

## SYMPOSIUM

### EXCESSIVE JUDICIALIZATION, EXTRALEGAL INTERVENTIONS, AND VIOLENT INSURRECTION: A SNAPSHOT OF OUR 59TH PRESIDENTIAL ELECTION

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INTRODUCTION.....	336
I. RESTRICTING BALLOT ACCESS .....	339
II. CHANGING THE WAY WE VOTE .....	343
<i>A. Wisconsin.....</i>	345
<i>B. Pennsylvania.....</i>	352
III. COUNTING THE VOTES .....	357
IV. ATTACKING THE RESULTS .....	360
<i>A. Requesting That Courts Overturn Adverse Election Results.....</i>	361
1. Michigan .....	361
2. Pennsylvania .....	362
3. Georgia.....	362
4. Nevada .....	363
5. Minnesota.....	363
6. Wisconsin.....	363
7. General Attacks.....	364

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<i>B. Strong-Arming the States and Congress to Overturn         Adverse Election Results</i> .....	366
V. ELECTION SUBVERSION.....	368
CONCLUSION.....	370

#### INTRODUCTION

The Symposium included in this issue of the *Fordham Law Review* provides scholars and lawyers with the opportunity to think about some of the most provocative issues related to the way we elect our chief executive. When first conceived, this Symposium was meant to expand and elevate the discourse. Many of the participating authors have thought and written about these matters for years.<sup>1</sup> It was our hope that, after fifty-nine presidential elections, we could shape the debate—and perhaps reform the law<sup>2</sup>—for our next presidential election, our country’s sixtieth. Little did we realize at the inception of this project that the 2020 election would become so extraordinarily challenging—that our constitution, our laws, and the very norms that sustain our electoral process would be subject to the most severe stress test in one hundred and fifty years.<sup>3</sup> Even after the election was resolved, there remains an ongoing debate as to the legal and extralegal issues

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1. Professor and former Dean John D. Feerick is the quintessential example of a scholar who has been studying and writing about the Electoral College, succession to the presidency, and disability of the chief executive for over half a century. His work in this issue summarizes the problems related to the Electoral College, as well as his current thinking and proposals for reform. See John D. Feerick, *The Electoral College: Time for a Change?*, 90 FORDHAM L. REV. 395 (2021). Indeed, one of his many former students (and one of mine, as well) and now his colleague, Professor John Rogan, proposes in the current issue several important and novel responses when a presidential candidate has died or become disabled. See John Rogan, *Reforms for Presidential Candidate Death and Inability: From the Conventions to Inauguration Day*, 90 FORDHAM L. REV. 583 (2021).

2. Before the 2020 election and afterward, many have written about reforming our electoral system. One such area of particular significance, especially after former President Donald Trump attempted to have Vice President Mike Pence overturn the results of the election when Congress met to ratify the Electoral College votes, is reform of 3 U.S.C. § 15. See, e.g., Edward B. Foley, Opinion, *Congress Must Fix This Election Law—Before It’s Too Late*, WASH. POST (Dec. 1, 2020, 3:26 PM), <https://www.washingtonpost.com/opinions/2020/12/01/congress-must-fix-this-election-law-before-its-too-late/> [https://perma.cc/E5VU-7B8M]. See generally MICHAEL TOMASKY, *IF WE CAN KEEP IT: HOW THE REPUBLIC COLLAPSED AND HOW IT MIGHT BE SAVED* (1st ed. 2019) (providing an insightful historical analysis and a fourteen-point agenda for change).

3. See, e.g., Jerry H. Goldfeder and Lincoln A. Mitchell, Opinion, *Demand Respect for Results*, TIMES UNION (Oct. 3, 2020, 11:56 AM), <https://www.timesunion.com/opinion/article/Demand-respect-for-results-15619436.php> [https://perma.cc/WD23-MLP9]; Jerry H. Goldfeder and Lincoln Mitchell, Opinion, *A Donald Trump Coup If He Loses In 2020?: With All the Norms He’s Busted, Don’t Rule It Out*, USA TODAY (Mar. 14, 2019, 5:30 AM), <https://www.usatoday.com/story/opinion/2019/03/14/donald-trump-peaceful-transition-or-coup-if-he-loses-2020-column/3141268002/> [https://perma.cc/23GK-QY35]; Jerry H. Goldfeder & Lincoln Mitchell, *What If Trump Loses But Refuses to Leave the White House?: We Have to Start to Contemplate the Possibility*, N.Y. DAILY NEWS (Dec. 3, 2018, 5:00 AM), <https://www.nydailynews.com/opinion/ny-oped-what-if-trump-loses-but-refuses-to-leave-the-white-house-20181127-story.html> [https://perma.cc/DS5R-Y95H].

that surfaced during the campaign and afterward and what they portend for the future of our democratic republic.

One of the most salient features of 2020 is what I call the “judicialization of our elections.”<sup>4</sup> The courts have of course been involved many times in federal and state elections,<sup>5</sup> but the George W. Bush-Al Gore presidential race in 2000 was a watershed moment—unleashing an avalanche of lawsuits as a common, even integral, component of electoral strategy, especially in the race for the presidency.<sup>6</sup> One may not be happy about this, but unless there is a radical transformation in our polity, reliance on lawsuits as part of national campaigns will no doubt increase.

To understand the 2020 presidential contest, then, and to plan for our sixtieth quadrennial election, we are compelled to review how the courts were used by both Democrats and Republicans, as well as various voting rights and other independent organizations, in the run-up to the election, as the votes were being canvassed, and through Joseph R. Biden’s inauguration as the forty-sixth U.S. president.

There was, of course, another component to this election. After all the votes were certified and most of the lawsuits resolved, an organized mob attempted to halt the final legal procedure required in the election of a president.<sup>7</sup> The storming of the U.S. Capitol as the Electoral College votes were being confirmed was meant to restrain the peaceful succession that has

4. In 2006, I chaired a Continuing Legal Education panel at Fordham University of School of Law entitled *Using the Courts to Win the Presidency*. There were but a handful of cases to discuss. Little did we know how election litigation would metastasize over the years. In this issue, University of Iowa College of Law Professor Derek T. Muller offers an excellent narrative of this problem, along with several provocative solutions. See Derek T. Muller, *Reducing Election Litigation*, 90 FORDHAM L. REV. 561 (2021). One of Professor Muller’s most insightful explanations of the litigation explosion is the fact that political parties are funding so many of them, a likely consequence of Congress having raised the contribution level for party legal expenses to over \$100,000 per person in an election cycle. For a glimpse into the litigation fees generated by several lawyers in just one state during the 2020 election, see Max Mitchell, *2020 Election Litigation Cost Pa. \$3.4M. Here’s Who Got the Work*, LAW.COM (Apr. 15, 2021, 12:37 PM), <https://www.law.com/thelegalintelligencer/2021/04/15/2020-election-litigation-cost-pa-3-4m-heres-who-got-the-work/> [https://perma.cc/L9H6-B9BN]. See also Dan Roe & Dylan Jackson, *Sussmann Indictment Highlights Big Law’s Risky Relationship with Politics*, LAW.COM (Sept. 21, 2021, 10:42 AM), <https://www.law.com/americanlawyer/2021/09/21/sussmann-indictment-highlights-big-laws-risky-relationship-with-politics/> [https://perma.cc/G7Q6-E4Z4] (during the period from January 2019 through mid-September 2021, it is estimated that \$110 million was paid to law firms by the major political committees supporting Democratic and Republican lawmakers).

5. Robert Caro presents a vivid and riveting picture of how future-President Lyndon B. Johnson secured the Democratic Party nomination for the U.S. Senate in 1948 in no small part due to the brilliant legal strategy of his attorney Abe Fortas. See generally ROBERT A. CARO, *THE YEARS OF LYNDON JOHNSON: MEANS OF ASCENT* (1990). See also Martin Tolchin, *How Johnson Won Election He’d Lost*, N.Y. TIMES (Feb. 11, 1990), <https://www.nytimes.com/1990/02/11/us/how-johnson-won-election-he-d-lost.html> [https://perma.cc/8K49-57MP].

6. See, e.g., Richard L. Hasen, *The Democracy Canon*, 62 STAN. L. REV. 69, 90–92 (2009); Muller, *supra* note 4, at 576–77.

7. See generally Dmitry Khavin et al., *Day of Rage: An In-Depth Look at How a Mob Stormed the Capitol*, N.Y. TIMES, <https://www.nytimes.com/spotlight/us-capitol-riots-investigations> [https://perma.cc/3SYH-D9RW] (last visited Sept. 17, 2021).

been a hallmark of our electoral system since its inception.<sup>8</sup> It failed, but this violent, deadly attack evidenced the harsh and unmistakable fact that the rule of law was under siege.<sup>9</sup> Indeed, it also showed that of eleven incumbent presidents who lost reelection, only former President Donald Trump was willing to bend or break laws and norms, not to mention civil peace, in an attempt to retain his hold on the White House. Notwithstanding the former president's impeachment for inciting the insurrection and the ongoing prosecutions of participants in the January 6 attack, there is no reason to believe that the assault on the Capitol is not a prelude for what may occur in our sixtieth presidential election.

Largely in response to unfavorable results at the polls, an almost perfect string of losses in the courts,<sup>10</sup> and the failure to strong-arm state legislatures,<sup>11</sup> the vice president, the U.S. Department of Justice, and the U.S. Congress into changing the results of the 2020 elections,<sup>12</sup> a wide swath of the former president's supporters in over two dozen states have altered their election laws and regulations to restrict the vote.<sup>13</sup> And now several states are enacting laws to allow partisan actors to have the legal authority to ignore or overturn unfavorable results—a practice known as voter subversion.<sup>14</sup> In light of the spate of new laws either restricting the vote or providing the basis for its subversion, an even more robust invocation of the judiciary can be expected. Those opposing such measures, however, will face a U.S. Supreme Court that appears to be disinclined to rule in favor of voting rights advocates.<sup>15</sup>

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8. *See id.*

9. *See id.*

10. *Fact Check: Courts Have Dismissed Multiple Lawsuits of Alleged Electoral Fraud Presented by Trump Campaign*, REUTERS (Feb. 15, 2021, 10:41 AM), <https://www.reuters.com/article/uk-factcheck-courts-election/fact-check-courts-have-dismissed-multiple-lawsuits-of-alleged-electoral-fraud-presented-by-trump-campaign-idUSKBN2AF1G1> [<https://perma.cc/C2JQ-J226>].

11. One of the tactics employed by the former president was to try to persuade legislative leaders in various states to bypass the results of the popular vote and directly choose their electors. *See* Jerry H. Goldfeder, *Election Law and the Presidency: An Introduction and Overview*, 85 FORDHAM L. REV. 965, 968 (2016) (explaining the constitutional prerogative of the states and how political considerations compelled legislatures to choose one form or another in appointing electors). In this issue, Professor Michael T. Morley of Florida State University College of Law explores the role of the legislature in the presidential elector appointment process. *See* Michael T. Morley, *The Independent State Legislature Doctrine*, 90 FORDHAM L. REV. 501 (2021).

12. *See infra* notes 191–97 and accompanying text.

13. *See Voting Laws Roundup: July 2021*, BRENNAN CTR. FOR JUST. (July 22, 2021), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-july-2021> [<https://perma.cc/3VRJ-BWV>].

14. *See generally* STATES UNITED DEMOCRACY CTR. ET AL., A DEMOCRACY CRISIS IN THE MAKING: HOW STATE LEGISLATURES ARE POLITICIZING, CRIMINALIZING, AND INTERFERING WITH ELECTION ADMINISTRATION (2021); Richard L. Hasen, *Identifying and Minimizing the Risk of Election Subversion and Stolen Elections in the Contemporary United States*, 135 HARV. L. REV. F. (forthcoming 2022).

15. Professor James A. Gardner at the University at Buffalo School of Law has written a comprehensive and insightful article in this issue about the growing illiberalization of the nation's election laws because of the U.S. Supreme Court. *See* James A. Gardner, *The*

All told, then, the nation is at an inflection point as our next presidential election approaches. Whether Americans have the wherewithal to “keep” our republic, as Dr. Benjamin Franklin supposedly wondered,<sup>16</sup> is being tested unlike at any time since the Civil War.<sup>17</sup>

It is with this as a backdrop that a snapshot of the litigation that embroiled the 2020 election is presented.

### I. RESTRICTING BALLOT ACCESS

The most prominent features of our electoral system are state-driven and state-run.<sup>18</sup> As the Founders attempted to craft a functional government in light of the failures of the Continental Congress and a widespread disinterest in facilitating its success,<sup>19</sup> they were influenced by the various states’ abiding interests and jealousies. Reflecting this political reality, the discussions, proposals, and compromises were informed by the interests of

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*Illiberalization of American Election Law: A Study in Democratic Deconsolidation*, 90 FORDHAM L. REV. 423 (2021); see also Michael Wines, *As Washington Stews, State Legislatures Increasingly Shape American Politics*, N.Y. TIMES (Aug. 29, 2021), <https://www.nytimes.com/2021/08/29/us/state-legislatures-voting-gridlock.html> [https://perma.cc/R48B-5HZB] (“‘I don’t see any solution from litigation,’ said Richard Briffault, a Columbia University expert on state legislation. ‘If there’s going to be a change, it’s going to be through the political process.’”).

16. Gillian Brockell, *‘A Republic, If You Can Keep It’: Did Ben Franklin Really Say Impeachment Day’s Favorite Quote?*, WASH. POST (Dec. 18, 2019), [https://www.washingtonpost.com/history/2019/12/18/republic-if-you-can-keep-it-did-ben-franklin-really-say-impeachment-days-favorite-quote](https://www.washingtonpost.com/history/2019/12/18/republic-if-you-can-keep-it-did-ben-franklin-really-say-impeachment-days-favorite-quote/) [https://perma.cc/79EA-EN8E].

17. This issue contains three excellent articles on voter participation and how it impacts our electoral system. Professor Ava Ayers of Albany Law School discusses the act of voting as a civic virtue and an expression of inclusion in our political community’s “circle of membership.” See Ava Ayers, *Voting as Exclusion*, 90 FORDHAM L. REV. 373 (2021). Professor Ayers reminds us, however, that shadowing this narrative is another, more troubling aspect of our electoral system: that of voting as “affirm[ing] the exclusion of millions of people from our political community.” *Id.* at 373. Professor Rebecca Green of William & Mary Law School addresses the opportunities that members of the public have to observe—and, hence, learn about—the canvassing process and what reforms should be enacted to make election administration more transparent. See Rebecca Green, *Election Observation Post-2020*, 90 FORDHAM L. REV. 467 (2021). Professor Ekow N. Yankah of Cardozo School of Law explores how the struggle for full and unhindered voting rights for African Americans is an integral part of their citizenship. See Ekow N. Yankah, *Compulsory Voting and Black Citizenship*, 90 FORDHAM L. REV. 639 (2021).

