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## PART II. PRINCIPLES FOR THE RESOLUTION OF BALLOT-COUNTING DISPUTES

1 **Introductory Note:** The purpose of this Part is to provide principles applicable to
2 administrative and judicial processes that concern the counting of ballots after they have been cast.
3 In particular, the principles are designed for circumstances in which, based on the preliminary
4 count of ballots released on Election Night, the vote margin between the two leading candidates is
5 tight—and, in the colloquial terminology, the election is "too close to call." In this situation,
6 especially noticeable in elections for statewide or other high-profile offices, there is an inevitable
7 tendency of the two candidates to extend their electoral competition into the post-voting phase of
8 the election and to do so by engaging in an intense scrutiny of ballots to see whether enough might
9 be disputable to keep the election in play and potentially to overturn the reported Election Night
10 lead. In the midst of this dynamic, the candidate ahead on Election Night obviously will approach
11 the post-voting review of ballots with the view of preserving that lead, while the Election Night
12 runner-up has the desire to overtake the frontrunner. From their separate strategic perspectives,
13 both candidates will put pressure on the state's vote-counting processes, in their understandably
14 competitive efforts to win. A major goal of these Principles is to help a state's vote-counting
15 processes address and resolve critical issues even under intense pressure, which can become
16 especially acute in high-stakes scenarios, so that the final result of the election satisfies the
17 democratic standards and purposes for holding the election.
18 The Principles are structured to be useful to multiple audiences in multiple forms. A state
19 legislature, so inclined, could adopt the Principles in the form of statutory rules to govern the
20 state's vote-counting processes. Even without legislative adoption, a state court could invoke the
21 Principles to adjudicate litigation that arises over the counting of ballots, particularly in those
22 circumstances in which a state's existing statutory rules have left a matter for judicial interpretation
23 or case-law development in the tradition of the common law. Likewise, insofar as state law invests
24 administrative discretion over the counting of ballots in a statewide officer, like a Secretary of
25 State, or local election officials, those election administrators can invoke these Principles to guide
26 their discretion.
27 The overriding philosophy animating these Principles is one of fair electoral competition.
28 In a democracy, the election itself should be a vigorous competition between two (or more)
29 candidates and their partisan supporters, and it is appropriate from the perspective of the candidates

and their partisan supporters for that competitive spirit to extend into the vote-counting process when continuing the effort to win might affect the outcome. At the same time, from the perspective of the electoral system as a whole—and of the entire public that the electoral system serves—the counting of ballots should be scrupulously fair to both sides involved in the electoral competition. The government officials and institutions involved in the counting of ballots should neither be nor appear to be favoring one side or the other in the implementing of the ballot-counting rules and procedures. But just as in athletic competition the players may attempt to secure an inappropriately favorable ruling from the referee, so too in electoral competition may candidates and their partisan supporters attempt to induce government officials to favor their side in the vote-counting process. The principles set forth in this Part are designed to prevent that kind of inappropriate official favoritism in the vote-counting context and, just as importantly, to avert the public perception that such favoritism occurred.

**Scope:** Except as otherwise specifically provided, these Principles apply to any type of elective office, whether statewide or local, or legislative, executive, or judicial. For presidential elections, these Principles in general are intended to operate harmoniously with the Procedures for the Resolution of a Disputed Presidential Election set forth in Part III. Insofar as there may be some divergence between a principle in this Part, which applies to all types of elections, and a specific procedure set forth in Part III, designed for the particular exigencies of a presidential election, it is intended that Part III should control.

Although this Part has been drafted for candidate elections, rather than ballot initiatives and referenda, many of its principles may be suitably applicable or tailored to the latter circumstances as well. Similarly, this Part has been written for general elections, rather than party primaries, but many of its principles may apply to primary elections as well.

This Part is also intended to function harmoniously with Part I and, with respect to the counting of absentee ballots, this Part specifically incorporates and cross-references portions of Part I.

**Usage Note:** The term "disenfranchisement," when employed in this Part, includes both the denial of the right to vote across multiple elections (as occurs when felons are barred from voting unless and until their right to participate is reinstated) and the complete prevention of an opportunity to cast a ballot in a single election (as when a poll worker wrongfully refuses to give a voter a provisional ballot that the voter is entitled to cast). The term "disenfranchisement,"

1 however, is reserved for these absolute barriers to casting a ballot and does not extend to
2 impediments to voting, however onerous, if the voter has the capacity to overcome the impediment
3 (as would be true if the closest polling place to a voter's residence requires the voter to travel an
4 excessive distance and state law does not provide this voter an opportunity to vote by mail).

5 **SUBPART A. GENERAL PRINCIPLES**

6 **§ 201. Maximum Clarity and Specificity in Advance of the Election**

7 **(a) Before ballots are cast in an election, the laws of the state should prescribe as**
8 **clearly, precisely, and comprehensively as possible the specific rules and procedures for**
9 **counting those ballots, in order to minimize the grounds available for a dispute over the**
10 **counting of those ballots.**

11 **(b) Whenever the state's rules and procedures for the counting of ballots have been**
12 **prescribed in advance of an election in accordance with subsection (a), those rules and**
13 **procedures shall be followed as prescribed, unless doing so would violate the U.S.**
14 **Constitution or other federal law.**

15 **(c) Whenever *either* the state's rules and procedures for the counting of ballots have**
16 **failed to prescribe in advance of an election what should happen in a particular situation**
17 **that has occurred in the election, *or* there is a dispute over whether or not these rules and**
18 **procedures have prescribed what should happen in a particular situation that has occurred**
19 **in the election, the tribunal responsible for adjudicating the dispute shall render the decision**
20 **or adopt the interpretation that most promotes the equal right of all eligible voters to**
21 **participate in the election, including as necessary the protection of this equal right of**
22 **participation from circumstances that would undermine the integrity of the process by which**
23 **ballots in the election are cast and counted.**

24 **(d) States periodically should review their applicable rules and procedures**
25 **concerning the counting of ballots to determine whether they need updating in light of**
26 **technological, sociological, and other developments to promote clarity, precision, and**
27 **comprehensiveness to the maximum extent feasible.**

28 **Comment:**

29 *a. Priority of avoiding ambiguity in ballot-counting rules.* A paramount principle of
30 election law, upon which there is the greatest degree of consensus, is that the rules for counting

ballots should be specified without ambiguity insofar as is possible before the ballots are cast. However, because absolute clarity, precision, and comprehensiveness of a state's ballot-counting rules in advance of ballot-casting is an unattainable standard of perfection, the principle set forth in subsections (a) and (d) is framed in terms of achieving what subsection (d) labels as *maximum feasibility* with respect to these related objectives. To say merely that a state's laws should be "clear, precise, and comprehensive" would be to miss the key point that a state should undertake *best efforts* with respect to achieving these three objectives, not merely some perfunctory steps towards these ends. The inclusion of subsection (d) is designed to underscore the state's ongoing obligation to engage in best efforts towards these ends as conditions evolve.

Furthermore, the principle set forth in subsection (a) is deliberately framed in terms of these three interrelated objectives, rather than just one or two of them. *Clarity* concerns the avoidance of ambiguity. *Precision* concerns the avoidance of vagueness. *Comprehensiveness* concerns the avoidance of gaps in coverage. Ideally, ballot-counting rules will achieve optimality along all three dimensions of legislative drafting. (For the sake of brevity, this and other Comments in Part II occasionally will use terms like "ambiguity" and "clarity" to refer to more than one of these dimensions, when distinguishing among them is not essential in the particular context.)

The reason for this principle is straightforward: candidates and political parties are prone to dispute ballot-counting rules whenever doing so might help them to win an election. The greater the ambiguity (or other form of indeterminacy) in ballot-counting rules, the easier it is for candidates and political parties to pursue these disputes. If the relevant law is absolutely crystal clear and thoroughly comprehensive, a candidate will have nothing to dispute (at least insofar as the relevant law is concerned; there still may be purely factual issues worth disputing). Although candidates and parties desperate to win may attempt to make frivolous arguments concerning the interpretation of a perfectly clear and entirely determinate law, those arguments rarely gain any traction even in a hyperpolarized political environment. Ultimately, in a functioning democracy, common sense renders out of bounds interpretations of existing legal rules that are patently nonsensical and untenable.

*b. Ballot-counting should be conducted, to the greatest extent possible, in accordance with the rules established before the ballots were cast.* A corollary of the paramount principle set forth in subsection (a) is that, when ballot-counting rules have been specified in advance without ambiguity (or other form of indeterminacy), courts and administrators must enforce these rules as

written. Indeed, it is widely recognized as an essential element of electoral fairness that ballots be counted according to the rules established for counting ballots in advance of the election. Perhaps a postelection controversy will suggest that these rules should be changed in some way for the next election, but the controverted election must be conducted according to the rules set forth in advance. To change the rules for counting ballots after they have been cast is a breach of fundamental fairness that will violate due process, as several circuit courts have held.

**Illustration:**

1. Prior to the election, an existing provision of state law specifies: "No absentee ballot delivered by U.S. Mail is eligible to be counted unless it is either delivered to the appropriate election official before the polls close or is postmarked before Election Day and delivered to the appropriate election official no later than seven days after Election Day." In the particular election, a large number of absentee ballots were postmarked before Election Day but, due to negligence on the part of postal employees, were not delivered to the appropriate election officials until more than seven days after Election Day. There is no ambiguity to the rule as written; it contains no exception for late-arriving ballots due to negligence of postal workers. On the contrary, as written, the rule unambiguously renders these late-arriving ballots, even though postmarked, ineligible to be counted. Accordingly, judges must enforce the rule as written.

Occasionally, the claim will arise that to enforce an unambiguous rule as written would impose an unwarranted injustice upon innocent voters and would even be unconstitutional under the Fourteenth Amendment, according to jurisprudence developed by the U.S. Supreme Court over the last half-century, including the "one-person, one-vote" doctrine and its applicability to the vote-counting context. In America's legal system, federal constitutional law is obviously supreme, and thus even an unambiguous state law must yield if, as applied to a particular situation, it would cause an unconstitutional disenfranchisement of an otherwise eligible voter. Nonetheless, it is important to acknowledge that the governing constitutional jurisprudence—known as the *Anderson/Burdick* balancing test (after two leading Supreme Court precedents in this line of cases)—is notoriously amorphous and susceptible to uncertainty and disagreement. Not only has the Supreme Court itself fractured deeply in the application of this jurisprudence, but so too has the judiciary in general. Consequently, whenever an unambiguous state law is invalidated on the

basis of unsettled doctrine, the loss of statutory clarity threatens to undermine the legitimacy of the electoral process that the constitutional jurisprudence is intended to foster. The Constitution, of course, must prevail, but further development of constitutional jurisprudence in this particular context requires recognizing, among other considerations, the value of judicial restraint in service of promoting electoral legitimacy. The value of judicial restraint in this particular context, moreover, is underscored by the observation that two subsidiary strands of constitutional jurisprudence can sometimes point in opposite directions in the same vote-counting case: on the one hand, the "equal protection" component of the jurisprudence might be advanced by invalidating an unambiguous state statute that arguably conflicts with the equal right of citizens to participate in the election; on the other hand, the "due process" component of the same constitutional jurisprudence might be advanced by avoiding the unsettling of previously settled expectations associated with an unambiguous statute as written and in force at the time the ballots in the particular election were cast.

