredith & S. Christian Wheeler, *Can Where People Vote Influence How They Vote? The Influence of Polling Location Type on Voting Behavior* (Stanford Graduate School of Business, Research Paper Series, Research Paper No. 1926, 2006), available at <https://gsbapps.stanford.edu/researchpapers/library/RP1926.pdf> (suggesting that polling locations may influence voting behavior). Currently, whether and how polling place selection is designed to garner a preferred electoral outcome results in a finding of abuse of discretion is unknown.

<sup>96</sup> *Mirlisena v. Fellerhoff*, 463 N.E.2d 115, 118 (Ohio Ct. Com. Pl. 1984) (citation omitted).

<sup>97</sup> *Ury v. Santee*, 303 F. Supp. 119 (N.D. Ill. 1969) (voiding election for Equal Protection violations resulting from precinct overcrowding that led to many voters' inability to vote where a township had consolidated thirty-two precincts into six precincts, resulting in substantial population deviations).

with it, state and local elections officials may be civilly liable for any ensuing constitutional rights violations.<sup>98</sup>

## VI. VOTING TECHNOLOGY

Election officials choose the method voters will use to cast their ballots. The Help America Vote Act (HAVA) set minimum requirements that must be met by voting equipment used in federal elections. This equipment must:

- allow the voter to verify the voter’s selections before the ballot is cast,
- allow the voter to change the ballot or correct errors, and
- notify the voter if an over vote<sup>99</sup> exists and allow it to be corrected.<sup>100</sup>

HAVA also requires states to offer voting equipment with an audit capability,<sup>101</sup> and to make one voting station per polling location accessible to individuals with disabilities<sup>102</sup> for use in federal elections. States must also offer voting systems that can satisfy the alternate language requirements of the Voting Rights Act.<sup>103</sup> Finally, HAVA requires states to use voting technology that complies with error rate standards set by the Federal Election Commission.<sup>104</sup>

Even within the broad standards set by HAVA, election officials can choose from different voting systems. Their choice of voting method—as well as the subsequent ballot designed for that method—can affect an election because different voting technologies have been shown to have different residual vote rates. Residual vote rates measure the difference between the number of voters and the number of valid votes cast for given contest.<sup>105</sup>

Courts may become involved in challenges to voting equipment selection decisions. Several courts have allowed equal protection challenges to voting technology with different residual vote rates to proceed.<sup>106</sup> One court characterized the use of voting technologies with

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<sup>98</sup> See *League of Women Voters of Ohio v. Blackwell*, 432 F. Supp. 2d 723, 729, 730 (N.D. Ohio 2005) (holding that plaintiff’s claim of a constitutional rights violation survives defendant’s motion to dismiss because plaintiff met the threshold test that defendant’s failure to train might amount of “deliberate indifference” because of the history of training problems and the due process violations that were likely to occur as a result) (citation omitted).

<sup>99</sup> Over votes occur when voters cast votes for more than one candidate for a single office.

<sup>100</sup> 42 U.S.C. § 15481(a)(1)(A-B) (Supp. IV 2004) (permitting localities whose voting equipment cannot notify the voter of an over vote, to meet federal voting standards if the locality establishes a voter education program which includes information on the effect of an over vote and how to correct the problem if it arises).

<sup>101</sup> 42 U.S.C. § 15481(a)(2) (Supp. IV 2004).

<sup>102</sup> 42 U.S.C. § 15481(a)(3) (Supp. IV 2004).

<sup>103</sup> 42 U.S.C. § 15481(a)(4) (Supp. IV 2004).

<sup>104</sup> 42 U.S.C. § 15481(a)(5) (Supp. IV 2004).

<sup>105</sup> In addition to over votes, residual votes include under votes where the voter fails to make a discernable selection.

<sup>106</sup> *Black v. McGuffage*, 209 F. Supp. 889 (N.D. Ill. 2002) (denying most of the defendant’s motions to dismiss voting machinery challenges); see also *Stewart v. Blackwell*, 444 F.3d 843 (6th Cir. 2006) (finding an Equal Protection violation in use of punch card and central processed optical scan ballots because of

different error rates in different precincts as allowing local election officials to assign different levels of importance to different voters votes unequally based on the choice of voting equipment.<sup>107</sup> Due Process violations might exist if a law allows election officials to impose significantly inaccurate voting systems on some portion of the voting public without a rational basis.<sup>108</sup>

Questions remain as to the effect of the Supreme Court's admonishment that states cannot value one person's vote over another's<sup>109</sup> in the voting technology arena. Additionally, it is unclear on what scale votes must be "equally weighted" before an Equal Protection violation no longer exists.