18. See, e.g., U.S. CONST. art. I, §§ 2, 4; art. II, § 1. Although the Constitution authorizes the states to regulate their own elections, Alexander Hamilton, in *The Federalist Papers*, stresses the importance of Congress’s role: “If the State legislatures were to be invested with an exclusive power of regulating these elections, every period of making them would be a delicate crisis in the national situation, which might issue in a dissolution of the Union . . . .” THE FEDERALIST NO. 59 (Alexander Hamilton). Thus, the Founders included in Article I, Section 4 a safety valve, whereby national legislators, primarily the Senate, act as “security against the abuse of a power over its elections in the hands of the State legislatures.” *Id.* This model requires that each house of Congress has the political interest and will to stymie a state or group of states from abusing its power; yet the use of the filibuster permits a minority in the Senate from allowing the body to exercise its contemplated check on such abuse, as seen today. See also Wines, *supra* note 15.

19. See generally JOSEPH J. ELLIS, THE QUARTET: ORCHESTRATING THE SECOND AMERICAN REVOLUTION (1st ed. 2015).

the states. Likewise, ratification of the new constitution would be in the hands not of those eligible to vote throughout the new country but in those of the states, and nine such approvals were required.<sup>20</sup> True, the Founders sought a “united” country, but in order to reach that point and to fashion a nation responsive to the states’ interests, the constitutional republic was formed—and, in so many important ways, held together—by thirteen separate and distinct constituencies. Although during the last 250 years the United States has become more of a “nation-state” as the term is customarily understood, the fact that we are a nation of states remains with us in seemingly unalterable ways. For example, the laws and regulations of the states continue to govern how we run our national elections;<sup>21</sup> the decennial redistricting of the U.S. House of Representatives is conducted by states;<sup>22</sup> and the U.S. Senate continues to reflect the primacy of states irrespective of population.<sup>23</sup> Thus, predominant features of our governmental structure are hobbled by anachronistic political forces.

As the presidential election cycle was underway last year, all candidates were required to navigate a maze of state election laws, just as they have done throughout the years.<sup>24</sup> Requirements for ballot access in primary elections and the general election vary, sometimes dramatically, and the COVID-19 pandemic exacerbated the difficulties of satisfying them for many candidates.<sup>25</sup> Nevertheless, although previous events, such as hurricanes<sup>26</sup>

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20. James Madison, in *The Federalist No. 39*, underscored the importance of the states in the Founders’ proposed government: “Each State, in ratifying the Constitution, is considered as a sovereign body, independent of all others, and only to be bound by its own voluntary act. In this relation, then, the new Constitution will, if established, be a *federal*, and not a *national* constitution.” THE FEDERALIST NO. 39 (James Madison) (emphasis in original) (typeface altered for readability).

21. U.S. CONST. art. I, § 4; *id.* art II, § 1.

22. *Id.* art. I, § 2.

23. In fact, there is only one provision in the U.S. Constitution that requires unanimous consent before an amendment can be enacted—that of preserving the U.S. Senate as presently constituted with each state having an equal number of votes. *See* U.S. CONST. art. V. This seemingly ironclad protection of the Senate—and its functional veto of legislation that is supposed to check abusive laws by the states, especially by its use of the filibuster—reflects the dynamic at the Constitutional Convention in forging a document that unequivocally evidenced the Founders’ intent to elevate the states to the detriment of a transient popular will. *See* THE FEDERALIST NO. 59 (Alexander Hamilton). Of course, this provision of the Constitution can be amended to remove the Senate’s apparently inviolate power by either eliminating or modifying it so that the institution could function in ways more reflective of modern-day democratic principles.

24. *See, e.g.*, Perry v. Judd, 840 F. Supp. 2d 945 (E.D. Va. 2012), *aff’d*, 471 F. App’x 219 (4th Cir. 2012).

25. Of course, when candidates’ ability to appear on the ballot is compromised, their supporters’ First Amendment rights of association are adversely impacted, as well. *See, e.g.*, Seawright v. Bd. of Elections in the City of New York, 33 N.Y.3d 227 (2020); Jasikoff v. Comm’rs of Westchester Cnty. Bd. of Elections, 183 A.D.3d 669 (N.Y. App. Div. 2d Dep’t 2020); Bill Scher, *Will the Pandemic Keep Third Parties Off the 2020 Ballot?*, POLITICO (Apr. 19, 2020, 7:00 AM), <https://www.politico.com/news/magazine/2020/04/19/coronavirus-election-2020-third-party-libertarian-green-trump-biden-193013> [<https://perma.cc/6RZ2-EGGM>].

26. Jerry H. Goldfeder, Opinion, *Earthquakes, Irene and Elections*, CAPITOL, Sept. 26, 2011, at 8, <https://www.stroock.com/uploads/pub1113.pdf> [<https://perma.cc/TL5U-7EQF>];

or the terrorist attack of September 11, 2001,<sup>27</sup> have also interfered with electoral timelines and regulations, neither Congress nor state legislatures have enacted statutes that provide executives or election regulators the flexibility necessary to adjust electoral requirements in the face of exigent circumstances. Instead, as the election of 2020 demonstrates, although some legislative or executive actions were undertaken in response to the COVID-19 pandemic, many states did not act. Courts were more often called upon to suspend or modify election laws in response to extraordinary conditions.

In *Blankenship v. Newsom*,<sup>28</sup> for example, the plaintiff, a presidential candidate of the Constitution Party, sued California’s governor and secretary of state seeking an injunction barring the state from requiring him to submit petition signatures to place his name on the November ballot. Because the Constitution Party was not a recognized political party under California law, there was no automatic ballot access for his line. However, the law did permit access by either of two avenues: by getting 196,964 “wet” signatures<sup>29</sup> of registered voters through in-person solicitations or by obtaining approximately 62,000 “sign-ups” with his nascent political party through a variety of solicitation methods, including direct mail, email, and social media.<sup>30</sup> In any event, Blankenship made little or no effort to obtain signatures.<sup>31</sup> This failure was the death knell for his application. The court explained:

Given this unique moment in American history, disputes of this sort are many and multiplying—a fact underscored by Blankenship’s extensive briefing. Fatal to his plight, however, is the scarcity of analogous cases finding a severe burden *absent any showing of electoral effort expended on the part of the plaintiff*.<sup>32</sup>

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Jerry H. Goldfeder, Opinion, *In Case of Election Crisis, Congress Needs to Be Prepared*, U.S. NEWS & WORLD REP. (Oct. 15, 2008, 12:00 PM), <https://www.usnews.com/opinion/articles/2008/10/15/in-case-of-election-crisis-congress-needs-to-be-prepared> [<https://perma.cc/D9PT-UDYE>].

27. See Jerry H. Goldfeder, *Could Terrorists Derail a Presidential Election?*, 32 FORDHAM URB. L.J. 101, 103–05 (2005).

28. 477 F. Supp. 3d 1098 (N.D. Cal. 2020).

29. “Wet signatures” is the term used for in-person signatures on a petition, as opposed to an electronic signature or a fax of the original signature.

30. CAL. ELEC. CODE §§ 5151(c)(1), 8400 (West 2021).

31. *Blankenship*, 477 F. Supp. 3d at 1103 (“[H]e did not attempt any ‘wet’ signature solicitation; he did not reach out to any arm of California government for clarification on whether and how he might attempt such solicitation; he did not re-direct any planning or personnel to [the easier ballot access procedure of ‘sign-ups’]; and indeed, the record is silent on any commitment by Blankenship of campaign resources to an effort to appear on the California ballot. Instead, he elected to sue.”); *cf.* *Anderson v. Celebrezze*, 460 U.S. 780, 782 (1983) (noting that though the candidate’s petitions were submitted late, he filed the required number of signatures).

32. *Blankenship*, 477 F. Supp. at 1105 (emphasis added). The court further explained:

A survey of recent decisions is, on this point, highly illustrative. Over the last few months, district courts in this circuit have held plaintiffs’ burdens non-severe where “[p]laintiffs essentially abandoned most of their efforts” upon the arrival of COVID-19, or where “[p]laintiffs have not shown that they exercised reasonable

Thus, the court, relying on a raft of cases involving similar requests either to nullify or relax ballot access requirements,<sup>33</sup> ruled that even during a pandemic, a candidate must show some effort to comply with a state's laws before relief could be granted. In other words, the courts generally refused to modify a state's election laws just because there has been a showing of exigent circumstances. This was simply not enough of a reason.

Thus, even during the worst health crisis in a century, a focus on the state's interest in regulating the ballot remained paramount. The district court in *Libertarian Party of Illinois v. Pritzker*<sup>34</sup> summarized this posture thusly:

These signature requirements present an obvious obstacle for candidates like Plaintiffs Libertarian Party of Illinois and Illinois Green Party as well as for independent candidates like Intervenor Kyle Kopitke, but the regulatory scheme has been repeatedly upheld by federal courts . . . [W]hile these laws potentially impose some burden on candidates' speech and association rights, the state has an "important interest of ensuring that a political party that is new in a particular political subdivision demonstrates a modicum of public support before it can place its candidates on an election ballot."<sup>35</sup>

And even when granting relief, the courts emphasize this prevailing view. A case originating in Georgia is illustrative. In *Cooper v. Raffensperger*,<sup>36</sup> presidential and congressional candidates argued that the state's response to the pandemic made it extremely difficult to get on the ballot because "[g]athering signatures during the COVID-19 outbreak endangers public health and the lives of petition-circulators and potential signers."<sup>37</sup> Plaintiffs sought an order from the court suspending all signature requirements to obtain ballot access.<sup>38</sup> The court refused to do so, opining that "[s]uspending the signature requirement entirely, without requiring candidates to otherwise demonstrate support, would wrongfully disregard the State's interest."<sup>39</sup> The court ruled, however, that although "[i]n the end, 'there is no hard-and-fast rule as to when a restriction on ballot eligibility becomes an unconstitutional

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diligence to maximize their efforts to appear on the ballot in November 2020." Conversely—and moving to other circuits, where the "reasonable diligence" requirement is merely persuasive—trial judges *have* found severe burdens where the plaintiff's "campaign had already collected approximately seven hundred" of the requisite thousand signatures on the day a Stay-at-Home Order was issued; where the (gubernatorial candidate) plaintiff's pre-COVID-19 progress included both collecting "about 21,000 of the required 28,000 signatures" and petitioning local officials for relief. . . .

*Id.* (citations omitted).

33. *Id.*

34. 455 F. Supp. 3d 738 (N.D. Ill. 2020).

35. *Id.* at 741–42 (citations omitted) (quoting *Libertarian Party of Illinois v. Rednour*, 108 F.3d 768, 775 (7th Cir. 1997)).

36. 472 F. Supp. 3d 1282 (N.D. Ga. 2020). The court in *Cooper* referred the reader to *Munro v. Socialist Workers Party*, 479 U.S. 189, 197 (1986), noting "that states need not provide automatic ballot access." *Id.* at 1296.

37. *Id.* at 1288.

38. *Id.* at 1296.

39. *Id.*

burden,”<sup>40</sup> plaintiffs did indeed face a “moderate” constitutional burden,<sup>41</sup> and the court therefore reduced the signature requirement by thirty percent.<sup>42</sup>

Thus, a partial remedy such as reducing the number of signatures, while responsive to the plight of candidates and their supporters, reflects and reinforces the courts’ long-standing deference to the state’s strict laws on ballot access, a direct outgrowth of the Founders’ subservience to the new country’s constituent states.

## II. CHANGING THE WAY WE VOTE

As with ballot access rules, voting procedures are also determined by state legislatures—even in federal elections.

In 2020, once ballots had been set, a variety of actors, including governors, legislatures, election regulators, partisans, and not-for-profit groups, attempted to change voting procedures in response to the pandemic—demonstrating how the nation’s state-driven electoral system creates a confusing and inconsistent set of rules across the nation. A few references will demonstrate the point.

In New York, the governor simply cancelled a special election;<sup>43</sup> in Nevada, the secretary of state, the state’s principal election administrator, declined to cancel a primary election for Congress and other offices and

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40. *Id.* at 1293 (quoting *Garbett v. Herbert*, 458 F. Supp. 3d 1328, 1344 (D. Utah 2020)).

41. *Id.*

42. *Id.* at 1297. Similar relief was granted by a federal district court in New Hampshire. See *Libertarian Party of N.H. v. Sununu*, No. 20-cv-688, 2020 WL 4340308, at \*23 (D.N.H. July 28, 2020) (reducing the number of signatures by 35 percent); see also *Esshaki v. Whitmer*, 455 F. Supp. 3d 367, 383 (E.D. Mich. 2020) (reducing the statutory signature requirement by 50 percent); *Goldstein v. Sec’y of the Commonwealth*, 142 N.E. 3d 560, 575 (Mass. 2020) (reducing the statutory signature requirement by 50 percent); N.Y. Exec. Order No. 202.2 (Mar. 14, 2020) (reducing the signature requirement to 30 percent of the usual requirement). Some states permitted signature collection and petition submission in both electronic and physical formats. See, e.g., Fla. Emergency R. 1SER20-2 (Apr. 2, 2020); N.J. Exec. Order No. 105 (Mar. 19, 2020); N.J. Exec. Order No. 120 (Apr. 8, 2020); Utah Exec. Order No. 2020-8 (Mar. 26, 2020). But see *Kishore v. Whitmer*, 972 F.3d 745, 751 (6th Cir. 2020) (denying request to modify ballot-access requirements); *Hawkins v. DeWine*, 968 F.3d 603, 607 (6th Cir. 2020) (denying request to modify ballot-access requirements). A good synopsis of 2020 decisions in this area and the analysis supporting the prevailing view can be found in *Bond v. Dunlap*, No. 1:20-cv-00216, 2020 WL 4275035, at \*13–14 (D. Me. July 24, 2020).