**Illustrations:**

2. A state statute provides: "No absentee ballot is eligible to be counted unless the absentee voter writes the voter's birthdate on the absentee ballot envelope." The statute is unambiguous. Nonetheless, it is challenged as unconstitutional in a case involving three voters who accidently wrote, not their birthdate, but the date on which they cast their absentee ballot. There is no dispute that these three voters are otherwise eligible to participate in the election: they are registered, they supplied their driver's-license number (or other form of identification), as required, and the signature on their absentee ballot envelope clearly matches the corresponding one in their voter-registration file. In a local election for a city-council seat, in which the certified margin between the two leading candidates is just a single vote, the argument is made that to disqualify these three ballots solely because of the accidently incorrect birthdate would be unconstitutional disenfranchisement in violation of the *Anderson/Burdick* balancing test. Notwithstanding the fact that this constitutional challenge to the unambiguous statute was not adjudicated in advance of the election, and thus to invalidate the statute as applied to these three voters in the particular context of a ballot-counting dispute that may affect the outcome of a specific election arguably changes the rules of the election after the ballots have been cast, judges likely would conclude under the *Anderson/Burdick* balancing test that the state's

justification for enforcing its unambiguous statute is so low, while the voters' interest in avoiding disenfranchisement just because of an immaterial clerical error is sufficiently strong, that the constitutional calculus requires invalidating the statute as applied and thus counting these three votes.

3. A state statute provides: "No absentee ballot is eligible to be counted unless the absentee ballot envelope is signed by a witness who attests to the fact that the absentee voter cast the ballot free from duress." In an election for governor, when only 100 votes separate the two leading candidates, 500 absentee ballots were cast without the required witness signature. The applicable state statute is unambiguous in necessitating the invalidation of these absentee ballots because of the missing witness signature. Even so, the trailing candidate raises a constitutional claim under the *Anderson/Burdick* balancing test. There is no other basis for disqualifying these 500 absentee ballots: they were cast by registered voters who supplied their driver's-license number (or other form of required identification), and the voter's own signature matches the one on file in the voter's registration database. Moreover, apart from the missing witness signature itself, there is no other evidence of any duress or other form of impropriety associated with the casting of these 500 absentee ballots. The claim is that under *Anderson/Burdick* balancing the state lacks sufficient justification for disqualifying these ballots as the penalty for the missing signatures, and conversely the interests of these 500 voters are sufficiently strong in avoiding disenfranchisement as to invalidate the statute as applied to their situation. Here, in contrast to the previous Illustration, judges likely would conclude that the *Anderson/Burdick* balancing does not weigh conclusively in the voters' favor, and instead that the "due process" interests of avoiding changes to election laws after ballots have been cast warrant enforcement of this unambiguous statute as written and in force at the time the absentee ballots were cast. Judges reasonably might reach this determination as the appropriate constitutional calculus in this particular situation, even if they strongly believed that the state's witness-signature requirement—and, in particular, the disqualification of ballots solely because of a missing witness signature, without any additional evidence of wrongdoing—was objectionable as a matter of public policy.

As this pair of Illustrations demonstrates, *Anderson/Burdick* balancing is highly indeterminate and thus susceptible to a divergence of opinion on the conclusions it yields in

particular cases. Insofar as *Anderson/Burdick* balancing is used to challenge unambiguous statutory rules, the invalidation of those rules (especially by split judicial decisions, in which the judges themselves disagree on how *Anderson/Burdick* applies in the case at hand) introduces a degree of uncertainty and confusion about the governing election law that previously had been absent. When all judges concur that a state's statutory rule, no matter how clear, is unconstitutional and thus must yield to the supremacy of federal constitutional law, little damage is done to the value that ballot counting should be conducted according to clear rules existing in advance of the election, because by hypothesis the Constitution (which preexists the election and is of course the supreme operative rule) in this instance is relatively clear about what it requires (because there is no judicial disagreement on the point). Conversely, when the judges themselves reasonably disagree about what the antecedent Constitution requires regarding the facts at hand, the value of having ballot-counting disputes adjudicated according to clear antecedent rules is undermined, and particularly when an unclear antecedent Constitution is displacing a crystal-clear and precisely on-point statutory command of state law. Accordingly, given the value of having election laws settled in advance of casting ballots in an election, it is desirable that the application of *Anderson/Burdick* balancing in the particular context of vote-counting disputes be conducted with the minimum of judicial disagreement that is feasible. While all judges inevitably and appropriately must enforce the requirements of constitutional law as they in good conscience perceive those requirements, it is fully consistent with this judicial fidelity to the rule of law to acknowledge the existence of ambiguity in applicable constitutional jurisprudence and, accordingly, to seek the development of this constitutional jurisprudence in ways that most promote rule-of-law values and the legitimacy of the electoral process, including the critical value of clarity. This recognition, furthermore, cautions—in the particular context of a dispute over the counting of ballots after they have been cast—against the invalidation of an unambiguous statutory command enacted in advance of the election concerning how to count the ballots cast in that election. A perception that the rules for counting ballots are changing after those ballots have been cast, including when that change is pursuant to judicial disagreement about what the Fourteenth Amendment requires in the particular context, does not help to enhance public confidence that the outcome is according to the rule of law.

*c. Resolving ambiguity in favor of maximizing the legitimacy of the election.* In some circumstances, it may be obvious that the rules enacted in advance of the election have failed to

specify what should happen in a particular situation that has arisen after ballots have been cast. These are circumstances of genuine ambiguity, and judges need to do the best they can to apply the ambiguous rules to the situation at hand. The principle set forth in subsection (c) provides that judges should resolve ambiguity in favor of maximizing the legitimacy of the election. Doing so entails, whenever possible, protecting the equal right of all eligible voters to participate in the electoral process.

**Illustration:**

4. Prior to the election, a state statute provides: "In order for a provisional ballot to be counted, the voter must sign the provisional-ballot envelope as instructed." The provisional-ballot envelope itself contains instructions telling the voter to "sign here" and indicating a space immediately below. Elsewhere on the provisional-ballot envelope there is a space for the voter to "print" the voter's name. Suppose a voter has signed the provisional-ballot envelope, not where the instructions indicate ("sign here"), but in the space for the voter to print the voter's name. Suppose the voter's signature is clearly legible, so it is possible to identify the particular voter who cast the provisional ballot, and suppose that verification of the provisional voter's identity determines that the voter is indeed registered and qualified to participate in the election and that there is no other basis for invalidating the provisional ballot. May, or should, the provisional ballot be invalidated solely because it was signed in the wrong space on the provisional-ballot envelope? It would be possible to interpret the statutory language to yield this result. If "as instructed" means that the voter is absolutely required to sign in the space identified, then the voter did not sign as instructed. On the other hand, "as instructed" can be interpreted meaning simply that the voter has been told (on the envelope) to sign the ballot envelope and thus the voter must do so. Under this interpretation, the voter who has signed the ballot in the wrong space on the envelope still has complied with the statutory requirement of signing the ballot as instructed to do so. Because both interpretations of the statute are possible, the statute is ambiguous. In this situation, the principle set forth in subsection (c) requires judges and administrators to adopt the interpretation that avoids disenfranchising the voter by invalidating the voter's ballot. Even if arguably the more natural reading of the statutory language is to say that "as instructed" means signing in the space indicated by "sign here," judges and administrators are required to adopt the interpretation more favorable to the

voter and the protection of the basic right to participate in the election. As long as the statute is plausibly susceptible to a less-disenfranchising interpretation, courts and administrators are obligated to adopt that interpretation.

The goal of promoting an election's legitimacy sometimes requires the disqualification of ballots. Disqualification of ballots is required when it is necessary to protect the integrity of the electoral process, which is an element of protecting the equal right of all eligible voters to elect the candidate of their choosing. For instance, stuffing the ballot box with invalid votes obviously contravenes this equal right of eligible voters to determine the outcome of the election. Although not every breach of a voting rule is tantamount to ballot-box stuffing, some types of electoral malfeasance are tantamount to altering the count of valid ballots with the infusion of invalid ones. When statutes are ambiguous on the consequence of a breach of a procedural rule concerning the casting of ballots, courts invariably will need to decide whether protecting the integrity of the electoral process requires the disqualification of some ballots that are in breach of this rule.

**Illustration:**

5. Prior to an election, a state statute provides: "No otherwise eligible ballot shall be disqualified from being counted solely because the ballot, after being cast, was mishandled by election officials in breach of chain-of-custody procedures, unless there is evidence that during the time in which the ballot was outside proper chain-of-custody procedures the ballots were tampered with." In the particular election, after the ballots were cast, they were put in sealed ballot-storage containers for transmission from the polling place where they were cast to the headquarters of the local board of elections. Although rules required that poll workers representing both major political parties accompany sealed ballot containers during their physical transmission from the polling place to the board headquarters, at the end of Election Night one of the poll workers was fatigued and decided not to accompany the ballots. When the ballots arrived at the local headquarters in the custody of a poll worker from only one political party, the seals on the ballot containers were broken, but there was no evidence that the markings on the paper ballots themselves had been altered. During a recount, the question arose whether these particular ballots must be disqualified because both (a) there was a breach of chain-of-custody procedures (transmission accompanied by only one poll worker, from one party) and (b) the broken

seals were evidence of tampering. The statute is ambiguous insofar as, notwithstanding the broken seals, it is possible to interpret "tampered" to refer to only the ballots themselves, not the sealed container. In this situation, what should a court supervising the recount do? Although the value of protecting eligible voters from disenfranchisement would favor counting the ballots despite the unsealed containers, the breach of the chain-of-custody procedures, which put the ballots in the hands of a poll worker from one party, combined with the broken seals on the ballot containers—indicating a willful effort to tamper with the ballots—points to disqualifying the ballots because of the circumstances compromising the integrity of the electoral process. This is a situation in which the democratic ideal of equal participation of all eligible voters cuts in both directions. The ability of the judiciary to resolve the particular case one way or the other will depend upon particular circumstances concerning the breach of the chain-of-custody rules and the broken seals: if all the available evidence points to a deliberate effort to manipulate the contents of the ballots, even though there is no evidence of such tampering on the ballots themselves, the risk of deliberate partisan manipulation of the election may suffice to necessitate the disqualification of the ballots despite the obvious innocence of the voters who cast them. Conversely, however, if all the available evidence indicates that the risk of the ballots themselves being altered is exceedingly low despite the broken seals and the breach of chain-of-custody protocols, then the value of protecting eligible voters from disenfranchisement would require the counting of these ballots despite the compromised circumstances of their transmission from polling place to board headquarters.

*d. Dispute over whether ambiguity exists.* Sometimes it is debatable whether or not a preexisting law is unambiguous in its application to a specific circumstance. Subsection (c) also addresses this circumstance, treating it as functionally equivalent to the circumstance in which everyone agrees that the law is ambiguous and the question is what to do about the ambiguity. In each instance, the tribunal should endeavor to resolve the dispute consistent with the principle of protecting the equal participation of eligible voters so long as doing so is consistent with maintaining the integrity of the election.