## VII. RESCHEDULING AN ELECTION DUE TO DISASTER

Sometimes disasters that strike before Election Day<sup>110</sup> lead to requests to postpone an upcoming election.<sup>111</sup> State law may govern when an election can be postponed, who has the authority to postpone it, and how quickly the election must be rescheduled.<sup>112</sup> State or local law may also specify how the offices to be voted on during the postponed election will be filled in the interim.<sup>113</sup>

Once a disaster strikes shortly before an election, the election's outcome may be altered no matter what action is taken. The disaster may affect the logistics of holding an orderly election as scheduled because polling places may be unusable, election workers may be unavailable,<sup>114</sup>

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their higher residual vote rates), *vacated* (after the state abandoned the challenged voting equipment), 473 F.3d 692 (6<sup>th</sup> Cir. 2007).

<sup>107</sup> *McGuffage*, 209 F. Supp. at 901 (observing that unless election officials used the same voting equipment through all precincts, some voters would have a greater chance and others would have a lesser chance of their votes counting).

<sup>108</sup> *Id.* (refusing to dismiss defendant's motion to dismiss plaintiff's substantive due process claim).

<sup>109</sup> *Bush v. Gore*, 531 U.S. 98 (2000).

<sup>110</sup> See *infra* Chapter 7: Election Day for additional information on disasters which strike on Election Day.

<sup>111</sup> See Ed Anderson, *Blanco seeking to put off election; Statewide ballot not feasible now, she says*, TIMES-PICAYUNE (New Orleans), Jan. 25, 2006, at 5 (Hurricane Katrina in Louisiana); Jane Sutton, *Primary election delayed in devastated Dade*, UNITED PRESS INTERNATIONAL, Aug. 29, 1992 (Hurricane Andrew in Florida); Bill Moss, *Election is still on*, ST. PETERSBURG TIMES (Florida), Aug. 27, 1992, at 4B (Hurricane Andrew in Mississippi and Hurricane Hugo in North Carolina. See also John C. Van Gieson, *Dade Sues to Delay Tuesday's Election; Plaintiffs Say Thousands Wouldn't be Able to Vote—Judge Hears Arguments; Today*, ORLANDO SENTINEL (Florida), Aug. 29, 1992 at A6 (discussing disagreements between the Secretary of State who wanted to hold elections as scheduled and county elections supervisor who wanted them postponed one week).

<sup>112</sup> See Chapter 7: Election Day for additional information. See also Press Release, US States News, *Gov. Barbour Postpones Special Election*, Sept. 3, 2006 (governor postponed elections post-Katrina).

<sup>113</sup> Frank Donze and Robert Scott, *Officials May Stay on Past Normal 4 Years; Feb. 4 Election is Latest Storm Victim*, TIMES-PICAYUNE (New Orleans), Dec. 3, 2005, at National 1 (noting city law extended the terms of the current officeholders).

<sup>114</sup> *Id.* (noting 204 of 442 voting precincts were damaged or destroyed and numerous election commissioners were evacuated to other cities); Jane Sutton, *Primary Election Delayed in Devastated Dade*, UNITED PRESS INTERNATIONAL, Aug. 29, 1992 (noting many locations ordinarily used as polling places

and voters may be displaced or otherwise unable to get to the polls.<sup>115</sup> If the election is postponed, however, voter turnout may still be low,<sup>116</sup> and lightly-funded candidates disadvantaged.<sup>117</sup> In the absence of controlling statutes or case law, courts that hear cases concerning the scheduling of elections following a disaster may need to balance competing concerns of voter disenfranchisement and concerns related to the government's legitimacy if the election's postponement leads to office holders carrying over past their terms because their successors have not been elected.

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were in use as temporary shelters so alternative sites needed to be identified and voters needed to be informed of the change).

<sup>115</sup> Sutton, *supra* note 114 (noting 640,000 voters lived in the area that sustained heavy damage where roadways still needed to be cleared). See also Robin Benedick, *Chiles Won't Delay Election, Despite Mess in Dade; The Governor Will Ask the National Guard to Help Set Up Temporary Polling Places*, ORLANDO SENTINEL (Florida), Aug. 27, 1992, at A16 (quoting Dade County Elections Supervisor on the difficulty of getting voters who lost their house or electricity to the polls). Note also that National Guard members who have been mobilized may need to have special provisions made for them to vote by absentee ballot or they may become disenfranchised. See Sandra Sanchez, *Candidates Seek Delay of Elections*, USA TODAY, Aug. 31, 1992, at 3A (noting that 3000 National Guard personnel were mobilized outside their voting jurisdictions to assist in relief efforts).

<sup>116</sup> Bill Moss, *Election is Still On*, ST. PETERSBURG TIMES (Florida), Aug. 27, 1992, at 4B (stating turnout in city elections postponed two weeks because of Hurricane Hugo saw turnout of 7.5%).

<sup>117</sup> Robin Benedick, *Chiles Won't Delay Election, Despite Mess in Dade; The Governor Will Ask the National Guard to Help Set Up Temporary Polling Places*, ORLANDO SENTINEL (Florida), Aug. 27, 1992, at A16 (reporting a concern of party officials).