43. Owing to the previous incumbent’s election to the office of Queens District Attorney, there was a vacancy in the Queens Borough President position. Pursuant to the New York City Charter, a special election was scheduled to fill the position in June 2020. The city was facing a huge number of COVID-19 cases, hospitalizations, and deaths, resulting in a citywide lockdown. In response, New York Governor Andrew Cuomo issued an executive order cancelling the election. This extremely rare response to exigent circumstances was unprecedented in New York. Even on the morning of September 11, 2001, when primary elections were being held throughout the state, the then-governor ordered the cessation of voting and postponed the primary. But in 2020, the governor simply cancelled the election. An action was brought in state court, but the court denied a putative candidate’s requested relief to reinstate the election, and the decision was affirmed. See *Dao Yin v. Cuomo*, 127 N.Y.S.3d 700, at \*2 (Sup. Ct. 2020) (unpublished table decision), *aff’d*, 183 A.D.3d 926, 928 (N.Y. App. Div. 2d Dep’t 2020).

instead instituted mail-in balloting in place of in-person voting;<sup>44</sup> Ohio postponed in-person voting from March 17 to April 28, and mail-in balloting rules were liberalized;<sup>45</sup> and New Mexico's secretary of state mailed absentee ballot applications to every voter in the state to give them an alternative to in-person voting.<sup>46</sup> A comprehensive summary of actions taken and the many ensuing litigations can be found on the Stanford-MIT Healthy Elections Project website.<sup>47</sup> Wisconsin<sup>48</sup> and Pennsylvania,<sup>49</sup> two

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44. The state already had mail-in voting for those who registered for such ballots and retained a skeletal system of in-person polling places. But, as a result of the pandemic, the state introduced an automatic vote-by-mail primary. See KEN KUWAYTI ET AL., HEALTHYELECTIONS.ORG, THE 2020 NEVADA PRIMARY 14 (2020), [https://healthyelections.org/sites/default/files/2020-07/nevada\\_state\\_primary\\_memo.docx.pdf](https://healthyelections.org/sites/default/files/2020-07/nevada_state_primary_memo.docx.pdf) [<https://perma.cc/92FC-4EDR>]. As a result, turnout dramatically increased. *Id.* Opponents sought injunctive relief in federal court, arguing, inter alia, that only the legislature, not the secretary of state, had the authority to effect this change. *Paher v. Cegavske*, 457 F. Supp. 3d 919, 921–22 (D. Nev. 2020). The court disagreed, ruling that the legislature delegated its authority over elections to the secretary of state. *Id.* at 932. Constitutional claims were also alleged, but they were essentially swatted away by the court, which concluded that “[i]t is clear that as triggered by the uncertainties of COVID-19, the public’s interests align with the Plan’s all-mail election provisions.” *Id.* at 935.

45. Various parties disagreed with the plan and commenced an action in federal court, alleging various constitutional and statutory infirmities—essentially arguing for alternative procedures. The court, however, was unpersuaded, opining:

The Constitution does not require the best plan, just a lawful one. As is apparent from the briefing in this lawsuit, every group has a different idea of what the best plan would be. But the Court will not declare the Ohio Legislature’s unanimous bill to be unconstitutional simply because other options may have been better.

League of Women Voters of Ohio v. La Rose, 20-cv-1638, 2020 WL 6115006, at \*12 (S.D. Ohio Apr. 3, 2020). Ohio’s approach was similar to the New York State Legislature’s solution when faced with the attack on New York City on September 11, 2001, during statewide primary elections. The New York State Legislature set a new date for the primary, permitted those who voted on machines to vote again but disallowed those who had already voted by mail from casting another ballot. See Goldfeder, *supra* note 27, at 105 n.19.

46. Twenty-seven county clerks sought a writ of mandamus requiring the secretary of state to mail absentee ballots to every voter in lieu of in-person voting. Thirty-one state legislators, other county clerks, and the state Republican Party opposed the application on the ground that separation of powers precluded the court from cancelling the primary because the legislature had not done so. The court granted the writ insofar as the mailing of applications for absentee ballots by the secretary of state but did not cancel or postpone the primary election. See *State ex rel. Riddle v. Oliver*, 487 P.3d 815, 828–29 (N.M. 2021).

47. *COVID-Related Election Litigation Tracker*, STANFORD-MIT HEALTHY ELECTIONS PROJECT, <https://healthyelections-case-tracker.stanford.edu/> [<https://perma.cc/JA2N-4TR6>] (last visited Sept. 17, 2021). In its own words, “[t]his database tracks election law cases arising out of the COVID-19 pandemic—over 500 cases and appeals, comprising over 350 case families (i.e. all cases and appeals arising from a single complaint) in 46 states plus D.C. and Puerto Rico.” *Id.*

48. See Addy Bink, *From Lawsuits to Long Lines: The Story of Wisconsin’s 2020 Spring Primary*, WEAREGREENBAY.COM (Apr. 9, 2020, 8:28 AM), <https://www.wearegreenbay.com/election/from-lawsuits-to-long-lines-the-story-of-wisconsins-2020-spring-primary/> [<https://perma.cc/MZ4Z-7NE3>]; *Wisconsin Primary Recap: Voters Forced to Choose Between Their Health and Their Civic Duty*, N.Y. TIMES (Apr. 7, 2020), <https://www.nytimes.com/2020/04/07/us/politics/wisconsin-primary-election.html> [<https://perma.cc/CLN7-ZLWU>].

49. See Mitchell, *supra* note 4.

important battleground states, appeared to have an inordinate number of cases.

#### A. Wisconsin

Wisconsin had a scheduled primary on April 7, 2020, just as the pandemic began its first deadly surge. That election featured a Democratic Party primary for president,<sup>50</sup> which was essentially Bernie Sanders's last stand against Joe Biden; but, probably more significantly for Wisconsin voters, it also included a campaign for state supreme court justice,<sup>51</sup> a critical position in a highly partisan state. Many local positions, as well as the office of the mayor of Milwaukee, the state's largest city, were also in contention, with an African American candidate trying to unseat the incumbent.<sup>52</sup> As it turned out, after all the dust settled in the various litigations, Wisconsin's primary was the first major in-person election during the pandemic,<sup>53</sup> and turnout showed that many voters were determined to go to the polls despite the health risks.<sup>54</sup>

A few facts to start with: the governor was a Democrat, the legislature was controlled by the Republicans, and the state supreme court had a 5–2 conservative-leaning majority.<sup>55</sup> As the Wisconsin cases show, for some litigants the overriding issue was the pandemic, and they asked the courts for a liberalization of voting procedures. Certain institutions and partisans opposed the requested relief, thereby compelling the courts to act as arbiters.

Multiple actions with overlapping requests for relief were brought by a variety of parties. A thumbnail summary of the legal landscape demonstrates the political forces at play.

On March 18, 2020, about three weeks before the April 7 primary, the Democratic National Committee and the Democratic Party of Wisconsin sued the Wisconsin Elections Commission in federal court in the Western District of Wisconsin, seeking injunctive relief to: (1) extend the deadline

50. WIS. ELECTIONS COMM'N, CANDIDATES ON BALLOT BY ELECTION: 2020 SPRING ELECTION AND PRESIDENTIAL PREFERENCE VOTE (2020), [https://elections.wi.gov/sites/elections.wi.gov/files/2020-03/Candidates%20on%20Ballot%20By%20Election\\_3\\_3\\_2020.pdf](https://elections.wi.gov/sites/elections.wi.gov/files/2020-03/Candidates%20on%20Ballot%20By%20Election_3_3_2020.pdf) [<https://perma.cc/P9QF-J9SU>].

51. *Id.*

52. Lena Taylor failed in her bid to unseat incumbent mayor Tom Barrett. Danielle Kaeding, *Milwaukee Mayor Tom Barrett Wins Reelection Against Sen. Lena Taylor*, WIS. PUB. RADIO (Apr. 13, 2020, 7:10 PM), <https://www.wpr.org/milwaukee-mayor-tom-barrett-wins-reelection-against-sen-lena-taylor> [<https://perma.cc/U59C-2ZQB>].

53. *Wisconsin Primary Recap*, *supra* note 48.

54. See Richard H. Pildes & Charles Stewart III, *The Wisconsin Primary Had Extraordinarily High Voter Turnout*, WASH. POST (Apr. 15, 2020), <https://www.washingtonpost.com/politics/2020/04/15/wisconsin-primary-had-extraordinarily-high-voter-turnout/> [<https://perma.cc/5HTJ-T4ZP>].

55. The liberal insurgent candidate, Jill Karofsky, defeated conservative incumbent Daniel Kelly 55.2 percent to 44.7 percent, reducing the conservative-leaning majority to 4–3. Reid J. Epstein, *Upset Victory in Wisconsin Supreme Court Race Gives Democrats a Lift*, N.Y. TIMES (Oct. 27, 2020), <https://www.nytimes.com/2020/04/13/us/politics/wisconsin-primary-results.html> [<https://perma.cc/2ZWY-KKS9>].

for electronic and mail-in voter registration, (2) suspend the requirement that new voters provide proof of residence, (3) eliminate the requirement that absentee voters had to include a copy of voter identification with their ballots, and (4) bar election officials from rejecting ballots postmarked on or before election day.<sup>56</sup> Without opposition, the Republican National Committee and the Republican Party of Wisconsin intervened and opposed the requested relief. The state legislature tried to intervene, but the court did not permit it.<sup>57</sup>

On March 24, the city of Green Bay also sued the Wisconsin Elections Commission, the Wisconsin Department of Health Services, and the governor of Wisconsin, in the Eastern District of Wisconsin, seeking to cancel the April 7 primary and to allow the city to mail ballots to all registered voters, extend the deadline for electronic or mail registration, and set a June 2, 2020, deadline for counting all returned ballots.<sup>58</sup>

Two days later, on March 26, four women ranging in age from sixty-four to eighty-three, all of whom were self-quarantining to prevent themselves from contracting COVID-19, along with the Wisconsin Alliance for Retired Americans and the League of Women Voters of Wisconsin, filed yet another action in the Western District of Wisconsin, seeking inter alia, to prevent the Wisconsin Elections Commission from rejecting mail-in ballots that lacked a witness signature.<sup>59</sup>

On the same day, another group of plaintiffs<sup>60</sup> filed their own action in the Western District of Wisconsin, seeking to postpone the primary until “after the health crisis had subsided” and, among other relief, to suspend the voter-ID requirement and the witness requirement for absentee ballots.<sup>61</sup>

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56. *Democratic Nat’l Comm. v. Bostelmann*, 488 F. Supp. 3d 776, 778 (W.D. Wis. 2020).

57. *Id.* at 817.

58. *City of Green Bay v. Bostelmann*, No. 20-C-479, 2020 WL 1492975, at \*1 (E.D. Wis. Mar. 27, 2020). This case was dismissed for lack of jurisdiction under the political subdivision rule. The court stated:

The court’s decision is not intended to minimize the serious difficulties the City and its officials are facing in attempting to conduct the upcoming election. The court is saying only that the City and its mayor are not the proper parties to bring such a claim in federal court. In that connection, the court notes that a group of individuals and civic groups representing voters filed a lawsuit seeking similar relief to address the same problem in the Western District of Wisconsin.

*Id.* at \*3.

59. *Gear v. Knudson*, No. 20-cv-00278, 2020 WL 7365044, at \*1 (W.D. Wis. July 2, 2020). This action was consolidated with other Western District cases, collectively referred to as *Democratic National Committee v. Bostelmann*.

60. The plaintiffs were “Reverend Greg Lewis; Souls To The Polls; Voces De La Frontera; Black Leaders Organizing For Communities; American Federation Of Teachers Local, 212, AFL-CIO; SEIU Wisconsin State Council; and League Of Women Voters Of Wisconsin.” See *Lewis v. Knudson*, No. 3:20-cv-284, 2020 WL 2702363, at n.1 (W.D. Wis. Mar. 31, 2020). This action was also consolidated with other Western District cases, collectively referred to as *Democratic National Committee v. Bostelmann*.

61. *Id.*

On Friday, April 3—just one and one-half business days before the scheduled primary—a candidate for mayor of Milwaukee commenced her own action in federal court seeking to postpone the primary to September.<sup>62</sup>

Of these five federal actions, three were in the Western District and were consolidated.<sup>63</sup> The Western District’s consolidated case was decided on April 2, and the court ruled as follows: (1) the primary would not be cancelled or postponed; (2) the casting of and receipt of absentee ballots would be extended six days beyond primary day; (3) absentee ballots would not be required to have witness statements, provided the voter stated that COVID-19 prevented obtaining one; (4) photo IDs would still be required; and (5) the time to show proof of residency would not be extended because it was simply too late to modify the requirement.<sup>64</sup>

In weighing the competing claims, the court determined that there was some likelihood of success by the plaintiffs in their request for adjourning the primary.<sup>65</sup> But, in balancing the interests of those worried about voting in person several days hence and the state’s obligations to maintain scheduled elections in an orderly fashion, the court opted to deny the application—though not without some reservation.<sup>66</sup> As the court put it:

Without doubt, the April 7 election day will create unprecedented burdens not just for aspiring voters, but also for poll workers, clerks, and indeed the state. As much as the court would prefer that the Wisconsin Legislature and Governor consider the public health ahead of any political considerations, that does not appear in the cards. Nor is it appropriate for a federal district court to act as the state’s chief health official by taking that step for them.<sup>67</sup>

In concluding that the primary should proceed, the court appeared to be implicitly rebuking the legislature and governor for not acting in concert to protect the health of the public as its first priority. Nevertheless, although the court rejected the application to postpone the primary, it did relax several voting procedures.<sup>68</sup>

However, these palliative measures would be obviated almost immediately. The Republican National Committee and Republican Party of Wisconsin (along with the Republican-controlled legislature, which had been denied intervention in the district court) sought a stay of the Western District’s injunction in the Court of Appeals for the Seventh Circuit. On April 3, the Seventh Circuit responded with mixed results, granting a stay of the district court’s order to ease the witness statement requirement but declining to stay the district court’s extension of the mail-in ballot period.<sup>69</sup>

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62. *See Taylor v. Milwaukee Election Comm’n*, 452 F. Supp. 3d 818, 819–20 (E.D. Wis. 2020).

63. *Democratic Nat’l Comm. v. Bostelmann*, 451 F. Supp. 3d 952 (W.D. Wis. 2020).

64. *Id.* at 968–83.

65. *Id.* at 972.

66. *Id.* at 974–75.

67. *Id.*

68. *Id.* at 968–83.

69. *Democratic Nat’l Comm. v. Bostelmann*, 977 F.3d 639, 655–56 (7th Cir. 2020).

The Republicans pursued the matter and sought emergency relief on April 4 in the Supreme Court before Justice Kavanaugh, who referred the matter to the full Court.<sup>70</sup> On April 6, the Court, in a 5–4 decision, stayed the remainder of the district court’s injunction that permitted mail-in votes to be cast after Election Day,<sup>71</sup> based, in part, on the *Purcell* principle,<sup>72</sup> which, roughly speaking, disfavors changes to voting procedures on the eve of an election. The Court stated:

By changing the election rules so close to the election date and by affording relief that the plaintiffs themselves did not ask for in their preliminary injunction motions, the District Court contravened this Court’s precedents and erred by ordering such relief. This Court has repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election.<sup>73</sup>

On April 3—as the Western District’s consolidated case was being litigated and one day after it had denied plaintiffs’ application to postpone the primary—Milwaukee mayoral candidate Lena Taylor and a civil rights organization, Justice Wisconsin, Inc., commenced its own federal action in the Eastern District and sought the same relief, postponement of the primary.<sup>74</sup> Indeed, as the issues in *this* case were being briefed, and after the Court of Appeals had already sustained the denial of the Democrats’ request to postpone the primary, on April 6 the governor issued an executive order doing just that—suspending in-person voting from April 7 to June 9.<sup>75</sup> The Wisconsin legislature immediately brought an action in state court, and enforcement of the governor’s order was enjoined in the late afternoon of April 6.<sup>76</sup>

Later in the day on April 6, the federal court in the Eastern District case issued its own decision against postponing the primary.<sup>77</sup> Chief U.S. District Judge Pamela Pepper, obviously torn by the circumstances she faced, opined:

[T]he circumstances that gave rise to the filing of this complaint, and the [related cases] are not extraordinary. “Extraordinary” seems too mild a word . . . . [T]his election is scheduled to take place during what United

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70. *Republican Nat’l Comm. v. Democratic Nat’l Comm.*, 140 S. Ct. 1205 (2020).