**Illustration:**

6. Prior to the election, a state statute provides: "Only registered voters are eligible to participate in an election." A separate state law permitted online voter registration, and thousands of citizens attempted to take advantage of this convenience. As a result of a computer glitch, however, the registration process was never completed for many of these voters: the computer failed to show these voters the screen saying "Click here to verify U.S. citizenship." State law also said that, to be registered, a voter must attest at the time of registration to the voter's U.S. citizenship. The computer glitch misled these voters because, after submitting their address and other relevant information but without opportunity to attest to citizenship, the computer screen flashed a message: "Thank you! You may update your registration information at any time by reentering the Voter Registration Portal." Any of these misled voters who checked the "Portal" electronically would have seen that, as a result of the glitch, the system did not consider their registration complete. But many of the misled voters did not bother to check because they thought that the "Thank you!" message was equivalent to telling them that their registration was complete. After the election, there were enough of these misled voters to affect the outcome of one race on the ballot. Thus, the question for the court was whether to count or disqualify the provisional ballots cast by these misled voters. One candidate took the position that the relevant state law was unambiguous in requiring voters to be registered in order to participate in this election and, despite the fact that these voters failed to complete their registration because of the computer error, it remained true that the voters were unregistered and therefore could not participate. The other candidate argued that the state law was ambiguous insofar as it did not say specifically what to do when the voters took reasonable steps in an effort to register and were defeated in their effort only because of a fault attributable to the government itself. This candidate argued that it was possible to construe the relevant state law as treating the misled voters as "registered" for purposes of the law, because they completed as much of the electronic registration form as was provided to them through the online portal. In light of this disagreement, the adjudicatory tribunal should adopt the interpretation that most promotes the legitimacy of the election. In this instance, the equal right of all eligible citizens to participate in the election calls for treating as registered those voters who attempted to register and who would have done so

successfully but for an administrative error on the part of the government. Moreover, in this instance, there is no countervailing requirement to disqualify the ballots cast by the voters affected by the government error in order to protect the integrity of the election: there is no risk of fraud associated with the voters who attempted to register but failed to do so because of the government error. Consequently, promoting the legitimacy of the election requires in this instance the counting of the provisional ballots cast by the affected voters in order to avoid their disenfranchisement because of a government mistake.

## REPORTERS' NOTE

*a. The due-process principle of* Griffin *and* Roe. Competitive events that produce winners and losers require clear rules in advance of the competition. Otherwise, it may be impossible to determine which competitors won or lost according to agreed-upon rules. A dispute that emerges over the meaning of the rules, after the competition is already underway, and upon which the outcome of the competition may hinge, threatens to undermine the legitimacy of the competition in the eyes of the competitors and the spectators interested in the competition's outcome. This point applies to athletic competition; it also applies to electoral competition.

The federal judiciary has recognized the importance of this point. In fact, its importance is of such magnitude that for the conduct of an election to deviate from clearly applicable rules governing the election established before the election began implicates the Due Process Clause of the Fourteenth Amendment (and, at least in some contexts, violates due process). The two leading cases are Griffin v. Burns, 570 F.2d 1065 (1st Cir. 1978), and Roe v. Alabama, 43 F.3d 574 (11th Cir. 1995).

*Griffin* involved a Rhode Island statute that permitted absentee voting in "all" municipal elections. Consequently, absentee voting was used in a primary election as part of the process to fill a Providence City Council seat. The Secretary of State administered the absentee voting in this election, along with other aspects of the voting process, providing absentee ballots to those voters who qualified to vote absentee under the terms of the state's statute. After these absentee ballots had been cast, however, the Rhode Island Supreme Court ruled that the statutory right to vote absentee applied only to general elections and not to primary elections. The state supreme court issued this ruling—and ordered all absentee ballots cast in this election to be left uncounted, thereby disenfranchising all the voters who had cast them—despite there being no indication of this limitation in the statute, despite the fact that the statute expressly extended the right to vote absentee to "all" municipal elections, and despite the fact that the Secretary of State in reliance on this express statutory language had utilized absentee voting for this particular primary election.

The candidate who would have won the election if the state supreme court had not voided these absentee ballots sought relief in federal court, which ordered a new election. (The federal court chose this remedy rather than requiring the counting of ballots that the state supreme court had disqualified.) The U.S. Court of Appeals for the First Circuit affirmed, asserting: "we do not

see how an election conducted under these circumstances can be said to be fair." 570 F.2d at 1076. The appeals court observed: "The statute on its face did not prohibit such [absentee] ballots" in the context of a primary election and "in utilizing such ballots voters were doing no more than following the instructions of the officials charged with running the election." Id. at 1075. The First Circuit held, therefore, that the disqualification of these absentee ballots after they had been cast "presented a due process violation." Id. at 1078.

Roe v. Alabama also involved absentee ballots, but the specific circumstances were something of the opposite situation than in Rhode Island, insofar as the state supreme court ordered the counting of ballots that a state statute explicitly rendered invalid. Alabama had a statute providing that an absentee ballot was invalid unless submitted in an envelope either notarized or signed by two witnesses attesting that the voter cast the ballot without any improper influence or duress. In an election for chief justice of the Alabama Supreme Court, in which the apparent margin of victory was only about 200 votes, over a thousand absentee ballots had been cast in violation of the statutory witness requirement. The Alabama Supreme Court (in an opinion issued by a majority of justices who did not recuse themselves from the case) ruled that the witness requirement was merely directory, meaning that ballots cast in violation of it were still entitled to be counted. For a narrative account of the dispute over the outcome of this election, see EDWARD B. FOLEY, BALLOT BATTLES: THE HISTORY OF DISPUTED ELECTIONS IN THE UNITED STATES 267-277 (2016).

The U.S. Court of Appeals for the Eleventh Circuit, however, held that to count the ballots cast in violation of the witness requirement would violate due process. See Roe v. Alabama, 43 F.3d 574, 580-581 (11th Cir. 1995). The Eleventh Circuit ordered a trial in federal district court on the question whether prior to this particular election it had been the practice in Alabama to count absentee ballots despite their noncompliance with the statutory witness requirement. See Roe v. Alabama, 52 F.3d 300 (11th Cir. 1995). When the answer at trial was that the overwhelming practice in the state had been to reject such noncompliant ballots, not to count them, the district court ruled—and the Eleventh Circuit emphatically affirmed—that due process required their exclusion from the counting of ballots in this particular election. See Roe v. Alabama, 68 F.3d 404, 408 (11th Cir. 1995) ("The facts established on remand in the district court were stronger in favor of the Roe Class than the prior panel could have expected.") The court reiterated its pretrial hypothesis that the state-court order to count the ballots, "if permitted to stand, will constitute a retroactive change in the election laws that will effectively 'stuff the ballot box,' implicating fundamental fairness issues." 43 F.3d at 581. Relying on the First Circuit precedent in Griffin v. Burns, the Eleventh Circuit observed that in this situation "failing to exclude the contested absentee ballots will constitute a post-election departure from previous practice in Alabama" and that this change in the ballot-counting rules after those ballots had been cast is unconstitutional. Id.

In light of the due-process principle recognized in both *Griffin* and *Roe*, whenever state law prior to the casting of ballots in an election has a clear rule concerning the counting of those ballots, as a general proposition no state court should deviate from that clear rule in the adjudication of a dispute over the counting of ballots after they have been cast.

*b. The voting-rights jurisprudence of* Anderson/Burdick *balancing.* It is possible that a state's statutory rule for the counting of ballots, despite being entirely clear in its requirements, violates the right to vote as protected by the U.S. Constitution. To take an obviously extreme hypothetical, if state law provided that no absentee ballot is entitled to be counted if cast by an African American, or a woman, that state law would be unconstitutional—and unenforceable—no matter how clear it might be. (The Fifteenth Amendment prohibits discrimination with respect to voting on the basis of race, and the Nineteenth Amendment does the same with respect to gender.) If an issue arose on whether to invalidate absentee ballots cast by African Americans or women, as required by state law, the federal Constitution would require that either those ballots be counted despite their invalidity under state law or else the election be voided because of the state's discriminatory voting rule. It would not be permissible to enforce the clear state rule as written just because it was the state law in effect at the time the ballots were cast.

In addition to the specific constitutional prohibitions against racial and gender discrimination in the context of voting, as provided in the Fifteenth and Nineteenth Amendments, the U.S. Supreme Court has developed a general jurisprudence of voting rights under the Equal Protection Clause of the Fourteenth Amendment and, in something of an auxiliary role, the Freedom of Speech Clause of the First Amendment. This general jurisprudence consists primarily of a balancing test known by the names of two leading cases that developed the test: Anderson v. Celebrezze, 460 U.S. 780 (1983), and Burdick v. Takushi, 504 U.S. 428 (1992). Pursuant to this balancing test, the Supreme Court applies strict scrutiny to a state's election rules that impose "severe" burdens on voting rights, but diminishes the "rigorousness" of its scrutiny "when a state election law provision imposes only 'reasonable, nondiscriminatory restrictions'" on voting rights.

Courts have utilized *Anderson/Burdick* balancing to invalidate some state laws that disqualify already-cast ballots, requiring them to be left uncounted, in particular circumstances. A leading case of this type is Northeast Ohio Coalition for the Homeless v. Husted, 837 F.3d 612 (6th Cir. 2016) (NEOCH 2016). (This particular NEOCH opinion is denominated NEOCH 2016 because there have been multiple Sixth Circuit opinions issued in the same ongoing lawsuit over Ohio's ballot-counting rules for a decade, going back to 2006.) There, a three-judge panel of the Sixth Circuit (Boggs, Rogers, and Keith) unanimously invalidated an Ohio statute that disqualified absentee ballots when their voters made inconsequential clerical errors on the envelopes in which they transmitted their ballots. The Ohio statute required that absentee voters include their correct address and date of birth, among other identifying information, on the exterior of the ballot's transmission envelope. The trial of the case elicited evidence showing that occasionally voters make innocent clerical errors when writing their address or birthdate on these envelopes. A typical error of some frequency occurs when a voter accidentally writes "today's date" (in other words, the date on which the voter fills out the envelope), rather than their birthdate, in the place on the envelope that calls for the voter's birthdate. The trial also showed that, despite errors of this kind, local boards of elections usually have no difficulty in verifying the eligibility of the absentee voter because of other identifying information provided on the envelope (the voter's Social Security or driver's-license number, for example). In light of this evidence, and utilizing *Anderson/Burdick*

balancing, the trial court ruled that disqualification of absentee ballots in these circumstances, solely because of the innocent clerical errors, was unconstitutional disenfranchisement of eligible voters in violation of the Fourteenth Amendment. On this point, the Sixth Circuit panel unanimously affirmed.

The Sixth Court wrote: "we agree with the district court that Ohio has made no [valid] justification for mandating technical precision in the address and birthdate fields of the absentee-ballot identification envelope." 837 F.3d at 632. Prevention of fraud would not sustain the statute because "the district court was not presented with a shred of evidence of mail-in absentee-voter fraud," id. at 633; and, more importantly, local election boards always have the authority to reject a particular absentee ballot suspected of fraud—including when the evidence of fraud concerns a mistaken address or birthdate—with the consequence being that there was no reason to invalidate a ballot when there was no suspicion of fraud: "boards [have] more than sufficient flexibility to investigate birthdate errors for fraud without the heavy-handed requirement of ballot rejection on a technicality. Id. Nor did Ohio's interest "in standardizing its identification-envelope requirement" suffice. Id. at 634. There was nothing unconstitutional about Ohio *asking* all voters to supply their address and birthdate on the envelope; the constitutional deficiency was voiding a ballot, and thereby disenfranchising the voter, solely because of a clerical error that in no way prevented the local election board from confirming the voter's eligibility. Thus, the appeals court concluded:

> Ohio could include instructions explaining the steps that officials should take to positively identify voters before determining that an identification envelope is sufficient or insufficient. Instead, the legislature enacted a measure that forces elections boards to reject some identifiable ballots. We cannot find that Ohio's stated interests outweigh the burden that the field-perfection requirement places on absentee voters.

Id.

In this way, the Sixth Circuit's application of *Anderson/Burdick* balancing resulted in the nullification of a state statutory requirement concerning the counting of ballots that was entirely unambiguous. Lack of clarity was not a problem with this particular Ohio statute. On the contrary, the statute was crystal clear in prohibiting the counting of an absentee ballot with this type of clerical error; indeed, the statute had been enacted specifically for that purpose. But the clarity of the statute did not make it constitutional. Its unconstitutionality was caused by the impropriety of disenfranchising voters solely because of a trivial clerical mistake.

The Sixth Circuit's ruling in *NEOCH 2016* occurred before ballots were cast in the November 2016 general election. The court issued its opinion on September 13, 2016, and absentee ballots were not available until the start of Ohio's early voting period, beginning on October 12. Thus, before any absentee ballots were cast as part of the 2016 general election, the state's election officials as well as all candidates and their campaigns were on notice that, as a consequence of the court's decisions, any absentee ballot having an inconsequential clerical error must be counted notwithstanding the clear statutory prohibition to the contrary. In this way, the NEOCH v. Husted

application of *Anderson/Burdick* balancing posed no tension with the due-process principle of Griffin v. Burns and Roe v. Alabama.

The Sixth Circuit, however, has not limited its application of *Anderson/Burdick* balancing to ballot-counting rules solely to constitutional claims asserted prior to the casting of the disputed ballots. In Hunter v. Hamilton County Board of Elections, 635 F.3d 219 (6th Cir. 2011), a three-judge panel invoked *Anderson/Burdick* balancing, along with Bush v. Gore, 531 U.S. 98 (2000), to require the counting of provisional ballots that the local board of elections had determined to be ineligible for counting under state law. (Although the panel was unanimous in its judgment, the judges split 2-1 in their reasoning.) This ruling, on January 27, 2011, concerned ballots cast as part of the November 2010 general election and arose specifically in the context of a dispute over which candidate won a local judicial race (for a seat on Hamilton County Juvenile Court). If the disputed provisional ballots remained uncounted, then the Republican candidate would be certified the winner. But the vote tally was close enough, with only 23 votes separating the two candidates, that a group of 269 rejected provisional ballots easily could change the outcome if, based on the Democratic candidate's claim arising under federal constitutional law, these provisional ballots were required to be counted.

The local election board had refused to count these 269 ballots because they were "wrong precinct" ballots, even though the voters who had cast them had done so at the correct polling location. In other words, pursuant to the county's administration of the election, several "precincts" used the same polling location, and these 269 voters had been given the incorrect ballot at the correct location. The Democratic candidate had argued to the board that these ballots should count because the mistake must have been a poll worker's fault, because the voter had gone to the correct polling place and, having told a poll worker the voter's address, had been given the wrong ballot rather than being instructed how to obtain the correct ballot (often by moving to a different table within the same room). The board responded by invoking an unambiguous Ohio statute that required disqualification of a provisional ballot cast in the wrong precinct, regardless of the circumstances, even if the fault was a poll worker's error. The Democratic candidate's argument to the federal district court was that the board's response violated the Equal Protection Clause of the Fourteenth Amendment because, notwithstanding the same unambiguous Ohio statute, the board had counted 27 "wrong precinct" ballots that had been cast at the board's own headquarters (an option that voters were entitled to exercise if they preferred). The board justified its distinction between the two groups of ballots on the ground that the board itself bore sole responsibility for giving a voter the wrong ballot when the voter cast the ballot at the board's headquarters, but that a voter conceivably shared some responsibility for casting an incorrect ballot at a multiple-precinct polling location. Perhaps, for example, an astute voter could have figured out how to get to the correct table within the multi-precinct polling location, even if the poll worker upon hearing the voter's address should have directed the voter to the correct table. The district court rejected the board's argument on this point, and the Sixth Circuit majority agreed.

The Sixth Circuit majority observed that the board's attempt to distinguish between the two groups of ballots caused an "arbitrary and disparate treatment" of voters in violation of the

constitutional principle articulated in Bush v. Gore. 635 F.3d at 234. Emphasizing the fact that for both groups of ballots "the voters went to the correct location" and yet the election workers who were legally "required to give the voters the correct ballot" corresponding to their addresses failed to do so, id. at 237, the Sixth Circuit majority concluded: "we believe that the situations of voters at the Board office and at multiple-precinct polling locations are substantially similar." Id. In addition to invoking the precedent of Bush v. Gore to reach this conclusion, the Sixth Circuit majority also relied upon *Anderson/Burdick* balancing: "We think it unlikely that 'a corresponding interest sufficiently weighty' for equal-protection purposes justifies the Board's decision to refuse to consider similar evidence of poll-worker error with respect to similar provisional ballots." Id. at 238. Quoting *Burdick* itself, the court added: "the Board has not asserted 'precise interests' that justified the unequal treatment." Id. The upshot of this Sixth Circuit ruling was that both groups of ballots must be counted, and accordingly upon completion of remand proceedings in the district court the Democratic candidate won enough of the additionally counted ballots to overturn the initial outcome and prevail as the ultimate winner of the election.

Disagreeing with the majority of the Sixth Circuit panel, Judge Rogers doubted the applicability of the equal-protection principle articulated in Bush v. Gore to the facts of *Hunter*. "The two wrong-precinct groups of ballots," Judge Rogers wrote, "are sufficiently different that Ohio law could permit counting the 27 votes on the ground that the error was much more clearly and ascertainably not attributable to the voter than in the election-day polling place situations." Id. at 248. Subsequent to *Hunter*, however, a different three-judge panel of the Sixth Circuit (Gibbons, Cook, Rosenthal) unanimously confirmed that to disqualify a provisional ballot solely because it was cast in the "wrong precinct" at the correct multi-precinct polling location was, without more, a violation of the Fourteenth Amendment under *Anderson/Burdick* balancing. NEOCH v. Husted, 696 F.3d 580 (6th Cir. 2012) (*NEOCH 2012*). In other words, it did not matter whether or not there was a separate group of "wrong-precinct" ballots cast at a local election board's headquarters that were treated differently and thus the comparative analysis under Bush v. Gore was irrelevant. Rejecting the state's contention that *Anderson/Burdick* balancing did not apply because the Ohio statute unambiguously disqualified "wrong-precinct" provisional ballots in *all* circumstances, the *NEOCH 2012* panel observed that the Supreme Court itself had applied *Anderson/Burdick* balancing to "Indiana's facially neutral voter-identification requirement" in Crawford v. Marion County, 553 U.S. 181 (2008), and therefore "the *Anderson/Burdick* standard applies" given that Ohio voters are "'burdened by' Ohio's law that rejects wrong-precinct ballots regardless of poll-worker error." 696 F.3d at 592 (internal punctuation omitted).

Thus applying *Anderson/Burdick* balancing, the *NEOCH 2012* panel first determined that the burden imposed on voters by this Ohio statute was "substantial": evidence in the district court showing "systematic disqualification of thousands of wrong-precinct ballots and a strong likelihood that the majority of these miscast ballots result from poll-worker error." Id. at 594 (internal quotation omitted). The Sixth Circuit panel specifically cited, as representative of the record evidence, "Franklin County's precinct location guide, which shows how different house numbers on the same street end up in different precincts, almost at random, demonstrat[ing] how

easily poll workers can make mistakes under the pressures of election day." Id. The court then observed that the Ohio law "effectively requires voters to have a greater knowledge of their precinct, precinct ballot, and polling place than poll workers" and "[a]bsent such omniscience, the State will permanently reject their ballots without an opportunity to cure the situation." Id. at 595.

On the other side of the *Anderson/Burdick* balancing scales, the Sixth Circuit found essentially no justification for imposing this draconian burden on innocent voters. Although the State claimed the need to organize Election Day voting on the basis of location-specific precincts, the Sixth Circuit retorted: "By definition, right-place/wrong-precinct ballots *are* cast at the right polling location, demonstrating that these voters attempted to comply with the State's precinct requirement." Id. (emphasis in original). "In sum," the court concluded, although a state has "legitimate interests in maintaining a precinct-based voting system, the State does not show how those interests support the specific restriction challenged here: the summary rejection of poll-worker-induced right-place/wrong-precinct ballots." Id. at 597. Thus, the Sixth Circuit's *Anderson/Burdick* balancing weighed heavily against the state, and in favor of protecting valid voters from "the rejection of thousands of provisional ballots each year" that the court characterized as "fundamentally unfair." Id. (internal quotation omitted).

Admittedly, some tension exists between the application of *Anderson/Burdick* balancing to a state's rules for counting ballots after they have been cast, as the Sixth Circuit did in *Hunter*, and the due-process principle articulated in Griffin v. Burns and Roe v. Alabama. The *Griffin/Roe* due-process principle holds that it is problematic, if not unconstitutional, to change the rules for casting ballots after they have been cast—especially when to do so is to deviate from statutory rules that were unambiguously clear in advance of the election on whether a ballot in a particular circumstance is entitled to be counted. To count a ballot that was ineligible, according to the unambiguous rules promulgated beforehand, would be tantamount to stuffing the ballot box with invalid votes, according to the Eleventh Circuit in Roe v. Alabama itself. *Hunter*, it must be said, involved such a clear state statutory rule: no wrong-precinct provisional ballot is eligible to be counted regardless of the particular circumstances, including the egregiousness of poll-worker error. Despite this clear state rule disqualifying the ballots at issue, the Sixth Circuit's subsequent ruling required the counting of those ballots, thereby changing the relevant ballot-counting rule applicable to these ballots, in apparent contradiction of Roe v. Alabama and its due-process principle.