71. There was no challenge to that part of the order permitting mail-in votes cast on or before primary day to be canvassed if *received* six days afterward. *Id.* at 1208.

72. *See generally* *Purcell v. Gonzalez*, 549 U.S. 1 (2006). An excellent analysis on the use and misuse of the *Purcell* principle can be found in my former student’s article. *See* Andrew Vazquez, Note, *Abusing Emergency Powers: How the Supreme Court Degraded Voting Rights Protections During the COVID-19 Pandemic and Opened the Door for Abuse of State Power*, 48 *FORDHAM URB. L.J.* 967 (2021).

73. *Republican Nat’l Comm.*, 140 S. Ct. at 1207. Part of the Court’s justification included the fact that counsel for the Democratic National Committee neglected to request an extension by which voters could cast an absentee ballot. *See id.*

74. *See Taylor v. Milwaukee Election Comm’n*, 452 F. Supp. 3d 818, 819–20 (E.D. Wis. 2020).

75. Wis. Exec. Order No. 74 (Apr. 7, 2021), <https://evers.wi.gov/Documents/COVID19/EO074-SuspendingInPersonVotingAndSpecialSession2.pdf> [<https://perma.cc/53FX-XQZY>].

76. *Wisconsin Legislature v. Evers*, No. 2020 AP 000608 (Wis. 2020).

77. *Taylor v. Milwaukee Election Comm’n*, 452 F. Supp. 3d 818, 830 (E.D. Wis. 2020).

States Surgeon General Jerome M. Adams has warned will be “the hardest and saddest week of most Americans’ lives.” . . . In the last week—since March 30, 2020—confirmed cases in Wisconsin have jumped from 1,221 on March 30 to 2,440 on April 6; in Milwaukee alone, confirmed cases have skyrocketed from 617 on March 30 to 1,256 on April 6. . . . Over the afternoon and evening hours of April 6, 2020, this court’s staff received a flood of telephone calls and emails from individuals asking the court to postpone the primary election. . . . Despite all this, it appears that tomorrow morning, those who have not yet voted will face a grim choice: go out to the polling places (the ones that are open) and risk being exposed to the virus or spreading it to their friends and neighbors, or forego one of the most sacred rights of citizenship—the right to have a say in the governance of their communities, their state and their nation. “Extraordinary” is a feeble description of the circumstances that appear to be leading to that choice. But this court must hold, as Judge Conley did [in the Western District case], that this federal court does not have the authority “to act as the state’s chief health official” by making the decision that needs to be made to put the health and safety of the community first.<sup>78</sup>

Thus, despite multiple litigations in state and federal court by a variety of plaintiffs seeking ameliorative remedies to the voting procedures for Wisconsin’s primary election for president, Congress, and state and local offices, both the state supreme court and the U.S. Supreme Court disallowed any significant changes to the election law—even in the face of “the worst week” of the pandemic thus far. Ironically, despite COVID-19 and the success of the Republicans in these lawsuits, a relatively high turnout election ensued and the Democratic candidate for the state supreme court ousted the Republican incumbent.<sup>79</sup>

These hard-fought litigations were only a warm-up to the judicial battles that would be fought as the general election drew closer. As November 3, 2020, approached, the Wisconsin litigation continued. In now-four cases<sup>80</sup> consolidated in the Western District of Wisconsin, the plaintiffs pressed again for more liberal registration and voting procedures. The court, after holding an evidentiary hearing and receiving expert opinions on the effects of the pandemic on in-person voting in the primary election, found certain provisions of the Wisconsin election law unconstitutional and granted a preliminary injunction to allow voters more time to register, an opportunity to obtain a replacement ballot online, and an extension of the time period to six days after the general election by which a mail-in ballot may be received by election officials.<sup>81</sup> It rejected eliminating the photo-ID requirement or relaxing the witness statement requirement for a mail-in

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78. *Id.* at 829–30 (citations omitted).

79. See Pildes & Stewart, *supra* note 54.

80. The fourth case was commenced after the primary election. *Edwards v. Vos*, No. 20-cv-340, 2020 WL 6741325 (W.D. Wis. June 23, 2020). It, too, would be part of the consolidated case known as *Democratic National Committee v. Bostelmann*.

81. *Democratic Nat’l Comm. v. Bostelmann*, 488 F. Supp. 3d 776, 816–18 (W.D. Wis. 2020).

ballot.<sup>82</sup> It also determined<sup>83</sup> that failure by the Elections Commission to loosen voting requirements was not a violation of the federal Voting Rights Act of 1965.<sup>84</sup>

The district court's decision was issued on September 21. The Republican National Committee, the Republican Party of Wisconsin, and the state legislature,<sup>85</sup> all as intervenors in the consolidated case, immediately filed an emergency application for an interim stay and obtained it from the Seventh Circuit on September 27.<sup>86</sup> Two days later, however, the court vacated its own interim stay on the ground that neither the Republican Party intervenors nor the state legislature had standing to pursue an appeal of the district court's order.<sup>87</sup> The legislature moved for reconsideration, and a week later, the Seventh Circuit, reversing itself, stayed enforcement of the district court's injunction, relying on the principle articulated in *Purcell* that federal courts should not change voting procedures so close to an election.<sup>88</sup>

Plaintiffs sought to overturn this stay by going to the U.S. Supreme Court.<sup>89</sup> Their application to Justice Kavanaugh was referred by him to the full court and was rejected. In response to plaintiffs' motion, several members of the Court provided reasons for their respective positions.<sup>90</sup> A synopsis of their views is instructive for future election litigation.

Justice Gorsuch, joined by Justice Kavanaugh, made the following points in his concurrence. He said the district court inexplicably struck down Wisconsin's law that absentee ballots must be received by Election Day as unconstitutional although thirty states have that very requirement.<sup>91</sup> Furthermore, he added, the district court wrongly believed that the existence of COVID-19 allowed the court to substitute its own judgment for the legislature's.<sup>92</sup> And, in response to the district court's extension for election

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82. *Id.*

83. *Id.* at 816.

84. Pub. L. No. 89-100, 79 Stat. 437 (codified as amended in scattered sections of 52 U.S.C.).

85. In the earlier phase of the litigation, the Seventh Circuit had ruled that the district court improperly rejected the state legislature's motion to intervene. *Democratic Nat'l Comm. v. Bostelmann*, No. 20-cv-249, 2020 WL 1505640 (W.D. Wis. Mar. 28, 2020).

86. *Democratic Nat'l Comm. v. Bostelmann*, Nos. 20-2835, 20-2844, 2020 WL 5807297, at \*1 (7th Cir. Sept. 27, 2020).

87. *See Democratic Nat'l Comm. v. Bostelmann*, 977 F.3d 639, 641 (7th Cir. 2020).

88. *See Purcell v. Gonzalez*, 549 U.S. 1, 4–5 (2006) (“Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls.”).

89. *Democratic Nat'l Comm. v. Wis. State Legislature*, 141 S. Ct. 28 (2020). Although it is impolitic to evaluate other lawyers' strategic judgments, it appears that an application to the Supreme Court was bound to fail. Litigants were treated to a majority's robust explanation of how the district court ran afoul of a variety of principles in permitting even a slight change to the mail-in procedures. *See id.* at 30–34 (Kavanaugh, J., concurring).

90. *See generally Democratic Nat'l Comm.*, 141 S. Ct. 28.

91. *Id.* at 28–30 (Gorsuch, J. concurring).

92. *Id.* Justice Gorsuch exclaimed:

Never mind that, in response to the pandemic, the Wisconsin Elections Commission decided to mail registered voters an absentee ballot application and return envelope over the summer, so no one had to ask for one. Never mind that voters have also

officials to receive absentee ballots to six days after Election Day, Gorsuch asked, “what about 3 or 7 or 10” days, and proceeded to provide his own answer: “The Constitution provides that state legislatures—not federal judges, not state judges, not state governors, not other state officials—bear primary responsibility for setting election rules.”<sup>93</sup> He concluded: “No one doubts that conducting a national election amid a pandemic poses serious challenges. But none of that means individual judges may improvise with their own election rules in place of those the people’s representatives have adopted.”<sup>94</sup>

Justice Kavanaugh penned his own, quite lengthy, concurrence. He provided three distinct reasons why the district court’s liberalization of the absentee ballot rule was flawed. First, citing to *Purcell* and other cases, Kavanaugh said election rules should not be changed so close to an election. It causes confusion for voters and election administrators alike. Second, apart from his *Purcell* rationale, he further opined it is not within the authority of federal judges to second-guess or override state legislators’ response to the pandemic. Unlike, for example, the state legislature of Mississippi, which modified its election law so that absentee ballots need not be received by Election Day, other states, such as Vermont, did not. Because the Wisconsin legislature had not changed its law, the Justice thought the district court should not have done so. Finally, Justice Kavanaugh stated that election deadlines are important and must be respected by the courts, especially when presidential electors are on the ballot. Citing to Professor Richard Pildes’s article about the subject, he said the prospect of ballots received after Election Day “changing” the election could increase cries of “stolen” or “rigged” elections.<sup>95</sup>

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been free to seek and return absentee ballots since September. Never mind that voters may return their ballots not only by mail but also by bringing them to a county clerk’s office, or various “no touch” drop boxes staged locally, or certain polling places on election day. Never mind that those unable to vote on election day have still other options in Wisconsin, like voting in-person during a 2-week voting period before election day. And never mind that the court itself found the pandemic posed an insufficient threat to the health and safety of voters to justify revamping the State’s in-person election procedures.

*Id.* at 28–29.

93. *Id.* at 29 (citing U.S. CONST. art. I, § 4, cl. 1).

94. *Id.* at 30.

95. *Id.* at 30–40. The article cited by Justice Kavanaugh is Richard Pildes, *How to Accommodate a Massive Surge in Absentee Voting*, U. CHI. L. REV. ONLINE (June 26, 2020), <https://lawreviewblog.uchicago.edu/2020/06/26/pandemic-pildes/> [<https://perma.cc/7QLJ-BBD5>]. There has been a growing body of literature about this “blue shift” of the election results, causing the putative winner in a race to “change” after Election Day. *See, e.g.*, Edward B. Foley and Charles Stewart III, *Explaining the Blue Shift in Election Canvassing*, <https://ssrn.com/abstract=3547734> [<https://perma.cc/NW89-JNFT>]. That is what prompted then-President Trump to declare in 2018 that no votes should be counted in Florida after Election Day. *See* Abigail Abrams, *President Trump Attacked Mail-In Ballots in Florida. Here Are the Facts*, TIME (Nov. 12, 2018, 10:19 PM), <https://time.com/5452569/voter-fraud-florida-2018-mail-ballots-absentee/> [<https://perma.cc/33K7-G3SV>]. And, in 2020, Trump exploited this blue shift as part of his spurious claim that the election was stolen from him. *See, e.g.*, Barbara Sprunt, *Fact Check: Trump Falsely Claims That Votes Shouldn’t Be Counted After Election Day*, NPR (Nov. 1, 2020, 8:11 PM),

As if these reasons were not enough, Justice Kavanaugh went on to disparage the dissenting Justices' analysis that a continued stay would "disenfranchise" thousands of voters. He, like Justice Gorsuch did in his concurrence, which Justice Kavanaugh joined, identified a litany of opportunities for voters in Wisconsin to vote by mail and in person and reiterated the proposition that deadlines in a state's election laws are enacted so that orderly procedures abide.<sup>96</sup>

Justice Kagan, joined by Justices Breyer and Sotomayor, dissented and would have vacated the stay of enforcement of the district court's extension for receipt of absentee ballots.<sup>97</sup> The dissent points out that reliance on *Purcell* is misplaced, especially because the district court issued its decision a full six weeks before the election and because Justices Gorsuch and Kavanaugh improperly ignored or minimized the difficulty that too many voters would have in casting their ballot during the pandemic.<sup>98</sup>

In short, Justices Gorsuch and Kavanaugh's explication of the Court's decision to not disturb the court of appeals's stay is instructive as to the current majority's posture regarding voting rights.

### B. Pennsylvania

The Pennsylvania litigation was very similar to Wisconsin's, with a different end result. In this instance, the state legislature, controlled by Republicans, enacted an election law in 2019—before the pandemic and a full year in advance of the presidential election—that was signed by the Democratic governor. The new law permitted, for the first time in the state, no-excuse absentee voting.<sup>99</sup>

In the early summer of 2020, Trump's reelection campaign, the Republican National Committee, and various Republican congressional candidates in Pennsylvania commenced an action in federal court to challenge the new absentee voting law and various derivative procedures.<sup>100</sup> Plaintiffs sought a preliminary injunction, alleging that the state's primary election, held on June 2, was a "hazardous, hurried, and illegal implementation of unmonitored mail-in voting which provides fraudsters an easy opportunity to engage in ballot harvesting, manipulate or destroy ballots, manufacture duplicitous votes, and sow chaos."<sup>101</sup> They alleged that the law and its implementation by the secretary of state and her representatives in sixty-seven counties was unconstitutional. Their rationale was twofold: first, the no-excuse law would lead to "unlawful votes," which would dilute those cast lawfully, and second, equal protection principles

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<https://www.npr.org/2020/11/01/930140373/fact-check-trump-falsely-claims-that-votes-shouldnt-be-counted-after-election-da> [<https://perma.cc/QU6N-RWCL>].

96. *Democratic Nat'l Comm. v. Wis. State Legislature*, 141 S. Ct. at 35–36.

97. *Id.* at 46.

98. *Id.* at 40–46.

99. *See* 25 PA. CONS. STAT. §§ 3150.11, 3159.12 (West 2021).

100. *See Donald J. Trump for President, Inc. v. Boockvar*, 481 F. Supp. 3d 476 (W.D. Pa. 2020).

101. *Id.* at 482.

would be violated because of the “patchwork, inconsistent implementation” of the use of “drop-boxes” and other features of voting throughout the commonwealth.<sup>102</sup> The secretary of state and other defendants moved for a stay of the action based on the abstention doctrine, which the district court granted, on the ground that state law questions were at issue.<sup>103</sup>

Almost simultaneously, the Pennsylvania Democratic Party filed its own lawsuit in state court, seeking a declaratory judgment regarding the meaning and extent of the new election law.<sup>104</sup> The party’s action was commenced in Pennsylvania’s Commonwealth Court, and the state supreme court exercised its extraordinary jurisdiction, which allows the court to hear matters of important policy.<sup>105</sup> In this case, the matter of important policy was clarifying the law in time for the November election.