The way to reconcile this tension is to say that Roe v. Alabama and its due-process principles do not apply when the state's antecedent ballot-counting rule, no matter how unambiguous, itself violates the federal Constitution. In Alabama, it would not have been unconstitutional to disqualify absentee ballots that failed to comply with the statutory requirement of notarization or signature by two witnesses, as required by the unambiguous state law, and therefore to deviate from *this* clear-antecedent rule contravenes due process. In Ohio, by contrast, it would be unconstitutional to disqualify a provisional ballot cast in the proper polling place solely because it was a "wrong-precinct" ballot, and therefore it does not violate due process for a federal

1 court to insist, after these ballots have been cast, that the state's clear-antecedent disqualification
2 rule yield to the supremacy of complying with federal constitutional standards. In this way, there
3 is a hierarchy of federal constitutional principles: correcting an unwarranted infringement on
4 voting rights, as identified by *Anderson/Burdick* balancing, takes precedence over the due-process
5 principle of Roe v. Alabama. In other words, it is not an improper deviation from a clear state rule
6 when that clear state rule was unconstitutional to begin with, given *Anderson/Burdick* balancing,
7 even though the unconstitutionality of that clear state rule was not judicially determined before the
8 disputed ballots had been cast.
9 Although this reconciliation of tension between *Anderson/Burdick* and *Griffin/Roe* is
10 logically coherent as a formal proposition, there remains some uneasiness with the idea of
11 nullifying a clear state ballot-counting rule, after those ballots have been cast, based on
12 *Anderson/Burdick* balancing. The reason for this unease is the amorphousness of
13 *Anderson/Burdick* balancing itself. As election-law scholars have observed, *Anderson/Burdick*
14 balancing is especially malleable and can yield divisive and controversial results. See Samuel
15 Issacharoff, *Voter Welfare: An Emerging Rule of Reason in Voting Rights Law*, 92 IND. L.J. 299
16 (2016); Richard L. Hasen, *The 2012 Voting Wars, Judicial Backstops, and the Resurrection of*
17 *Bush v. Gore*, 81 GEO. WASH. L. REV. 1865 (2013); Christopher S. Elmendorf & Edward B. Foley,
18 *Gatekeeping vs. Balancing in the Constitutional Law of Elections: Methodological Uncertainty on*
19 *the High Court*, 17 WM. & MARY B. RTS. J. 507 (2008). The Supreme Court itself fractured badly
20 over the applicability of *Anderson/Burdick* balancing to Indiana's voter ID law in *Crawford*: there
21 were essentially three groups, with three justices in each group, unable to form a majority on an
22 understanding of how *Anderson/Burdick* balancing is supposed to work and what result it is
23 supposed to yield in the particular case.
24 A recent example of judges badly divided over the application of *Anderson/Burdick* is
25 Feldman v. Arizona Secretary of State's Office, 843 F.3d 366 (9th Cir. 2016) (en banc). The case
26 involved a state statute that criminalized the collection and submission of absentee ballots by third-
27 party ballot collectors. Six members of an 11-judge en banc panel voted to enjoin the law as
28 unconstitutional under *Anderson/Burdick* balancing. Five members of the same en banc panel
29 reached the opposite conclusion concerning the proper application of *Anderson/Burdick* balancing
30 to this particular state statute. (The U.S. Supreme Court, without any noted dissent, stayed the
31 injunction ordered by the Ninth Circuit's en banc panel. 137 S. Ct. 446.) Other examples of sharp
32 judicial division over *Anderson/Burdick* balancing include North Carolina NAACP v. McCrory,
33 831 F.2d 204 (4th Cir., 2-1 in part, reversing district court), stay denied by divided vote, 137 S. Ct.
34 27 (2016), and Frank v. Walker, 773 F.3d 738 (7th Cir. 2014; denying en banc review by equally
35 divided court).
36 In light of the indeterminacy of *Anderson/Burdick* balancing, the argument can be made
37 that courts never should invoke *Anderson/Burdick* balancing to require the counting of ballots after
38 they have been cast in contravention of an unambiguous state statute. On this view, *Hunter* was
39 wrong to invoke *Anderson/Burdick* balancing in this specific context, and instead
40 *Anderson/Burdick* can invalidate a state's unambiguous ballot-counting rule *only* in a judicial

decision rendered prior to the casting of ballots subject to that state rule. This view would create a kind of estoppel principle, requiring such *Anderson/Burdick* claims to be raised in advance of an election, thereby in effect reversing the hierarchy of constitutional principles so that Roe v. Alabama and its due-process principle take precedence over *Anderson/Burdick*.

Although this view is certainly plausible, it is unlikely to prevail. Not only is there no existing precedent to support it, and indeed it is contrary to the precedent that does exist, but also federal judges are unlikely to be willing to permit enforcement of a state's ballot-counting rule, no matter how unambiguous, that the federal judges determine to be unconstitutional under (from their perspective) a proper interpretation of the Fourteenth Amendment. Moreover, eliminating *Anderson/Burdick* from the arsenal of federal judicial analysis in the context of a dispute over the counting of ballots after they have been cast will not eliminate the problem that sometimes the enforcement of federal law, including federal constitutional law, will appear in tension with Roe v. Alabama and its due-process principle. As *Hunter* itself shows, Bush v. Gore remains available as an alternative basis for invalidating the application of a state's ballot-counting rules after the ballots at issue have been cast, and this is true even if *Anderson/Burdick* were to be taken off the table in this context. Also, in addition to the previous observation that a state's ballot-counting rules might violate other provisions of federal constitutional law, like the Fifteenth or Nineteenth Amendment, there is also the possibility that a state's ballot-counting rules might violate federal statutory law, like the Voting Rights Act or the Help America Vote Act. Thus, it is untenable to suggest that all tension with Roe v. Alabama is avoidable, and accordingly there is no inherent reason to preclude consideration of just *Anderson/Burdick* balancing in a dispute over ballots after they have been cast.

With these considerations in mind, subsection (b) has been drafted to reflect the view that, although generally an unambiguous state rule should control how a ballot is to be counted (and thus it is generally improper, after the ballot has been cast, to deviate from that unambiguous state rule), on rare occasions a superseding requirement of federal law will negate enforcement of that unambiguous state ballot-counting rule—and a subset of those rare occasions will involve an application of *Anderson/Burdick* balancing. Consistent with this view, as reflected in Comment *b* to this Section, federal judges should be sensitive to the value underlying the due-process principle of Roe v. Alabama if and when they engage in *Anderson/Burdick* balancing in the context of a ballot-counting dispute after the disputed ballots have been cast. Precisely because *Anderson/Burdick* balancing is not always straightforward, and can yield divergent results among conscientious judges, courts should be wary about negating the enforcement of an unambiguous state ballot-counting rule based on nebulous and malleable application of *Anderson/Burdick* balancing. At the same time, however, as in both *NEOCH 2012* and *NEOCH 2016*, there will be circumstances in which the application of *Anderson/Burdick* balancing to an inappropriately draconian state rule is straightforward—with federal appeals-court judges unanimous in this conclusion—and it would be inappropriate to preclude invocation of *Anderson/Burdick* balancing in such circumstances. As drafted, subsection (b) would permit judges to do so; yet it would also permit, rather than ordering a counting of ballots that are ineligible under the terms of the clear but

unconstitutional state law, voiding the results of an election for which these ballots are outcome-determinative (and thus requiring instead the holding of a new election free from the defect of the unconstitutional ballot-counting rule).

*c. "The Democracy Canon" and the interpretation of ambiguous vote-counting rules*. Subsection (c) embraces a longstanding and widespread principle of statutory construction in the context of election laws, namely that statutory ambiguity should be resolved insofar as possible in favor of protecting the equal right of eligible voters to cast ballots that count. Recognized as already well-established by leading treatise writers in the middle of the 19th century, this principle has been recently labeled as "the Democracy Canon" and championed by Professor Richard L. Hasen (an Adviser to this project). See Richard L. Hasen, *The Democracy Canon*, 62 STAN. L. REV. 69 (2009); GEORGE MCCRARY, A TREATISE ON THE AMERICAN LAW OF ELECTIONS 522-523 (4th ed. 1897); see also THOMAS COOLEY, CONSTITUTIONAL LIMITATIONS 623-624 (1868); FREDERICK BRIGHTLY, A COLLECTION OF LEADING CASES ON THE LAW OF ELECTIONS IN THE UNITED STATES 320, 334, 448-449, 501 (1871). The idea behind calling it the "Democracy Canon" is that it is a canon of statutory construction that promotes the basic value of democracy insofar as it safeguards the equal right of all eligible citizens to participate in elections.

A related idea is that no voter should be disenfranchised solely because of a mistake that does not affect the voter's eligibility to participate in an election. This "materiality" idea is embodied in the Civil Rights Act of 1964, which among its other provisions forbids anyone "acting under color of law" to "deny the right of any individual to vote in any election because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election." 52 U.S.C. § 10101(a)(2)(b). Moreover, as already discussed, this same "materiality" principle has found constitutional expression, as part of *Anderson/Burdick* balancing, in such cases as *NEOCH 2016*. Professor Justin Levitt has undertaken a systematic examination of this idea, urging greater recognition of its importance and relevance. See Justin Levitt, *Resolving Election Error: The Dynamic Assessment of Materiality*, 54 WM. & MARY L. REV. 83 (2012).

Section 201(c)—as well as other related Sections of this Part, including § 203(b) and § 204(d)—draw upon the scholarly insights of Professors Hasen and Levitt. As those authors recognized, however, and indeed as was also recognized by 19th-century treatise writers, in some specific contexts the interpretation of ambiguous vote-counting rules requires the disqualification of ballots cast by eligible voters. Although always regrettable, and to be avoided if at all possible, such disqualification is sometimes necessitated by the obligation to protect the integrity of an election from the taint of an impropriety. As Illustration 5 in the Comment to this Section indicates, if there is evidence that a particular batch of ballots has been tampered with, it may be necessary to preclude the counting of those ballots even though the voters who cast them were entirely eligible and innocent of any wrongdoing. In this particular type of situation, the principle of protecting the equal right of all eligible voters to participate in the election simultaneously cuts in opposite directions, because counting ballots that have been tainted by tampering (so that the votes

recorded on them are *not* the votes as cast by eligible voters) would be to undermine the votes cast by eligible voters on the remaining untainted ballots. In this particular situation, it may be unavoidably necessary to disqualify some tainted ballots cast by eligible voters in order to safeguard the efficacy of the untainted ballots cast by all other eligible voters. Recognition of this truth, however, does not negate the important point that such situations are exceedingly rare, and thus in most circumstances involving the interpretation of ambiguous election laws, § 201(b)—reflecting the same underlying norm of equal citizenship as the "Democracy Canon" and the "materiality" principle—may be invoked to protect eligible voters from disenfranchisement caused by unwarranted disqualification of their voted ballots.

**§ 202. Transparency**

**(a) In order to foster public confidence that the counting of ballots is fair and accurate, and that it is conducted in accordance with the rules and procedures specified in advance of the election (as provided in § 201), all proceedings at which ballots are counted, or examined on a ballot-by-ballot basis in order to determine whether or not each ballot is eligible to be counted, shall be open to members of the public, including journalists and others who are permitted to report the proceedings in a manner that enables nonattending members of the public to understand the basis for any official decision concerning the disposition or counting of ballots. When more members of the public wish to observe the proceedings in person than space permits, election officials may use nonpartisan methods, including "first come, first serve" or lottery, to determine which members of the public obtain this in-person access; provided that it is permissible for election officials to reserve a portion of the available space for representatives of the press and other major media outlets, as well as residents of the local community, as long as reserved access is provided pursuant to a nonpartisan policy.**

**(b) Each political party or independent candidate on the ballot shall have the right to designate an observer to attend any proceeding required to be open to the public under subsection (a), and the proceeding shall be held in a space large enough to accommodate the attendance of all such observers.**

**(c) Whenever electronic voting machines are used for the casting and counting of ballots and lack an adequate form of paper record of the ballots cast and counted on those machines, each political party and independent candidate in the election shall have the right to designate an observer to examine, under the supervision of election officials, each such**

**machine and its software, in order for the candidate to be confident that the machine operated correctly and counted accurately the ballots cast on the machine. Election officials shall also designate at least three additional observers unaffiliated with any candidate or party, who are entitled to examine the machines on the same basis as the representatives of the candidates, so that these additional observers may report to the public on the reliability and accuracy of the machines.**

**(d) Election officials may structure any examination of machines under subsection (c) to minimize the disclosure of any proprietary software entitled to trade-secret protection, but in no event may officials deny candidates and observers the right of examination provided in subsection (c).**

**(e) In accordance with the longstanding right of voters to a secret ballot, none of the rights of transparency provided in this Section encompasses a right of a candidate, party, observer, or other member of the public to ascertain the identity of the voter who cast a particular ballot the contents of which are under public scrutiny as part of the counting process, or to ascertain the contents of a ballot when the eligibility of the ballot or the voter who cast it is in dispute.**

**Comment:**

*a. Transparency is internationally recognized as core vote-counting value.* When Americans look overseas to assess the legitimacy of other countries' purportedly democratic elections, the first criterion for making this judgment is whether the electoral process was sufficiently transparent to assess its legitimacy. The function of international election observers is to be eyewitnesses to the casting and counting of ballots. When monitors are unable to perform this function, there is no way to assess whether the election has been free and fair—or conducted in accordance with the preestablished rules.

The same principle applies to elections within the United States. They, too, need to be open to observation, whether by international or local monitors, so that their legitimacy can be assessed and verified. In the American context, a key component of that monitoring is conducted by the institutional press, which under the freedoms and protections of the First Amendment serves as the eyes and ears of the public as a whole.

Obviously, not all members of the public can physically be in the same room where ballots are cast or counted, and differentiating between the press and the general public is more

challenging in the age of the internet and declining newspapers than previously. Nonetheless, it is not an impossible task. Many departments of government—including the military, the judiciary, and legislative offices—have procedures and protocols for granting "press pass" access to accredited journalists, including the creation of "press pool" reports when conditions require that access to journalists must be limited strictly to just a few individual reporters. When necessary, with respect to polling places or the offices of state and local election administrators, similar procedures and protocols have been (and continue to be) developed to permit adequate access for accredited journalists in order to inform the public of the workings of their democracy.

Since the invention of television, it is also possible for the limited number of journalists able to attend in person the official sessions at which ballots are counted to televise those proceedings so that citizens who cannot be in the same room can experience a close approximation of being there. This level of public transparency was one of the most important distinguishing features between the generally successful recount of Minnesota's 2008 U.S. Senate election and the aborted recount of Florida's 2000 presidential election. In Minnesota, the State Canvassing Board's recount proceedings were televised over the internet, with images of each disputed ballot projected on a screen so that viewers both in the room and at home could see the appearance of the ballot for themselves and thus judge whether they believed the Board treated the ballot fairly in deciding whether to count the ballot and, if so, for which candidate. By contrast, in 2000, Miami-Dade's canvassing board conducted its proceedings behind closed doors, out of public view. The lack of transparency fueled distrust of the process, which boiled over into vociferous protests colloquially termed "the Brooks Brothers riot," and which led to the administrative decision to terminate the county's recount proceedings without completion. The clear lesson of these contrasting experiences is that all recounts, and related official proceedings concerning the counting of ballots, should be conducted with sufficient transparency to instill public confidence in the legitimacy of those proceedings.

*b. The participation of the partisan competitors.* It is essential not only that the media be able to observe the vote-counting process on behalf of the public, but also that designated observers representing political parties (and independent candidates) be able to do so. The parties obviously have adversarial interests with respect to the counting of votes, and thus it is not enough to require them to rely on the reporting of journalists. Instead, they need to be in the room where the vote counting occurs, to be able to see the process for themselves, without any media filtering.

Moreover, the observers attending on behalf of the parties may need a level of access to the vote-counting process beyond what is made available to the media. Although looking at an image of a ballot on a screen might suffice for the public to understand the nature of the process and evaluate its legitimacy, the party observers might need to inspect the actual ballot itself. For example, it may be debatable whether one mark was added on top of another, or vice versa. Only by looking closely at the physical ballot would it be possible to make this kind of judgment. As long as permitting the parties to inspect a disputed ballot in this way does not prevent the officials conducting the recount from engaging in the same inspection, there should be no denying the right of parties to do so. The press and other members of the public have no such need to closely inspect each disputed physical ballot, and allowing them the same level of access as representatives of the parties would unduly delay the completion of recount proceedings.

*c. Transparency from start to finish.* This principle of transparency applies to all phases of administering the vote-counting process. It applies to polling places, where at the end of Election Night poll workers produce initial tallies from the voting machines and submit those returns to local election administrators. It applies to the offices of the local election administrators, where they aggregate the returns from polling places, as well as make the determinations concerning the eligibility of absentee and provisional ballots. It applies to the proceedings of the Secretary of State or other state-level election official, who compiles the aggregated returns from the various localities, and it applies to any local- or state-level recount proceedings.

*d. Public explanation of reasons for disqualifying ballots.* In proceedings to evaluate the eligibility of absentee or provisional ballots, the officials making this evaluation must state publicly the grounds upon which any such ballot is rejected. These proceedings must not in any way compromise the secrecy of the votes cast on the ballots themselves. All such rejected ballots should remain secure in their secrecy envelopes, as there would be no reason to open them. Conversely, for any absentee or provisional ballots that are determined eligible to be counted, the administrative task of opening the secrecy envelope and counting the ballot must be conducted in such a way that the votes cast on the ballot are not publicly linked to the identity of the voter who cast these votes.

*e. Judicial deliberations.* The principle of transparency, as set forth in this Section, does not negate the longstanding tradition of multimember judicial panels being entitled to deliberate together privately concerning the disposition of cases before them. As with other types of judicial

cases, all court rulings on the counting of ballots shall be publicly announced, along with the legal reasoning underlying the court's decision. In circumstances of pressing exigency, courts may need to issue orders immediately, with their opinions to follow.

**REPORTERS' NOTE**

*a. The press and the public.* The advent of internet-based news and social-media organizations complicates identifying who qualifies for "press" access. In 2015, adopting what is one instructive approach, the U.S. Supreme Court updated its policy for determining who is entitled to receive "full-time" press credentials for the purpose of attending oral arguments and otherwise obtaining seats in the Courtroom reserved for the media. According to this new policy, to receive this status an applicant must, among other requirements, be "a full-time journalist" who "operates or is employed by a media organization, and the applicant's primary professional work is for the media organization through which the applicant seeks [the credential]," and "[t]he applicant or the applicant's media organization has a record of substantial and original news coverage of the work of the Court." See Requirements and Procedures for Issuing Supreme Court Press Credentials, https://www.supremecourt.gov/publicinfo/press/Media_Requirements_And_Procedures_Revised_070717.pdf. The Court has also issued commentary to explain these requirements, including its understanding of what qualifies as a "media organization": "an entity that has as its principal business the regular gathering and reporting of original news for the public, that disseminates its reporting through publicly accessible media, and that has operated continuously for the two years preceding the application for credentials." By this definition, a media organization may be entirely internet-based. See Commentary, https://www.supremecourt.gov/publicinfo/press/Media_Credential_Commentary_February_2015_mod.pdf. Based on this standard, the Court has issued 24 full-time press credentials for the current year, including two for journalists whose work is entirely internet-based: BuzzFeed News and Howe on the Court. See Hard Pass Holders for the October 2017 Term: https://www.supremecourt.gov/publicinfo/press/Hard%20Pass%20List%20OT%2017.pdf. Although the Supreme Court's rules and procedures for determining media access to its Courtroom are obviously tailored specifically to its circumstances, Secretaries of State and local boards of elections could adopt analogous rules and procedures suitable for determining media access to their proceedings that concern the counting of votes.

Federal circuit courts are split over the extent to which the First Amendment requires local boards of elections to provide press access to polling locations on Election Day. Compare Beacon Journal Publishing Co. v. Blackwell, 389 F.3d 683, 685 (6th Cir. 2004) (granting TRO to require journalists "to have reasonable access to any polling place for the purpose of news-gathering and reporting so long as [these journalists] do not interfere with poll workers and voters as voters exercise their right to vote"), with PG Publishing Co. v. Aichele, 705 F.3d 91, 111 n.22 (3d Cir. 2013) (holding that First Amendment does not require journalists to be permitted to enter specific room where voting process is administered on Election Day, at least when journalists are entitled

to place cameras 10 feet from entrance in way that permits observation of administration of electoral process that occurs within). However the Supreme Court might resolve this circuit split, two points are worth noting. First, these cases concern polling places on Election Day, not the subsequent counting or recounting of ballots, or the adjudication of controversies over which ballots are entitled to be counted. Whereas the casting of ballots is an activity that requires voter privacy, the counting or recounting of votes—and especially the adjudication of controversies over which votes are entitled to be counted—is the kind of adjudicatory procedure for which the necessity of public and press access has traditionally been recognized for purposes of First Amendment jurisprudence. See, e.g., Press–Enterprise Co. v. Superior Court, 478 U.S. 1, 8-9 (1986). Second, and more important, even if there were no First Amendment right of the press to observe government proceedings concerning the counting of ballots, sound public policy concerning the functioning of a democracy would warrant making those proceedings open to the public and the press.

In the recount of the 2008 U.S. Senate election in Minnesota, the proceedings were televised over the internet, and images of disputed ballots displayed for public view, so that citizens at home could evaluate whether they agreed or disagreed with the Canvassing Board's disposition of each ballot. See The Whole Story—The Franken/Coleman Recount & Election Contest, at http://theuptake.org/accomplishments/the-whole-story-the-frankencoleman-recount-election-contest/. Minnesota Public Radio even conducted an online public-opinion survey, asking readers to say how they would have ruled on selected ballots in dispute. See Challenged Ballots: You Be the Judge, at http://minnesota.publicradio.org/features/2008/11/19_challenged_ballots/. By one analysis, 45,000 individuals tuned in to livestream broadcasts of the recount proceedings. See Political Junkies Flock to Live Streaming of Senate Recount Proceedings, at https://www.minnpost.com/politics-policy/2008/12/political-junkies-flock-live-streaming-senate-recount-proceedings. It is difficult to overstate the value of this transparency in contributing to public perceptions of the legitimacy with which the Minnesota recount was handled. By contrast, the lack of public transparency in the Florida 2000 recount is a major factor in derailing that recount. For a comparison of these two episodes, see Edward B. Foley, Ballot Battles: The History of Disputed Elections in the United States, at chs. 11-12 (2016).