On September 17, the Pennsylvania Supreme Court, in a 4–3 vote, issued its ruling: it allowed a three-day extension for receipt of absentee ballots, not the seven days plaintiffs requested, and permitted voters to place mail-in ballots in drop-boxes.<sup>106</sup> The court, however, ruled that county boards were not required to provide for a “cure” of absentee ballots that were filled out incompletely or incorrectly or to canvass ballots that were mistakenly not inserted into a “secrecy envelope.”<sup>107</sup>

In the federal action, the Republican Party plaintiffs sought a stay in the U.S. Supreme Court of the Pennsylvania Supreme Court’s order. On October 19, it was rejected by a vote of 4–4.<sup>108</sup> In response to a request by the Republicans for the Court to grant certiorari on an expedited basis to resolve these voting issues before the November election, Justice Alito—joined by Justices Thomas and Gorsuch—issued a “statement” on October 28 asserting that review of the Pennsylvania Supreme Court’s decision by the U.S. Supreme Court would be “highly desirable.”<sup>109</sup> The plaintiffs’ reasoning was that the statute had required absentee ballots to be received by 8 PM on Election Day, and the legislature had not changed any election dates when the original no-excuse bill was passed or in March of 2020 when the legislature again reviewed election laws in the face of the pandemic. But, just as there was no majority to grant a stay of enforcement of the state supreme court’s order, there was no majority to grant the request for an expedited appeal (Justice Barrett did not participate in the consideration or determination of the application).<sup>110</sup>

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102. *Id.* at 482–84.

103. *See* Donald J. Trump for President, Inc. v. Boockvar, 493 F. Supp. 3d 331, 422–23 (W.D. Pa. 2020).

104. *See* Pa. Democratic Party v. Boockvar, 238 A.3d 345, 352 (Pa. 2020).

105. *See* 42 PA. CONS. STAT. § 726 (2021).

106. *See* Boockvar, 238 A.3d at 386.

107. *See id.*

108. Justice Ruth Bader Ginsburg had died on September 18. *See* Scarnati v. Boockvar, 141 S. Ct. 644 (2020).

109. Republican Party of Pa. v. Boockvar, 141 S. Ct. 1, 2 (2020) (mem.).

110. *See id.* at 1.

However, as referred to by Justice Alito, the secretary of state had issued guidance that segregated mail-in votes received between 8 PM on Election Day and three days later.<sup>111</sup> As a practical matter, this appeared to be a satisfactory solution in light of the legal contention as to whether the state supreme court went beyond its authority in ordering such relief. At the request of the Republicans, the U.S. Supreme Court ordered the Pennsylvania counties to comply with this guidance.<sup>112</sup>

The reason this was so critically important was that the mail-in votes received after 8 PM on Election Day might mean the difference between winning or losing Pennsylvania, a perceived battleground state, in a presidential election that many anticipated would be close. As it turned out, President Joe Biden won the state with a relatively comfortable margin, and the “extra” mail-in votes received during that three-day period were not dispositive.<sup>113</sup>

Thus, for all practical purposes, the issue was moot—though, of course, it was not put to rest as a legal matter. Indeed, on February 22, 2021, some three and one-half months after the election, and after President Biden had been sworn in, the U.S. Supreme Court denied the petition for certiorari to review the Pennsylvania Supreme Court’s September 17 decision.<sup>114</sup> Justices Thomas, Alito, and Gorsuch wrote dissenting opinions, and their views are worth noting.

Justice Thomas began by citing<sup>115</sup> Chief Justice William Rehnquist’s concurring opinion in *Bush v. Gore*:<sup>116</sup> “Because the Federal Constitution, not state constitutions, gives state legislatures authority to regulate federal elections, [the Republican] petitioners presented a strong argument that the Pennsylvania Supreme Court’s decision violated the Constitution by overriding ‘the clearly expressed intent of the legislature.’”<sup>117</sup> Yet, he lamented, despite the petitioners’ “strong showing they were entitled to relief,”<sup>118</sup> the Court was divided, leading to a denial of their application for a stay or an expedited certiorari process. Justice Thomas believed that the

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111. PA. DEP’T OF STATE, PENNSYLVANIA GUIDANCE FOR MAIL-IN AND ABSENTEE BALLOTS RECEIVED FROM THE UNITED STATES POSTAL SERVICE AFTER 8:00 P.M. ON TUESDAY, NOVEMBER 3, 2020 (2020), <https://www.dos.pa.gov/VotingElections/OtherServicesEvents/VotingElectionStatistics/Documents/2020-10-28-Segregation-Guidance.pdf> [<https://perma.cc/H3FJ-QZMA>].

112. Republican Party of Pa. v. Boockvar, No. 20A84, 2020 WL 6536912 (Nov. 6, 2020) (mem.).

113. President Biden won Pennsylvania by approximately 55,000 votes; the number of absentee ballots that were received between November 3 and November 6 was approximately 10,000. See Marc Levy, *Court Blocks Small Number of Ballots in Pennsylvania over ID*, AP NEWS (Nov. 12, 2020), <https://apnews.com/article/election-2020-joe-biden-donald-trump-pennsylvania-elections-98e58fb49da12fc3183ee5932d58752a> [<https://perma.cc/P5TP-6HCC>].

114. Republican Party of Pa. v. Degraffenreid, 141 S. Ct. 732 (2021) (mem.).

115. *Id.* at 732–40.

116. 531 U.S. 98 (2000).

117. Degraffenreid, 141 S. Ct. at 733 (Thomas, J., dissenting) (quoting 531 U.S. 98, 120 (2000) (Rehnquist, C.J., concurring)).

118. *Id.*

issue of whether a court could essentially override the legislature in setting election rules was so important that the Court should have addressed the matter. After all, he said:

We are fortunate that the Pennsylvania Supreme Court's decision to change the receipt deadline for mail-in ballots does not appear to have changed the outcome in any federal election.

....

But we may not be so lucky in the future.

....

Because the judicial system is not well suited to address these kinds of questions in the short time period available immediately after an election, we ought to use available cases outside that truncated context to address these admittedly important questions. Here, we have the opportunity to do so almost two years before the next federal election cycle. Our refusal to do so by hearing these cases is befuddling

....

One wonders what this Court waits for. We failed to settle this dispute before the election, and thus provide clear rules. Now we again fail to provide clear rules for future elections. The decision to leave election law hidden beneath a shroud of doubt is baffling. By doing nothing, we invite further confusion and erosion of voter confidence. Our fellow citizens deserve better and expect more of us.<sup>119</sup>

For his part, Justice Alito, joined by Justice Gorsuch, dismissed the view that because the election of 2020 was concluded, the issue was moot:

I agree with Justice Thomas that we should grant review in these cases. They present an important and recurring constitutional question: whether the Elections or Electors Clauses of the United States Constitution, Art. I, § 4, cl. 1; Art. II, § 1, cl. 2, are violated when a state court holds that a state constitutional provision overrides a state statute governing the manner in which a federal election is to be conducted.<sup>120</sup>

Chief Justice Roberts, who did not express a view as to whether the Pennsylvania Supreme Court overstepped its authority in permitting an extension of the receipt of mail-in ballots, wrote a brief concurrence in the Wisconsin case that touched on the issue the court faced in the Pennsylvania litigation:

While the Pennsylvania applications implicated the authority of state courts to apply their own constitutions to election regulations, this case involves federal intrusion on state lawmaking processes. Different bodies of law and different precedents govern these two situations and require, in these

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119. *Id.* at 734–38.

120. *Id.* at 738 (Alito, J., dissenting).

particular circumstances, that we allow the modification of election rules in Pennsylvania but not Wisconsin.<sup>121</sup>

Chief Justice Roberts correctly distinguishes the two issues: in Wisconsin, it was a federal court that changed an election deadline; in Pennsylvania, it was the state supreme court. Although it is a valid distinction, Chief Justice Roberts's explanation as to why the Pennsylvania extension was permitted while Wisconsin's was not is somewhat opaque. A reasonable explanation of the difference between the Court staying enforcement of a federal court's order and declining to stay a state supreme court's is probably based less on substantive legal principles than the timing of the two cases and the number of votes on the Court that could be mustered. In any event, these two hard-fought litigations evidenced the increasing invocation of the courts to expand or restrict voting opportunities in a presidential election.<sup>122</sup>

Thus, despite protestations lacing their opinions, it was judges who determined how the voting process would unfold. In this regard, the result in Wisconsin was more in keeping with a constitutional originalist's interpretation that only state legislatures should determine election laws in presidential elections, while the result in Pennsylvania illustrates a more modern, expansive view of a state's voting laws, which may include a state court's interpretation of those laws. Of course, had the mail-in votes received in Pennsylvania in the three-day period after Election Day proved dispositive in the presidential race, there is no doubt the Supreme Court would have granted certiorari on an expedited basis and weighed in on whether the Pennsylvania court's ruling should have been granted any deference. The issue before the Court would have been whether a state court could order voting procedures based on its reference to and interpretation of the state constitution or whether it should only consider the explicit specifics of an act by the legislature.

Interestingly, the failure of the U.S. Supreme Court to stay enforcement of the Pennsylvania Supreme Court's order or to address the merits of the case is consistent with the U.S. Supreme Court's decision in *Bush v. Gore*.<sup>123</sup> In the 2000 decision, the U.S. Supreme Court, having found by a 7–2 vote that Florida's recount process violated the Equal Protection Clause of the U.S. Constitution, decided by a 5–4 vote not to remand for the state to rectify its procedures. The Court's latter determination was based on its view that the Florida Supreme Court interpreted the state legislature's intent to invoke 3 U.S.C. § 5—the “safe harbor” statute protecting a state's electoral college vote from challenge—and the day the Court issued its opinion was the

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121. *Democratic Nat'l Comm. v. Wis. State Legislature*, 141 S. Ct. 28, 28 (2020) (Roberts, C.J., concurring).

122. Of course, there were other states in which one party or another used the courts to shape voting procedures. For a full recitation of them, see *COVID-Related Election Litigation Tracker*, *supra* note 47.

123. *See* 531 U.S. 98 (2000).

deadline for such protection.<sup>124</sup> In so doing, the U.S. Supreme Court recognized the role of a state court in determining election procedures, even in the absence of an explicit law. If the Supreme Court had addressed the merits of the Pennsylvania case, there is the possibility that the more conservative-leaning judges would have taken the view that a state supreme court's interpretation of an election provision should not be considered, which would be an ironic 180-degree turnabout from the conservative Justices' approbation of the Florida Supreme Court's inference of intent by that state's legislature in 2000.

### III. COUNTING THE VOTES

Once voting rules have been set, there can also be issues as to the procedures for actually counting the votes. Here, too, each state has its own set of laws and regulations. Challenges to a particular rule often involve invoking the jurisdiction of the state or federal court, and this presidential contest had an exceptional number of cases.

A few facts first. As a result of laws, court decisions, and the pandemic, there appeared to be many more mail-in ballots in crucial states than in the past.<sup>125</sup> In addition, given the heightened polarization in the country, more people voted than in any previous election.<sup>126</sup> The results, though not quite clear on election night, came into focus over the next few days as absentee ballots were counted, and the race was called on Saturday, November 7, 2020, after President Biden was declared the winner in Pennsylvania and passed the 270 Electoral College vote majority.<sup>127</sup> Even at that time, however, there were several states, including Georgia, Arizona, and Nevada, where canvassing of the votes continued.<sup>128</sup>

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124. *Id.* at 110 (“The Supreme Court of Florida has said that the legislature intended the State’s electors to ‘participat[e] fully in the federal electoral process,’ as provided in 3 U.S.C. § 5.”).

125. See Nathaniel Rakich & Jasmine Mithani, *What Absentee Voting Looked Like in All Fifty States*, FIVETHIRTYEIGHT (Feb. 9, 2021), <https://fivethirtyeight.com/features/what-absentee-voting-looked-like-in-all-50-states/> [<https://perma.cc/RME6-48MM>]. Surveys show that mail-in voting was approximately 46 percent of the vote in 2020, compared to what had been the high of 21 percent in 2016. *Id.*

126. James M. Lindsay, *The 2020 Election by the Numbers*, COUNCIL ON FOREIGN RELS. (Dec. 15, 2020, 5:00 PM), <https://www.cfr.org/blog/2020-election-numbers> [<https://perma.cc/7B8B-B6M7>]. Over 159 million people voted in 2020, which was the first time the totals exceeded 140 million. *Id.*

127. Bryan Slodysko, *Explainer: Why AP Called Nevada for Biden*, AP NEWS (Nov. 6, 2020), <https://apnews.com/article/ap-explains-tight-race-nevada-f475219c06984c45003cb8d3672857d5> [<https://perma.cc/NC8W-NK7Q>].

128. The Associated Press called Arizona for President Biden on the night of November 3. See Domenico Montanaro, *AP Explains Calling Arizona for Biden Early, Before It Got Very Close*, NPR (Nov. 19, 2020, 4:13 PM), <https://www.npr.org/2020/11/19/936739072/ap-explains-calling-arizona-for-biden-early-before-it-got-very-close> [<https://perma.cc/T2NG-4VA6>]. As his margin grew smaller, the major networks waited; on November 12 they finally put the state in his column. *Id.* Georgia was another state that was close, and hand counts were required to confirm President Biden’s win. Kate Brumback, *Biden Wins Georgia, Ending Long Losing Streaks for Democrats*, AP NEWS (Nov. 19, 2020), <https://apnews.com/article/election-2020-joe-biden-donald-trump-georgia-elections-bb997641ca36805c0f53f406a3529d87>

During this canvassing period, the former president and his supporters waged an aggressive campaign in the courts—all but a few of which were wholly unsuccessful. One bright spot for the former president was a case filed in Nevada state court on Election Day granting his campaign’s request to keep polls open an extra hour in a county it considered important.<sup>129</sup> After this case, litigation efforts in support of President Trump went largely downhill, including cases in important swing states. An overview of such cases, all of which were ultimately unsuccessful, follows below.

In Nevada, Republicans sought to have observers during the process of duplicating mail-in ballots,<sup>130</sup> to have observers who could “meaningfully” observe the canvassing of votes,<sup>131</sup> and to enjoin the use of the electronic voting system that verifies signatures.<sup>132</sup>

In Arizona, the president’s supporters sought to enable voters to cast second ballots because the electronic voting system allegedly did not count their votes,<sup>133</sup> to require Maricopa County to perform a hand count by precinct instead of by voting center,<sup>134</sup> to order that ballots filled out with Sharpie pens be counted,<sup>135</sup> and to halt canvassing until “overvotes” in Maricopa County were independently adjudicated.<sup>136</sup>

In Pennsylvania, the Republican plaintiffs sought to stop the canvassing of votes in Philadelphia because, they alleged, there were no Republican observers.<sup>137</sup> They also sought to enjoin the public identification of voters in Northampton, whose ballots were invalidated during pre-canvassing procedures;<sup>138</sup> to require poll watchers in Philadelphia to be allowed to be

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[<https://perma.cc/96XB-NPUD>]. The AP called this state for Biden on November 12. *See* Slodysko, *supra* note 127. After Pennsylvania and the race were called for President Biden on November 7, AP called Nevada later in the day. *See id.*

129. *See* *Trump for President v. Gloria*, No. A-20-824153-C (Nev. 8th Jud. Dist. Ct. Nov. 3, 2020).