*b. The ability to verify the results of an election.* The sharply increased concern about the vulnerability of electronic voting machines to the possibility of "hacking" has caused jurisdictions to switch to systems that provide a paper-based record of votes cast. See, e.g., Charles Thompson, *Pa. says counties must have new voting machines - with paper trails - for next presidential election*, PennLive, April 12, 2018, http://www.pennlive.com/news/2018/04/state_asks_counties_to_have_a.html. See generally Eric Manpearl, *Securing U.S. Election Systems: Designating U.S. Election Systems as Critical Infrastructure and Instituting Election Security Reforms*, 24 B.U. J. Sci. Tech. 168 (2018). Notwithstanding that welcome development, insofar as any jurisdictions retain electronic voting machines that lack such a paper record, the same concern over the possibility of hacking necessitates the right of parties, independent candidates, and representatives

of the public to examine the software used on such voting machines whenever a question is raised concerning the integrity or accuracy of the machines.

### § 203. Equal Treatment

**(a) In accordance with the equal right of all eligible voters to participate in an election, all rules for the counting of ballots should be written, interpreted, and enforced to treat equivalent ballots equally, except as provided in subsection (b).**

**(b) Any deviation from the equal treatment of equivalent ballots required under subsection (a), should be specified with adequate justification in advance of the election in accordance with § 201. Any deviation not specified in advance contravenes § 201(c), unless compelled by the necessity to protect the integrity of the election.**

**Comment:**

*a. Same relevant characteristic.* Sometimes it is debatable whether two ballots share the same feature for purposes of a counting rule. For example, state law may require a ballot to be rejected if flawed in a particular way, unless the flaw was caused by poll-worker error. Two ballots may have exactly the same flaw, but it may be uncertain whether both were subject to equivalent poll-worker error. In one case the flaw might have been induced by a poll worker at a neighborhood polling place, while in the other case the same flaw might have been induced by a worker at a centralized polling location. Although an argument certainly could be made that the two ballots are identical in the relevant respect, it might also be possible to argue that the two ballots are not identical with respect to the crucial consideration of poll-worker error—for example, if the circumstances in which the voter and the poll worker interact at the neighborhood polling location differ significantly from the interaction that occurs at a centralized polling location. The point is simply that it sometimes can be difficult to say with certainty that the principle of equality dictates a particular result in a particular situation.

On the other hand, in some situations there is no doubt at all. If the relevant rule provides that a provisional ballot is ineligible to be counted if its envelope is unsigned by the voter, then to count one provisional ballot with an unsigned envelope while disqualifying another provisional ballot just because its envelope is unsigned would be a violation of this Section's principle.

*b. Remedial consequences.* Sometimes it is difficult to provide a remedy for a violation of this Section's principle. If some ballots already have been counted in violation of a relevant state rule, while other ballots identical in relevant respect under the rule have not, then subsection (a) is

violated unless (i) the uncounted ballots are also counted in violation of the state's rule, or (ii) there is some way to uncount the ballots already counted in violation of the rule (often a physical impossibility when all counted ballots are commingled), or (iii) the election is declared void. How to handle this remedial difficulty is considered in subsequent Sections of this Part.

*c. Justified deviations from the equal treatment of identical ballots.* The aforementioned remedial difficulty provides one reason why it might be justified in some instances to treat identical ballots differently, counting some and disqualifying others. So too may emergency circumstances require responses that do not provide the same treatment for identical ballots. Whenever the government knowingly deviates from the principle of subsection (a), it should do so pursuant to a clear rule specified in advance of the election, with an explanation of the reason why unequal treatment of identical ballots is necessitated in a particular contingency. In this respect, the principle of statutory clarity set forth in § 201(a) takes precedence over the principle of equal treatment set forth in this Section, except when the unequal treatment is unconstitutional or otherwise a violation of federal law as provided in § 201(b). When the government has failed to provide the kind of rule and accompanying explanation in advance of an election, as called for in § 201(a), the after-the-fact justification for the unequal treatment of equivalent ballots must be essential to preserve the integrity of the particular election.

**Illustrations:**

1. State law provides that no absentee ballot is eligible to be counted unless the ballot was delivered in an envelope on which is written the voter's identification information (either driver's-license number or one of several specified forms of identification). In a particular election, five absentee ballots were mistakenly counted by election officials even though their envelopes lacked the required identification, and these five ballots cannot be uncounted because they have been irretrievably commingled with other counted ballots. There remain uncounted, however, 150 absentee ballots with the exact same defect. Equal treatment of identical ballots would require counting 150 more ineligible ballots just because five equivalently ineligible ballots already were accidentally counted. State law reasonably could provide that in this instance the principle of equal treatment for identical ballots should yield to the overriding goal of counting only those ballots eligible to be counted. If state law establishes this policy in advance of the election, clearly specifying that additional ineligible ballots should not be counted solely because of

the accidental counting of a few equivalently ineligible ballots, then state law on this point would be consistent with subsection (b).

2. In a municipal election to fill an at-large city-council seat, a fire unexpectedly caused a box of absentee ballots to be destroyed before they could be counted. State law contained no explicit provision on what to do in this situation. The ballots came from addresses throughout the entire municipality, and thus there was no reason to think they were anything other than a random sample of all absentee ballots cast in the election. In this circumstance, rather than voiding the entire election, or disqualifying the vast majority of absentee ballots that remained undestroyed, a state court reasonably could conclude that the better response is simply to permit the result of the election to stand without inclusion of the destroyed ballots. Although doing so arguably provides unequal treatment of equivalently eligible ballots, and although the state provided no clear rule for this result in advance, the specific circumstances of the unexpected and unusual situation indicate that this judicial ruling is warranted to preserve the integrity of the election. Given that voiding the election would frustrate the electoral will of voters (particularly those voters for whom casting a ballot in any newly scheduled "do-over" election would be especially burdensome), the best way to conclude the election is to count the vast majority of the ballots that were not destroyed by the fire.

3. A particular congressional district is well-known to be especially competitive. Under state law, which permits voters to cast provisional ballots if they have moved residences within the same county, the provisional ballots are eligible to be counted as long as the voter was registered at the prior address even if the voter has not updated the voter's registration status. As a result of this rule, over three-quarters of provisional ballots cast in the state are routinely eligible to be counted. In a particular election for this congressional seat, however, all the provisional ballots from one polling location were inexplicably lost in their transmission from the polling place to the county's board of election headquarters on Election Night. The number of lost provisional ballots, moreover, was such that if three-quarters of them (the typically counted proportion of provisional ballots) were counted, they might have altered the outcome of the congressional race. The particular precinct in which the lost provisional ballots were cast has voters who overwhelmingly vote for candidates from one party. Although this was not the first time in recent years that ballots

in this particular congressional district have been lost during their transmission from polling locations to the election board's headquarters, state law has no provision explicitly dictating what should happen in this situation. Because state law has no provision dealing with this question, and to permit the election to be certified without counting the lost ballots would violate the principle of equal treatment for equivalently eligible ballots, and furthermore leaving this particular batch of provisional ballots uncounted would raise questions about partisan manipulation of the election's results (thereby undercutting the integrity of the election), it would be necessary to craft a judicial remedy that would restore these suspiciously lost provisional ballots to equal terms with equivalently counted provisional ballots. That judicial remedy might be to permit the provisional voters whose ballots were lost to cast them again, as extraordinary as that remedy would be, or alternatively it might be to void the entire congressional election, but it would be necessary to adopt a remedy consistent with the principle of equal treatment for equivalently eligible ballots, because the state had not provided justification in advance for deviation from this principle in this foreseeable circumstance. In this particular situation, maintaining the integrity of the election supports, rather than conflicts with, the equal treatment of equivalent ballots.

## REPORTERS' NOTE

*a. Same relevant characteristic.* Hunter v. Hamilton County Board of Elections, 635 F.3d 219 (6th Cir. 2011), described in Reporters' Note *b* to § 201, provides the basis for Comment *a* to this Section and illustrates the difficulties that sometimes can occur when endeavoring to determine whether ballots are equivalent for purposes of the obligation that ballot-counting rules treat equivalent ballots equally. In *Hunter*, the Sixth Circuit majority viewed as essentially equivalent (1) "wrong-precinct" provisional ballots that had been cast at a multi-precinct polling location and (2) "wrong-precinct" provisional ballots that had been cast at the local election board's headquarters. One member of the Sixth Circuit panel, however, viewed these two groups of provisional ballots as distinguishable.

Moreover, whether ballots are equivalent may depend, at least in part, on how a particular state law is written. A state law, for example, might provide that an absentee ballot is valid if witnessed by at least two other voters registered in the same state. Under this rule, a ballot witnessed by only one registered voter would not be equivalent to a ballot witnessed by two or more registered voters. If, however, the rule were changed so that one witness sufficed, then ballots with only one witness would become equivalent to any ballot with two or more witnesses.

The litigation over the 2008 U.S. Senate election in Minnesota illustrates the obstacle to providing equal treatment of equivalent ballots when some of them already have been counted in violation of state law while many others properly have been rejected. See Coleman v. Franken, 767 N.W.2d 453 (Minn. 2009). In that case, election officials in some counties mistakenly had counted absentee ballots that failed to comply with the state's unambiguous statutory witness requirement. In most other counties, however, local election officials correctly had enforced this clear witness rule and had refused to count noncompliant ballots. As the main claim in a judicial contest of the certified election, the losing candidate (the previous incumbent, Senator Norm Coleman) argued that equal protection as reflected by Bush v. Gore, 531 U.S. 98 (2000), required counting all unwitnessed ballots as long as the previously counted unwitnessed ballots remained included in the certified result of the election. Distinguishing Bush v. Gore as involving a circumstance of statutory ambiguity, however, the Minnesota Supreme Court rejected this equal-protection argument. The court unanimously held that, when the state's statute clearly calls for the rejection of noncompliant ballots, the Equal Protection Clause of the Fourteenth Amendment does not require the counting of additional noncompliant ballots just because some equivalently noncompliant ballots already have been mistakenly counted. Refusing to void the election (or provide any other judicial remedy), the Minnesota Supreme Court let the certified result of the election stand despite the fact that the certification rested on this differential treatment of equivalently noncompliant ballots. In this respect, the Minnesota Supreme Court's decision accords with the Eleventh Circuit's decision in Roe v. Alabama, 68 F.3d 404 (11th Cir. 1995), which also rejected an equal-protection argument that a state must count all ineligible ballots suffering from the same legal infirmity just because a few ballots having this infirmity already have been mistakenly counted.