130. *See* *Kraus v. Cegavske*, No. 20 OC 142 1B, 2020 WL 8340238, at \*5 (Nev. 1st Jud. Dist. Ct. Oct. 29, 2020).

131. *Stokke v. Cegavske*, No. 2:20-cv-02046 (D. Nev. Nov. 6, 2020).

132. *See* *Marchant v. Gloria*, No. A-20-824878-W (Nev. Dist. Ct. Clark Cnty. Nov. 23, 2020); *Becker v. Gloria*, No. A-20-824878-W (Nev. Dist. Ct. Clark Cnty. Nov. 16, 2020).

133. *Aguilera v. Fontes*, No. CV 2020-014562, 2020 WL 11273092, at \*2 (Ariz. Super. Ct. Nov. 29, 2020) (“[T]he law cannot provide, nor does it guarantee, perfection”).

134. *See* *Ariz. Republican Party v. Fontes*, No. CV 2020-014553, at 9 (Ariz. Super. Ct. Mar. 12, 2020) (denying request after finding that the machines counted the votes flawlessly).

135. Complaint at 6–7, *Aguilera v. Fontes*, No. CV2020-014083 (Ariz. Super. Ct. Nov. 4, 2020). This case was dismissed by plaintiffs. Notice of Dismissal, *Aguilera*, No. CV2020-014083 (Ariz. Super. Ct. Nov. 7, 2020).

136. *Trump v. Hobbs*, No. CV 2020 014248 (Ariz. Super. Ct. Nov. 7, 2020).

137. Complaint, *Donald J. Trump for President, Inc. v. Philadelphia Cnty. Bd. of Elections*, No. 2:20-cv-05533-PD (E.D. Pa. Nov. 5, 2020), <https://www.courthousenews.com/wp-content/uploads/2020/11/trump-philly.pdf> [<https://perma.cc/WP97-AP7G>]. Plaintiff voluntarily dismissed the case. Notice of Dismissal, *Donald J. Trump for President, Inc. v. Philadelphia Cnty. Bd. of Elections*, No. 2:20-CV-05533-pd (E.D. Pa. Jan. 8, 2021), [https://unamericanbar.com/filings/PA/trump-president-inc-v-philadelphia-county-boe/PA\\_-\\_DJT\\_v.\\_Philly\\_BOE\\_-\\_Volunt\\_mDLxvub.pdf](https://unamericanbar.com/filings/PA/trump-president-inc-v-philadelphia-county-boe/PA_-_DJT_v._Philly_BOE_-_Volunt_mDLxvub.pdf) [<https://perma.cc/F6MH-XYW8>]. In fact, Republicans had already been entitled to have observers.

138. *See In re* Motion for Injunctive Relief of Northampton County Republican Committee, No. C-48-cv-2020-6915 (Pa. Commw. Ct. 2020) (denying the request); *see also*

within six feet of canvassers;<sup>139</sup> to overturn the Allegheny County Elections Division's acceptance of 2349 mail-in ballots with undated declarations of voter identity;<sup>140</sup> to overturn the Bucks County Board of Elections's acceptance of mail-in ballots with date or address defects or with unsealed secrecy sleeves;<sup>141</sup> and to enjoin county election officials from reaching out to voters to cure defects on absentee ballots.<sup>142</sup>

In Georgia, President Trump and his supporters tried to exclude vote totals from counties where voters allegedly included noncitizens and those who voted in person but were recorded as having voted by absentee ballots.<sup>143</sup> Trump and his supporters also tried to sequester ballots in Chatham County received after 7 PM on Election Day.<sup>144</sup>

In Michigan, President Trump's supporters sought to exclude vote totals from counties where officials supposedly counted ineligible ballots, from deceased voters and where vote totals allegedly exceeded registrations.<sup>145</sup> Trump's supporters also tried to stop vote-counting in Detroit, where polling places purportedly did not have inspectors from each political party.<sup>146</sup>

This sampling of cases demonstrates that Republican partisans, including the former president's own campaign committee, attempted to minimize or reverse President Biden's margins of victory in various battleground states immediately after Election Day and throughout the canvassing process.

One can only speculate whether these plaintiffs would have had greater success had the lawsuits been filed prior to the election. After all, they, and the Democratic supporters of Biden, sought judicial intervention in the months and weeks before the general election on other issues. As Justice

*In re* Pre-Canvass of Absentee and Mail-in Ballots of November 3, 2020 General Election, No. 2020-05627 (Pa. Ct. Common Pleas Bucks Cnty. Nov. 23, 2020) (denying the request).

139. *See In re* Canvassing Observation, 241 A.3d 339, 350 (Pa. 2020). The state supreme court held that poll watcher proximity was a decision by local county boards and that subject poll watchers were close enough under state law. *Id.*

140. *See In re* 2,349 Ballots in the 2020 General Election, 241 A.3d 694 (Pa. Commw. Ct.) (unpublished table decision), *rev'd sub nom. In re* Canvass of Absentee and/or Mail-in Ballots of November 3, 2020 General Election, 241 A.3d 1058 (Pa. 2020).

141. *In re* Canvass of Absentee and/or Mail-in Ballots of November 3, 2020 General Election, 241 A.3d 1058 (Pa. 2020). The relief requested was denied.

142. Complaint at 11, *Barnette v. Lawrence*, No. 2:20-cv-05477, 2020 WL 6440273 (E.D. Pa. Nov. 3, 2020). Citing to *Bush v. Gore*, plaintiffs argued that this practice constituted an equal protection issue in that not all counties were affirmatively seeking cures of absentee ballots; they failed to mention that Republican Party election officials did this in Seminole County in Florida during that very same 2000 election, and the courts did not discount those votes. *See Jacobs v. Seminole Cnty. Canvassing Bd.*, 773 So. 2d 519 (Fla. 2000). The relief in the instant case was denied.

143. *See Brooks v. Mahoney*, No. 4:20-cv-00281, 2020 WL 6682673 (S.D. Ga. Nov. 16, 2020). This case was withdrawn.

144. *In re* Enforcement of Election Laws & Securing Ballots Cast or Received After 7pm on November 3, 2020, No. SPCV2000982-J3, 2020 WL 6701610 (Ga. Super. Ct. Nov. 5, 2020). This case was dismissed for lack of evidence that any of the subject fifty-three ballots were returned after 7 PM on Election Day.

145. *Bally v. Whitmer*, No. 1:20-cv-1088 (W.D. Mich. Nov. 11, 2020). This case was withdrawn.

146. *See Stoddard v. City Election Comm'n*, No. 20-014604 (Mich. Cir. Ct. Nov. 6, 2020). According to the court, the plaintiffs misread the statute. *Id.* at 2.

Thomas correctly remarked in a different context: “Because the judicial system is not well suited to address these kinds of questions in the short time period available immediately after an election, we ought to use available cases outside that truncated context to address these admittedly important questions.”<sup>147</sup>

Such an approach would require campaigns and supporters to identify issues before an election. Admittedly, it is not easy to foretell all of the problems that may arise during an election, but experienced election lawyers would know most of them. Doing so may also require partisans to find common ground, which is also not easy to do; but many of the issues are not that intractable or difficult to resolve in advance. It is true that courts are reluctant to provide “advisory” opinions, but in the context of an impending election, their role in this respect could be very useful and should be explored.<sup>148</sup>

#### IV. ATTACKING THE RESULTS

Prior to the 2020 election, the ten incumbent presidents who had been defeated in their reelection efforts each accepted the verdict of the voters and vacated the White House. Not so with President Trump. He has persistently spewed the false narrative that the election was rigged or imbued with fraud despite consistent findings to the contrary.<sup>149</sup> Worse, in an extraordinarily egregious flouting of norms, he attempted to overturn the results of the election.<sup>150</sup>

President Trump undertook these efforts on two parallel tracks—in the courts and through extralegal means. The cases President Trump or his Republican Party allies brought in state and federal courts will be addressed first, followed by a discussion of their extralegal efforts.

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147. *Republican Party of Pa. v. Degraffenreid*, 141 S. Ct. 732, 737 (2021) (mem.).

148. In the run-up to the mayoral election in 2001 in New York City, I was counsel for the leading Democratic Party candidate in the upcoming primary election. My counterparts representing the three other major candidates and I sought to have the court order certain procedures in advance of the primary election to minimize contention if voting margins were close. Unfortunately, the Board of Elections in the City of New York vigorously opposed this attempt, jealously guarding its prerogatives as the arbiter of the canvassing process. *See Ferrer v. Bd. of Elections*, 286 A.D.2d 783 (N.Y. App. Div. 2001).

149. Indeed, Attorney General William P. Barr, an otherwise supportive member of the former president’s cabinet, repudiated Trump’s claim. *See Katie Benner & Michael S. Schmidt, Barr Acknowledges Justice Dept. Has Found No Widespread Voter Fraud*, N.Y. TIMES (Dec. 14, 2020), <https://www.nytimes.com/2020/12/01/us/politics/william-barr-voter-fraud.html> [<https://perma.cc/J7F9-26P5>].

150. *See, e.g.,* Jerry H. Goldfeder & Lincoln Mitchell, *We Warned in March 2019 of a Coup Attempt If Trump Lost the 2020 Election. We Were Right*, USA TODAY (Aug. 2, 2021), <https://www.stroock.com/uploads/Goldfeder-and-Mitchell-USA-Today-2021-08-02-copy1.pdf> [<https://perma.cc/E75D-7QWV>]; *see also* CNN, *They Predicted a Trump Coup Attempt. Hear What They Say Now*, <https://www.cnn.com/videos/politics/2021/08/06/assault-on-democracy-election-experts-predicted-trump-coup-goldfeder-mitchell-newday-sot-vpx.cnn> [<https://perma.cc/DU8A-3EXB>] (last visited Sept. 17, 2021).

*A. Requesting That Courts Overturn Adverse Election Results*

President Trump and his allies brought dozens of actions in state and federal courts, often overlapping and with little or no success. The cases were often dismissed for deficiencies in the pleadings because the lawyers were unfamiliar with proper procedure. Just as often, the relief requested was denied because fraud or other problems were alleged in a conclusory manner with no actual evidence adduced. A sample of these cases follows.

## 1. Michigan

On November 9, supporters of President Trump brought a state court action in Michigan to enjoin certification of Biden's victory in the state based on allegations that Detroit election workers failed to verify signatures on absentee ballots and coached voters to cast ballots for Biden. The requested relief was denied on the ground that the allegations were rife with "generalization, speculation and hearsay."<sup>151</sup>

On November 11, the Trump campaign committee brought another action, this time in federal court, to enjoin the certification of the results in Michigan,<sup>152</sup> alleging that Republican representatives were unable to observe the conduct of the election. The campaign committee also filed a lawsuit on November 16 to delay the state's certification until an audit could be conducted.<sup>153</sup> The basis of the second case was an allegedly illegal plan to mail voters absentee ballot applications, culminating in Democratic Party inspectors filling out "thousands" of ballots in violation of state law. Both cases were voluntarily dismissed.<sup>154</sup>

On November 25, Republican voters brought a federal action seeking decertification of the Michigan vote in favor of President-elect Biden or, alternatively, to certify the results for President Trump on the ground that "there was widespread voter irregularities and fraud in the processing and tabulation of votes and absentee ballots."<sup>155</sup> In addition to the doctrines of mootness and abstention, a federal district court in the Eastern District of Michigan rejected the claims on the ground that plaintiffs failed to establish an injury-in-fact sufficient for standing.<sup>156</sup>

On November 15, another group, Black Voices for Trump, sought to enjoin Michigan's certification on the ground that there was no meaningful poll observation, that canvassers were instructed to count invalid ballots, that

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151. *Constantino v. Detroit*, No. 20-014780 (Mich. Cir. Ct. Nov. 13, 2020).

152. *Trump for President v. Benson*, No. 1:20-cv-1083, 2020 WL 8573863 (W.D. Mich. Nov. 17, 2020).

153. *Complaint, Johnson v. Benson*, 1:20-cv-01098 (W.D. Mich. Nov. 16, 2020).

154. *Trump for President v. Benson*, No. 1:20-cv-1083, 2020 WL 8573863 (W.D. Mich. Nov. 17, 2020); *Johnson v. Benson*, 1:20-cv-01098 (W.D. Mich. Nov. 18, 2020).

155. *See King v. Whitmer*, 505 F. Supp. 3d 720, 725 (E.D. Mich. 2020) ("They seek relief that is stunning in its scope and breathtaking in its reach. If granted, the relief would disenfranchise the votes of the more than 5.5 million Michigan citizens who, with dignity, hope, and a promise of a voice, participated in the 2020 General Election. The Court declines to grant Plaintiffs this relief.").

156. *Id.* at 735.

there was improper funding of voting drives by Facebook's Mark Zuckerberg, and that election workers forged ballots.<sup>157</sup> The plaintiffs initiated their claims in the state supreme court, which denied the requested relief.<sup>158</sup>

## 2. Pennsylvania

On November 9, the Trump campaign committee brought an action in federal court to enjoin certification of President Biden's victory in Pennsylvania, on the alleged ground that the secretary of state and seven counties failed to

uphold and ensure the adherence to even basic transparency measures or safeguards against the casting of illegal or unreliable ballots creat[ing] an obvious opportunity for ineligible voters to cast ballots, result[ing] in fraud, and undermin[ing] the public's confidence in the integrity of elections.<sup>159</sup>

The court characterized plaintiffs' allegations as a "Frankenstein Monster . . . [which] ha[d] been haphazardly stitched together from two distinct theories in an attempt to avoid controlling precedent" and found that no evidence to support their claims was provided.<sup>160</sup>

On November 21, Republicans brought another action to prohibit certification in Pennsylvania—this time in state court—on the ground that the 2019 enactment of no-excuse absentee voting violated the state constitution. An injunction was temporarily granted but was vacated by the Pennsylvania Supreme Court.<sup>161</sup> On December 8, the U.S. Supreme Court denied an emergency application to stay the Pennsylvania high court's ruling.<sup>162</sup>

## 3. Georgia

On November 13, a Republican voter brought a federal action to enjoin certification of the results in Georgia on the ground that election officials violated the U.S. Constitution by their "disparate treatment of defective absentee ballots."<sup>163</sup> The court denied the requested relief on the grounds that there was no particularized injury and that plaintiff failed to demonstrate likelihood of success.<sup>164</sup>

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157. *See* Johnson v. Benson, No. 162286 (Mich. 2020), <https://electioncases.osu.edu/wp-content/uploads/2020/11/Johnson-v-Benson-Order-Denying-Extraordinary-Writs.pdf> [<https://perma.cc/MKP6-8FTL>].

158. *Id.*

159. Complaint at 22, Donald J. Trump for President, Inc. v. Boockvar, 502 F. Supp. 3d 899 (M.D. Pa. 2020).

160. Donald J. Trump for President v. Boockvar, 502 F. Supp. 3d 899, 910 (M.D. Pa. 2020).

161. *See* Kelly v. Commonwealth, 240 A.3d 1255, 1256 (Pa. 2020) (per curiam).

162. Kelly v. Pennsylvania, 141 S. Ct. 950 (2020) (mem.).

163. Wood v. Raffensperger, 501 F. Supp. 3d 1310, 1317 (N.D. Ga. 2020).

164. *See id.* at 1321–27.

On November 25, supporters of President Trump brought a state action to enjoin the certification of the results in Georgia.<sup>165</sup> Among other claims, the plaintiffs alleged that state election officials violated state law by accepting a grant of \$6.3 million from Center for Tech and Civic Life, a group controlled by Facebook’s Mark Zuckerberg, to fund the election.<sup>166</sup> The case was dismissed on the ground of sovereign immunity because only the secretary of state and governor were named defendants.<sup>167</sup>

#### 4. Nevada

On November 17, the former president’s supporters brought an action in Nevada state court seeking an order certifying President Trump as the winner in the state.<sup>168</sup> The action was based on allegations that there were widespread malfunctions in the electronic voting system, as well as illegal incentives given to Native American voters by a not-for-profit group. The court dismissed the case, holding that there was no proof of machine malfunctions, improper votes being counted, or improper vote manipulation.<sup>169</sup>

#### 5. Minnesota

On November 24, twenty-five Republican candidates for Congress and ten voters sued in state court to enjoin Minnesota from certifying its election results on the ground that the secretary of state impermissibly suspended the witness requirement for absentee ballots and failed to provide adequate poll watcher access.<sup>170</sup> The case was dismissed for a lack of evidence of fraud and on the basis of the doctrine of laches.<sup>171</sup>

#### 6. Wisconsin

On November 23, the Wisconsin Voters Alliance sued the Wisconsin Elections Commission in state court to block certification on the ground that the Mark Zuckerberg–funded group circumvented absentee ballot laws and

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165. *See* Wood v. Raffensperger, No. 2020-cv-342959, at 1 (Ga. Super. Ct. Dec. 8, 2020), <https://www.democracydocket.com/wp-content/uploads/2020/11/2020.12.08-John-Wood-v.-Raffensperger-Final-Order-KH623841x9D7F4-1.pdf> [<https://perma.cc/MXM2-LATN>].

166. Complaint at 2, Wood v. Raffensperger, No. 2020-cv-342959 (Ga. Super. Ct. Nov. 25, 2020), <https://www.democracydocket.com/wp-content/uploads/2020/11/2020CV342959-PETITION-1.pdf> [<https://perma.cc/Y84F-GHXH>].

167. *Wood*, No. 2020-cv-342959, at 7.

168. *Law v. Whitmer*, 477 P.3d 1124, at \*18–19 (Nev. 2020) (unpublished table decision) (“Contestants did not prove under any standard of proof that illegal votes were cast and counted . . . or that ‘the election board or any member thereof was guilty of malfeasance.’” (quoting NEV. REV. STAT. § 293.410 (2021))).

169. *Id.* at \*20.

170. Complaint, *Kistner v. Simon*, No. A20-1486 (Minn. 2020).

171. *Kistner v. Simon*, No. A20-1486 (Minn. 2020) (finding no evidence of fraud).

caused illegal votes to be cast.<sup>172</sup> The court denied the application for lack of evidence.

On December 1, President Trump and his supporters brought two cases to decertify the Wisconsin results, one in state court and the other in federal court.<sup>173</sup> The action in the Wisconsin Supreme Court alleged that absentee ballots that incorrectly contained voter certifications and applications were improperly accepted and that election workers filled in missing voter information. The action was dismissed on the ground that it was brought in the wrong court.<sup>174</sup> The federal case alleged that defective absentee ballots were improperly counted and that election officials filled in missing ballot information. The federal court, three months later, denied relief on the grounds of mootness and lack of standing, adding that “federal judges do not appoint the president in this country.”<sup>175</sup>

After losing these and other similar cases, President Trump and his allies brought a different kind of action, challenging the presidential electoral process itself.

## 7. General Attacks

Having failed in his attempt to decertify the Wisconsin vote, on December 2, Trump sued the Wisconsin Elections Commission in federal court seeking an order requiring that the certification of Biden’s presidential electors be remanded to the Republican state legislature.<sup>176</sup> The district court denied the application and held that the electors were chosen pursuant to Wisconsin law as required by the U.S. Constitution.<sup>177</sup>

On December 8, Trump supporters in the State of Texas threw a proverbial long ball. Attempting to invoke the original jurisdiction of the U.S. Supreme Court, the state of Texas sued to decertify results in Georgia, Michigan, Wisconsin, and Pennsylvania on the ground that each state improperly amended their election laws in violation of the federal constitution, treated Democratic voters more favorably than Republicans, and unlawfully relaxed

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172. *Wis. Voter Alliance v. Wis. Elections Comm’n*, No. 2020-AP-1930 (Wis. 2020) (“[The] petition falls far short of the kind of compelling evidence and legal support we would undoubtedly need to countenance the court-ordered disenfranchisement of every Wisconsin voter.”).

173. *Trump v. Evers*, No. 2020-AP-1971 (Wis. 2020); *Feehan v. Wis. Elections Comm’n*, 506 F. Supp. 3d 596, 600 (E.D. Wis. 2020).

174. *Trump*, No. 2020-AP-1971, at 2.

175. *Feehan*, 506 F. Supp. 3d at 600.

176. *See Trump v. Wis. Elections Comm’n*, 506 F. Supp. 3d 620 (E.D. Wis. 2020). The court did not mince words:

This is an *extraordinary* case. A sitting president who did not prevail in his bid for reelection has asked for federal court help in setting aside the popular vote based on disputed issues of election administration, issues he plainly could have raised before the vote occurred. This Court has allowed plaintiff the chance to make his case and he has lost on the merits. In his reply brief, plaintiff “asks that the Rule of Law be followed.” It has been.

*Id.* at 639 (citation omitted).

177. *Id.*

their absentee ballot regulations.<sup>178</sup> This extraordinary action by one state against others was ultimately rejected by the Supreme Court, but not until attorneys general from seventeen other states supported the action, displaying a unique use of the judiciary in a presidential election.<sup>179</sup> The Court declined to entertain Texas's motion to file a bill of complaint due to lack of standing.<sup>180</sup> Justices Thomas and Alito dissented, opining that the Court had no discretion to deny Texas the right to do so.<sup>181</sup>

On December 14, President Trump brought a federal action to prevent Biden's electors from New Mexico from voting during the Electoral College meeting scheduled for that day.<sup>182</sup> Failing to obtain immediate relief, Trump's attorneys withdrew the case.<sup>183</sup>

On December 22, the Wisconsin Voters Alliance brought an action in federal court against Vice President Pence, alleging that the federal statutes governing the counting of electoral votes<sup>184</sup> impermissibly disempowers state legislatures in postelection certification matters and requesting an injunction barring Vice President Pence and Congress from counting the Electoral College votes.<sup>185</sup> The action was dismissed on January 4, with the court finding that there was no particularized harm and adding that the "suit rests on a fundamental and obvious misreading of the Constitution."<sup>186</sup>

A similar case was commenced on December 27 in a federal court in Texas arguing that § 5 and § 15 of the law governing Congress's role in ratifying Electoral College votes would unconstitutionally prevent Vice President Pence from exercising his authority under Amendment XII of the U.S. Constitution.<sup>187</sup> On January 7—only hours after the vice president presided over Congress in an early morning continuation of the statutorily required January 6 joint meeting at which he declared Biden the next president—the court dismissed the case on the ground that plaintiffs could show no particularized harm and therefore had no standing.<sup>188</sup>

Although these cases were generally considered meritless, they demonstrate that former President Trump and his allies insistently sought a judicial imprimatur for their novel attempts to overturn the election in 2020.

178. *Texas v. Pennsylvania*, 141 S. Ct. 1230 (2020) (mem.).

179. Press Release, Off. of the Att'y Gen. for the Dist. of Columbia, AG Racine Leads Coalition of 23 Attorneys General Opposing Texas AG's Baseless Effort to Invalidate 2020 Election Results in Georgia, Michigan, Pennsylvania, Wisconsin (Dec. 10, 2020), <https://oag.dc.gov/release/ag-racine-leads-coalition-23-attorneys-general> [<https://perma.cc/8MJW-FBRK>]. Twenty-three attorneys general opposed the lawsuit. *Id.*

180. *Id.*

181. *Id.*

182. Complaint, *Trump v. Oliver*, No. 1:20-cv-01289 (D.N.M. Dec. 14, 2020).

183. *Trump v. Oliver*, No. 1:20-cv-01289 (D.N.M. Dec. 14, 2020).

184. 3 U.S.C. § 15 governs the counting of electoral votes in Congress.

185. *See Wis. Voters Alliance v. Pence*, 514 F. Supp. 3d 117 (D.D.C. 2021).

186. *Id.* at 119.

187. *See Gohmert v. Pence*, 510 F. Supp. 3d 435, 440, 443 (E.D. Tex. 2021) (finding that plaintiffs lacked standing to compel the vice president to determine which state's electoral votes should or should not count).

188. *Id.*

Indeed, it has already come to light that the former president's legal team *knew* that many of the allegations in these cases had no merit,<sup>189</sup> and several of his more prominent lawyers have been sanctioned for frivolous claims.<sup>190</sup>

*B. Strong-Arming the States and Congress to Overturn Adverse Election Results*

At the same time his lawyers were in state and federal courts in various states in which he lost to Biden, President Trump attempted to strong-arm various election officials, state legislatures, members of Congress, the Department of Justice, and the vice president to overturn his electoral defeat.

Because the Georgia Secretary of State had the presence of mind to record his hour-long conversation with President Trump, the public could clearly hear how he attempted to have the secretary of state “find” 11,780 votes to overcome the margin of Biden’s victory.<sup>191</sup> President Trump also used his bully pulpit to summon legislators from Michigan<sup>192</sup> and Pennsylvania<sup>193</sup> to the White House to persuade them to reject vote totals and appoint electors favorable to him. He also badgered officials in the U.S. Department of Justice to characterize the election as “corrupt”<sup>194</sup> and to have them persuade certain state officials to ignore Biden victories and select Trump electors.<sup>195</sup>

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189. Alan Feuer, *Trump Campaign Knew Lawyers’ Voting Machine Claims Were Baseless, Memo Shows*, N.Y. TIMES (Sept. 21, 2021), <https://www.nytimes.com/2021/09/21/us/politics/trump-dominion-voting.html> [https://perma.cc/MPP4-JFES].

190. King v. Whitmer, No. 20-13134, 2021 WL 3771875, at \*1 (E.D. Mich. Aug. 25, 2021) (“This lawsuit represents a historic and profound abuse of the judicial process. It is one thing to take on the charge of vindicating rights associated with an allegedly fraudulent election. It is another to take on the charge of deceiving a federal court and the American people into believing that rights were infringed, without regard to whether any laws or rights were in fact violated.”).

191. Amy Gardner, “I Just Want to Find 11,780 Votes”: In Extraordinary Hour-Long Call, Trump Pressures Georgia Secretary of State to Recalculate the Vote in His Favor, WASH. POST (Jan. 3, 2021, 9:59 PM), [https://www.washingtonpost.com/politics/trump-raffensperger-call-georgia-vote/2021/01/03/d45acb92-4dc4-11eb-bda4-615aaefd0555\\_story.html](https://www.washingtonpost.com/politics/trump-raffensperger-call-georgia-vote/2021/01/03/d45acb92-4dc4-11eb-bda4-615aaefd0555_story.html) [https://perma.cc/62N8-WJUB].

192. See Ed White et al., *Trump Summons Michigan GOP Leaders for Extraordinary Meeting*, AP NEWS (Nov. 19, 2020), <https://apnews.com/article/trump-invites-michigan-gop-white-house-6ab95edd3373ecc9607381175d6f3328> [https://perma.cc/MA7Q-FSQS].

193. See William Bender & Angela Coulombis, *President Trump Invited Pa. Lawmakers to the White House. Then Everyone Went Silent*, PHILA. INQUIRER (Nov. 26, 2020), <https://www.inquirer.com/news/president-trump-invited-pa-lawmakers-white-house-then-everyone-went-silent-20201126.html> [https://perma.cc/LW7R-9LPQ].

194. See Press Release, House Comm. on Oversight and Reform, Committee Obtains Key Evidence of President Trump’s Attempts to Overturn the 2020 Election (July 30, 2021), <https://oversight.house.gov/news/press-releases/committee-obtains-key-evidence-of-president-trump-s-attempts-to-overturn-the> [https://perma.cc/7P29-UHRS]; Katie Benner, *Report Cites New Details of Trump Pressure on Justice Dept. over Election*, N.Y. TIMES (Oct. 6, 2021), <https://www.nytimes.com/2021/10/06/us/politics/trump-election-fraud-report.html> [https://perma.cc/YPF2-J3NW].

195. See Katherine Faulders & Alexander Mallin, *DOJ Officials Rejected Colleague’s Request to Intervene in Georgia’s Election Certification: Emails*, ABC NEWS (Aug. 3, 2021, 2:56 PM), <https://abcnews.go.com/US/doj-officials-rejected-colleagues-request-intervene-georgias-election/story?id=79243198> [https://perma.cc/SQ5G-RP6H].

When all of these efforts failed, the former president and his supporters attempted to persuade Vice President Pence to decline to confirm the electoral vote count.<sup>196</sup> This avenue was also foreclosed when the vice president formally declined to do so.<sup>197</sup>

After President Trump's unprecedented demands in the courts and through extralegal means were rebuffed, he "encouraged" supporters, many of whom were armed, to storm the U.S. Capitol to physically prevent the official counting of the electoral votes.<sup>198</sup> This attempt failed, order was restored after several hours, and President Biden's electoral victory over President Trump was confirmed.<sup>199</sup>

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196. See Michael S. Schmidt, *Trump Says Pence Can Overturn His Loss in Congress. That's Not How It Works*, N.Y. TIMES (Apr. 30, 2021), <https://www.nytimes.com/2021/01/05/us/politics/pence-trump-election.html> [<https://perma.cc/9CDB-FFJB>]. Indeed, one of the former president's lawyers, John Eastman, who also spoke at the January 6 insurrectionist rally, wrote a lengthy memo outlining a series of steps the vice president could take while presiding over Congress as it ratified the Electoral College votes that would result in Trump's reelection. Jamie Gangel & Jeremy Herb, *Memo Shows Trump Lawyer's Six-Step Plan for Pence to Overturn the Election*, CNN (Sept. 21, 2021, 5:39 PM), <https://www.cnn.com/2021/09/20/politics/trump-pence-election-memo/index.html> [<https://perma.cc/84W3-JR9R>]. Eastman's analysis that the relevant federal law governing the counting of electoral votes could be interpreted to do so has been largely debunked. See Derek Muller, *Rebutting Some of the Claims in the Eastman Memo About Congress's Role in Counting Electoral Votes*, ELECTION L. BLOG (Sept. 21, 2021, 4:48 AM), <https://electionlawblog.org/?p=124703> [<https://perma.cc/3TGG-KVYH>]; Ned Foley, *Initial Reaction to Eastman Memo*, ELECTION L. BLOG (Sept. 21, 2021, 4:56 AM), <https://electionlawblog.org/?p=124705> [<https://perma.cc/Y9XF-REMK>]. Professor Foley was prescient that the law governing the counting of electoral votes could be abused by partisans in a manner not contemplated by its drafters. See Foley, *supra* note 2.

197. Alana Wise, *Pence Says He Doesn't Have Power to Reject Electoral Votes*, NPR (Jan. 6, 2021, 1:07 PM), <https://www.npr.org/sections/congress-electoral-college-tally-live-updates/2021/01/06/953995808/pence-says-he-doesnt-have-power-to-reject-electoral-votes> [<https://perma.cc/SZHJ-8AUX>]. According to *Washington Post* reporters Bob Woodward and Robert Costa, Vice President Pence's decision was in part informed by his conversations with former Vice President Dan Quayle, who previously had to preside over a joint session of Congress to confirm that he and President George H.W. Bush were defeated in the 1992 election. See BOB WOODWARD & ROBERT COSTA, PERIL 199 (2021) ("Mike, you have no flexibility on this. None. Zero. Forget it. Put it away," Quayle said [to Pence].").

198. This encouragement, or incitement, of Trump "insurrectionists" resulted in a violent, deadly attack on the Capitol. Trump was impeached on January 13, 2021, by the House of Representatives for his role in the attack; the vote to impeach was 232–197, with ten Republicans voting to impeach him. Nicholas Fandos, *Trump Impeached for Inciting Insurrection*, N.Y. TIMES (Apr. 22, 2021), <https://www.nytimes.com/2021/01/13/us/politics/trump-impeached.html> [<https://perma.cc/HM9J-ZRAA>]. He was acquitted by the Senate on February 13, 2021, by a vote of 57 for conviction and 43 for acquittal, with seven Republicans voting to convict him. *Id.* Although a majority of senators voted to convict, the vote fell short of the two-thirds requirement. See U.S. CONST. art. I, § 3, cl. 6. A video presentation of the January 6 insurrection was produced by *The New York Times*. See *Inside the Capitol Riot: An Exclusive Video Investigation*, N.Y. TIMES (Sept. 23, 2021), <https://www.nytimes.com/2021/06/30/us/jan-6-capitol-attack-takeaways.html> [<https://perma.cc/NW2D-RZHT>].

199. 167 CONG. REC. H115 (daily ed. Jan. 6, 2021) (statement of Vice President Pence). Despite no evidence of any fraud or other factors that would change or call into question the certified votes in any of the states, and even in the face of the armed attack on Congress during their presence, eight Republican senators and 139 Republican House members voted to reject one or more states' Electoral College results that unambiguously demonstrated Biden's election. *Id.* at H93, H112; Karen Yourish et al., *The 147 Republicans Who Voted*

Thus, our fifty-ninth presidential election was resolved despite the losing candidate attacking the outcome in the courts, importuning election officials to reverse the results, urging Justice Department lawyers to interfere with the process, and inciting armed supporters to physically halt the final step in the certification procedure.

In a word, the election was like no other we have had.

#### V. ELECTION SUBVERSION

In the aftermath of the election, former President Trump continues to assert that the election was stolen from him,<sup>200</sup> and polls have indicated that many of his supporters believe it.<sup>201</sup> This ongoing false narrative is unprecedented in American history and itself has the potential to undermine confidence in elections.

Even more troubling is that several states have enacted laws that threaten to strip election officials of ultimate authority to perform their jobs in the future in an objective manner.<sup>202</sup> The state of Georgia is an example. A new law provides that the position of chief election administrator, the secretary of state—whose 2020 occupant Brad Raffensperger declined President Trump’s demand to find 11,780 votes to flip Georgia in his favor—be stripped of decision-making authority on the state election board.<sup>203</sup> Furthermore, the legislature gave itself the authority to remove and replace up to four county representatives on the state election board, effectively giving the Republican majority a veto on the manner by which votes are canvassed.<sup>204</sup> Other Republican-controlled states are likewise hamstringing election officials with an eye toward facilitating favorable election results.<sup>205</sup> Indeed, a report issued earlier this year catalogues this increasing trend of putting “highly

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to Overturn Election Results, N.Y. TIMES (Jan. 7, 2021), <https://www.nytimes.com/interactive/2021/01/07/us/elections/electoral-college-biden-objectors.html> [https://perma.cc/EKK4-HMLT].

200. See Doyle McManus, *Trump’s Still Waging a War on Truth—And It’s Still Bad For Democracy*, L.A. TIMES (July 11, 2021, 4:00 AM), <https://www.latimes.com/politics/story/2021-07-11/trumps-still-waging-a-war-on-truth-and-its-still-bad-for-democracy> [https://perma.cc/RND4-JMBB].

201. See *53% of Republicans View Trump as True U.S. President*, REUTERS (May 24, 2021, 5:06 PM), <https://www.reuters.com/world/us/53-republicans-view-trump-true-us-president-reutersipsos-2021-05-24/> [https://perma.cc/QZ48-XBJM].

202. See Richard L. Hasen, *Republicans Aren’t Done Messing with Elections*, N.Y. TIMES (Apr. 23, 2021), <https://www.nytimes.com/2021/04/23/opinion/republicans-voting-us-elections.html> [https://perma.cc/6FS2-VUQT].

203. Mary Papenfuss, *Georgia Voting Law Punished Secretary of State for Defying Trump: Election Official*, HUFFINGTON POST (Mar. 28, 2021), [https://www.huffpost.com/entry/gabriel-sterling-brad-raffensperger-punishing-cnn-georgia-election-law\\_n\\_605fe4eac5b6531eed059a5f](https://www.huffpost.com/entry/gabriel-sterling-brad-raffensperger-punishing-cnn-georgia-election-law_n_605fe4eac5b6531eed059a5f) [https://perma.cc/TP7M-WVN2]; Stanley Dunlap, *State Election Board Reconvenes After Secretary of State Booted from Chair*, GA. RECORDER (Apr. 27, 2021, 8:13 PM), <https://georgiarecorder.com/2021/04/27/state-election-board-reconvenes-after-secretary-of-state-booted-from-chair/> [https://perma.cc/4ANL-V2JD].

204. See Nick Corasaniti & Reid J. Epstein, *What Georgia’s Voting Law Really Does*, N.Y. TIMES (Aug. 18, 2021), <https://www.nytimes.com/2021/04/02/us/politics/georgia-voting-law-annotated.html> [https://perma.cc/J3FR-3WBP].

205. See Hasen, *supra* note 202.

partisan elected officeholders in charge of basic decisions about our elections . . . muscl[ing] their way into election administration, as they attempt to dislodge or unsettle the executive branch and/or local election officials who, traditionally, have run our voting systems.”<sup>206</sup>

It remains to be seen whether these post-2020 developments will actually threaten the integrity of the nation’s electoral process, but it does appear that partisanship is replacing objectivity in the vote counting process, at least in some states. Whether such laws will indeed tip the scales in the next presidential election—or in congressional and state elections—cannot be predicted. As of this writing, Congress is considering various bills to mitigate overly restrictive voting laws that could determine outcomes in swing states, just as it has in the past.<sup>207</sup> Yet an alert citizenry—not to mention voting rights advocates and election lawyers—must be watchful of developments in the states and Congress.<sup>208</sup>

Another form of election subversion was presaged by the January 6 invasion of the U.S. Capitol that sought to stymie the confirmation of Biden’s Electoral College victory. Irrespective of the House of Representatives’s inquiry into that attack and the prosecutions of certain participants, who is to say that such armed partisans will not appear in 2024 at various polling places to intimidate voters or at state capitols to stop electoral votes from being counted?<sup>209</sup> After all, the Capitol attack followed a similar assault on the Michigan state legislature several months earlier.<sup>210</sup>

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206. See STATES UNITED DEMOCRACY CTR. ET AL., *supra* note 14, at 1. According to a press release accompanying its report:

As of April 6, at least 148 such bills have been introduced in 36 states. Many of the bills would make elections more difficult to administer or even unworkable; make it more difficult to finalize election results; allow for election interference and manipulation by hyper-partisan actors; and, in the worst cases, allow state legislatures to overturn the will of the voters and precipitate a democracy crisis. If these bills had been in place in 2020, they would have significantly added to the turmoil of the post-election period, and raised the prospect that the outcome of the election would have been contrary to the popular vote.

*Protect Democracy Releases Report on Election Interference Schemes by State Legislators*, PROTECT DEMOCRACY (Apr. 22, 2021), <https://protectdemocracy.org/update/protect-democracy-releases-report-on-election-interference-schemes-by-state-legislators/> [<https://perma.cc/UKU5-EQ9W>]. On June 10, 2021, the States United Democracy Center issued an update and said: “When we wrote in April, we had identified at least 148 bills in 36 states that were a source of alarm. Today, not only do we set that number at a minimum of 216 in 41 states, but 24 of them have been enacted into law.” Memorandum from States United Democracy Ctr., Protect Democracy, and Law Forward, to Interested Parties (June 10, 2021), [https://statesuniteddemocracy.org/wp-content/uploads/2021/06/Democracy-Crisis-Part-II\\_June-10\\_Final\\_v7.pdf](https://statesuniteddemocracy.org/wp-content/uploads/2021/06/Democracy-Crisis-Part-II_June-10_Final_v7.pdf) [<https://perma.cc/N8VZ-7BFQ>].

207. See U.S. CONST. art. I, § 4, cl. 1 (“Congress may at any time by Law make or alter such Regulations.”).

208. Indeed, one of the country’s leading election law scholars, Professor Richard L. Hasen, has recently published a warning of such election subversion, with a guide as to how to address it. See Hasen, *supra* note 14.

209. See, e.g., Robert Kagan, Opinion, *Our Constitutional Crisis Is Already Here*, WASH. POST (Sept. 23, 2021), <https://www.washingtonpost.com/opinions/2021/09/23/robert-kagan-constitutional-crisis/> [<https://perma.cc/BE7D-QLDN>].

210. Ivan Pereira, *Protestors, Some Armed, Spill into Michigan Capitol Building Demanding End to Stay-at-Home Order*, ABC NEWS (Apr. 30, 2020),

Whether they are characterized as domestic terrorists or overzealous partisans, there appears to be a core of disaffected Americans who are not satisfied with registering their views at the ballot box or redressing their grievances in the courts.

#### CONCLUSION

Former New York City Mayor Fiorello La Guardia famously said that there is no Republican or Democratic way to pick up the garbage.<sup>211</sup> Of course, when it comes to running a city, he was probably right. Unfortunately, the same sentiment appears not to be the case in running elections.

It seems that Democrats and Republicans have their own views as to which voting procedures should be in place, how votes should be counted, and what is a fair and accurate result. But this phenomenon is not new. Our history is full of ballot battles that share certain characteristics with what we experienced in 2020 and with how new laws are shaping our sixtieth presidential election.<sup>212</sup>

Indeed, partisans throughout our history were often quite brazen in pressing for favorable rules. An early example related to the manner by which presidential electors were chosen is the 1800 election. Electors during this period were chosen in a variety of ways, and states often changed their procedures based on political considerations.<sup>213</sup> None other than Thomas Jefferson schemed with James Madison “[to] manipul[at]e the selection of presidential electors in the key states of New York, New Jersey, and Pennsylvania.”<sup>214</sup>

Of course, this is not to say that one should be sanguine about the fierce attempts to restrict voting opportunities or shameless efforts to subvert the results by legal or extralegal means. Not at all.

After all, a review of the nation’s history shows that it is replete with legal and popular efforts to expand voting rights, ensure that voting procedures are fair and objective, and ensure that those who are sworn into office were the

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<https://abcnews.go.com/US/michigan-rally-shelter-place-order-spills-capitol-building/story?id=70432928> [<https://perma.cc/NA7K-GJXD>].

211. Nicole Gelinas, *The Disastrously Wrong Way to Collect NYC’s Trash*, N.Y. POST (Oct. 8, 2019), <https://nypost.com/2019/10/08/the-disastrously-wrong-way-to-collect-nycs-trash/> [<https://perma.cc/W737-3YVW>].

212. See, e.g., EDWARD B. FOLEY, *BALLOT BATTLES: THE HISTORY OF DISPUTED ELECTIONS IN THE UNITED STATES* (2016).

213. See Goldfeder, *supra* note 11, at 968 (“In fact, from 1789 through 1832, a majority of legislatures chose their state’s electors. Others did so through direct voting, or by a combination of district voting and legislative appointment. Indeed, states would sometimes change their method of appointing electors based on political considerations. In New York, for instance, the Federalists, who lost control of the state legislature to the Anti-Federalists in 1800, attempted to alter the state’s procedure from legislative appointment to district voting.” (footnotes omitted)).

214. *Creating the United States*, LIBR. OF CONG., <https://www.loc.gov/exhibits/creating-the-united-states/election-of-1800.html> [<https://perma.cc/5L8B-VHDW>] (last visited Sept. 17, 2021).

ones actually elected. Indeed, on balance, the dominant theme in the United States has been the achievement, over time, of more democracy, not less.

If the 2020 election has anything to teach us, it is that an alert, informed, and active citizenry is absolutely essential for an inclusive, transparent, and fair electoral system. And if Martin Luther King, Jr. and the late U.S. Representative John Lewis are to be proven right that the arc of our nation's history indeed bends toward justice, then those who espouse just and impartial elections must safeguard them through state and federal legislation, litigation, and political mobilization. Although the fifty-ninth presidential election reflected an extraordinarily contentious landscape—in the courts, at the polls, and on the streets—those who seek to preserve the republic must persist.<sup>215</sup> Otherwise the 2024 election promises to be a more polarizing and perhaps even more violent replay of the 2020 election—with no assurance that democratic institutions and norms of peaceful succession will hold.<sup>216</sup>

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215. Jerry H. Goldfeder, *Reform Our Elections and Save the Republic*, N.Y.L.J. (Oct. 31, 2019), <https://www.stroock.com/news-and-insights/reform-our-elections-and-save-the-republic> [<https://perma.cc/4644-JSBU>].

216. Activists, scholars, and election officials are already intensely exploring these issues. See, e.g., Transcript, U.C. Irvine Fair Elections and Free Speech Ctr., *Election Subversion: Is American Democracy in Danger?* (Sept. 24, 2021), [https://www.law.uci.edu/centers/fe/s/media-center/images/election-subversion-9-24-2021\\_transcript.pdf](https://www.law.uci.edu/centers/fe/s/media-center/images/election-subversion-9-24-2021_transcript.pdf) [<https://perma.cc/ZRL4-599H>]; Michael Wines, *Harassed and Harangued, Poll Workers Now Have a New Form of Defense*, N.Y. TIMES (Sept. 18, 2021), <https://www.nytimes.com/2021/09/18/us/election-workers-legal-aid.html> [<https://perma.cc/UNP6-SKLT>].