## § 204. The Accurate Counting of Eligible Ballots

**(a) The drafting, interpretation, and enforcement of all ballot-counting rules should aim to achieve an accurate count of all eligible ballots, and only eligible ballots, before the date upon which the winner of the election is to take office.**

**(b) Accuracy in the counting of ballots is measured by the discernibly objective marking of the ballot as cast, not the subjective mental desire of the voter who cast the ballot.**

**(c) Ballots cast by registered voters who are qualified to participate in the election shall be presumed eligible to be counted, unless either (i) another provision of law unambiguously specifies otherwise or (ii) invalidation of the ballot is necessary to safeguard the integrity of the election.**

**(d) Whenever there is a conflict between (i) protecting the equal right of qualified voters to participate in the election and (ii) safeguarding the integrity of the election from the counting of ineligible ballots or other form of inaccuracy, and the state's rules**

**promulgated in advance of the election fail to specify how to resolve the conflict (notwithstanding § 201(a)), the tribunal responsible for resolving the conflict shall endeavor to do so in such a way as to maximize the legitimacy of the resolution, including whenever possible by identifying the resolution that reasonable observers relying on neutral principles most likely would have reached in advance of the election. If the tribunal is not able to identify with confidence the resolution that reasonable observers likely would have reached in advance of the election, and if there exists a well-reasoned administrative explanation for how to handle the particular ballot-counting issue, the tribunal may adopt that administrative explanation as the best available resolution of the dispute under the circumstances; but in the absence of a well-reasoned administrative explanation, the tribunal should endeavor to resolve the dispute in the manner most consistent with the ideal of impartiality in the adjudication of electoral disputes.**

**Comment:**

*a. The relationship of accuracy and speed in vote-counting procedures.* While an accurate count of eligible ballots is undeniably a primary objective of the electoral system, in some contexts it becomes difficult to achieve maximum accuracy without sacrificing other important values. For example, accuracy might be enhanced by a year-long process of scrutinizing intensely all possible issues concerning the eligibility of voters who cast provisional ballots in an election, but if the office for which the election is held has only a two-year term, a year-long review of provisional ballots would consume half the term. Even if the presumptive winner is entitled to take office while the review is being conducted, so that there is no year-long vacancy as a result of the review, the office (and thus the conditional officeholder) will be under a cloud during the entire year of the review.

Moreover, if there is a reasonable chance that the year-long review will result in overturning the determination of the presumptive winner, then there is a correspondingly good chance that the person occupying the office during the entire period of the review is the wrong occupant. Consequently, it is imperative that the state's vote-counting period be designed so that the results are as accurate as they can be within the time between Election Day and the date on which the winners' terms of office begin. To be sure, there still can be a safety-valve mechanism that permits challenging the declared winner's right to hold office after the term commences on the ground that the vote-counting process that determined the declared winner was inaccurate. But

this safety-valve is not an adequate substitute for a vote-counting process that aims for the maximum accuracy that is achievable *before* the term of office begins.

*b. The principle of objectivity.* It is often said that the goal of counting ballots is, or should be, to identify the intent of the voters who cast them. Although that phrasing has obvious appeal, it is not entirely correct. In some situations, ballots must be counted in accordance with the objective markings that the voters made on their ballots, even if those markings do not correspond to the subjective intentions of the voters who cast them. The infamous "butterfly ballot" used in Palm Beach County, Florida, for the 2000 presidential election, is an example of this point. Because of a confusing ballot design, many voters who intended to vote for Al Gore mistakenly marked their ballots for Pat Buchanan. Despite this subjective intent, a ballot like this must be counted as objectively cast: as a vote for Pat Buchanan.

Both before and since 2000, there have been other similarly consequential instances of faulty ballot design. For example, in a 2006 congressional election, the placement of one race on the ballot in relation to another race likely caused thousands of voters accidently to skip over one of the two races. Although many of these voters likely went to the polls intending to vote in both races, their failure to mark a choice on the ballot for one of the races must be counted as a "No Vote" in that race. Similarly, there have been instances of administrative error that caused one candidate's name accidentally to be omitted from the ballots that voters received. Although some voters might have voted for the omitted candidate if his or her name had appeared on their ballots, they actually cast their votes for other candidates. These ballots, too, must be counted as cast, regardless of these voters' subjective preference for the omitted candidate.

To say that in all these circumstances the ballots must be counted according to their objective markings does not necessarily preclude an alternative remedy for the administrative error that precipitated the discrepancy between what the voters subjectively wanted and what the voters objectively did. Rather, if the administrative error is sufficiently severe or of a certain type, perhaps the remedy of voiding the election is warranted. But voiding an election does not determine how individual ballots themselves should be counted. The point here is that both the initial process of counting ballots on Election Night to produce preliminary returns, as well as any subsequent administrative process that simply involves recounting the ballots and retallying the results, requires counting the ballots in accordance with their objective markings regardless of whatever subjective intent may underlie those markings. Any alternative remedy would reside in a

subsequent collateral attack on the result of the ballot counting pursuant to this principle of objectivity—and would be external to the counting process itself.

*c. Democracy-enhancing presumption.* Subsection (c) establishes a presumption in favor of counting a ballot cast by a voter who is eligible to participate in the election. (A voter is eligible when both qualified and, as required, registered.) This presumption may be defeated by a clear rule of law specified in advance of the election in accordance with § 201. But if no such clear provision exists, the presumption in favor of counting the ballots of eligible voters holds.

In rare instances, even without a clearly specified rule in advance, the necessity of protecting the integrity of an election precludes counting ballots of eligible voters.

**Illustration:**

1. Suppose that despite protections designed to ward off a cyberattack on a locality's electronic voting machines that lacked a paper record, the unlikely threat materialized in which hackers apparently infiltrated these machines and altered the votes cast on those machines. Suppose further that state law failed to anticipate this occurrence and thus had no provision specifying what to do in the particular circumstances. Nonetheless, the obvious need to protect the election from manipulation of its results intended by this cyberattack would preclude counting the votes cast on the hacked machines. This regrettable situation, of course, would in no way have been the fault of the eligible voters who cast their ballots on those machines. Even so, it would be necessary to prevent the tainted ballots from affecting the result of the election. To be sure, a separate judgment might be made to void the election in its entirety because of the cyberattack, with the necessity of holding a new election. But in no event could these improperly manipulated ballots be permitted to be counted as part of identifying the election's winner.

*d. Situational conflict between two core democratic values.* As indicated by the immediately preceding cyberattack example, in some instances there can be a tension between two fundamental values associated with democratic elections: (1) the equal right of eligible voters to cast ballots that count; and (2) the protection of the election from improper manipulation designed to produce an outcome different from what an accurate count of eligible, and only eligible, votes would yield. When these two fundamental values conflict in a situation for which state law in advance of the election has not provided a solution, there can be no straightforward adjudication

of the dispute. Instead, the tribunal tasked with resolving the dispute should endeavor to resolve the tension between the two fundamental principles in such a way as to maximize the legitimacy of the resolution. In this context, the legitimacy of the election's outcome is maximized if the resolution of the ballot-counting dispute accords with how reasonable and impartial observers would have handled the particular issue in advance of the election. If it is impossible to discern how reasonable and impartial observers would have handled the issue in advance of the election, however, then the circumstance is one for which there may be no better solution than to accept the well-reasoned determination of administrative officials responsible under state law (at least in the first instance) for the particular ballot-counting issue at hand. If no such well-reasoned determination is available, then the tribunal is left in the difficult posture of discerning what resolution of the dispute most accords with the ideal of adjudicatory impartiality, for an especially damaging outcome would be one in which the tribunal's decision were to be widely condemned (even if erroneously) as biased towards one side in the dispute.

**Illustration:**

2. State law permits absentee voters to return their ballots either by mail or by personal delivery to their local election board, but by statute expressly prohibits the return of an absentee ballot by "any person other than the absentee voter or a person living in the same household as the absentee voter, unless the absentee voter has a physical disability in which case the absentee ballot may be returned by an individual who has been authorized by the state in advance of the election to return the ballot on behalf of the disabled voter." The state legislature enacted this particular statute because of the state's unfortunate experience with the practice of absentee ballot "brokers" collecting large numbers of absentee ballots from voters and, in some cases, providing unlawful payments to voters in exchange for their completed absentee ballots. The statute provides that "any person in violation of this prohibition is subject to a fine not exceeding $10,000 and a term of imprisonment not exceeding one year." The state statute, however, did not specifically provide that absentee ballots cast by eligible voters but returned in violation of this prohibition would be disqualified and left uncounted. In an election for mayor of the largest city in the state, the margin between the two leading candidates is only 65 votes. The election's outcome is in dispute because 380 absentee ballots have not been counted on the ground that they were returned in violation of this state statute. A student organization at a

local university, unaware of the statute, organized a campus "get out the vote" drive in which the student organizers announced that they would go from dorm to dorm to collect completed absentee ballots from their fellow students, returning them all in one batch, thereby making voting more convenient for these other students. The student organization made no payments in exchange for the completed absentee ballots. The candidate behind by 65 votes argues that the principle of equal participation of eligible voters should prevail and, because there is no evidence of any improper rewards offered by the student organization (and because this student organization was not the kind of improper "absentee ballot broker" that the state legislature had in mind when enacting its statutory prohibition), the 380 disputed absentee ballots should be counted as long as the student voters who cast them are otherwise eligible to participate in the election. By contrast, the candidate ahead by 65 votes argues that the statutory prohibition was enacted with the goal of protecting the integrity of elections and that, even if there are no improper payments by the student organization (and even if this student organization is not the typical "absentee ballot broker" that the state legislature had in mind), campus peer pressure clearly favored the opposing candidate in this mayoral race and thus campus peer pressure easily could have affected the absentee ballots cast and delivered as part of the student organization's campus-based "get out the vote" drive. Accordingly, the leading candidate argues that in this particular instance the principle of protecting the integrity of the election from a kind of improper influence that the state legislature itself identified as improper requires disqualification of the absentee ballots returned in violation of the statutory prohibition. The state's judiciary is thus faced with the difficult task of how to resolve this dispute. Not only does the statute itself fail to speak to the specific issue of whether the ballots should be disqualified (or whether, instead, the possibility of criminal punishment for violation of the statute is a sufficient remedy), but also there is no relevant prior judicial precedent that is sufficiently on point to provide an answer on how to decide this case. Consequently, under subsection (d) the state judiciary should consider whether it is possible to discern how, in advance of this election, reasonable and impartial observers would have resolved the tension between electoral equality, on the one hand, and electoral integrity, on the other, in this particular factual situation. In considering this question, if judges are confident in their judgment that reasonable and impartial observers in advance of the election would

have resolved this tension one way or the other (either permitting the counting of ballots in this particular circumstance, despite the violation of the statutory prohibition, or instead disqualifying the ballots because of the violation), then the judges should adjudicate the actual dispute at hand in accordance with this judgment. Conversely, if judges cannot confidently discern how reasonable and impartial observers would have resolved this tension between the two electoral principles, equality and integrity, in advance of the election, then the judges should consider whether there exists a well-reasoned administrative answer to the question. For example, before the question reached the court, a local canvassing board may have grappled with the same question; if so, and if the board's explanation for how to resolve the question is well-reasoned and appears unaffected by any partisanship or other form of favoritism, then under the circumstances it may be appropriate for the court to embrace that well-reasoned administrative decision. But if no such well-reasoned administrative determination exists, then the court must fall back on whatever judicial resolution most accords with the ideal of impartial adjudication of this electoral dispute.

## REPORTERS' NOTE

*a. The relationship of accuracy and speed in vote-counting procedures.* Hunter v. Hamilton County Board of Elections, 635 F.3d 219 (6th Cir. 2011), again serves as a useful example, in this instance illustrating the tension between (1) the value of determining as accurately as possible which candidate won more valid votes and (2) the value of resolving the ballot-counting dispute as speedily as possible so that the declared winner can serve the term of office for which the election was held. The judicial election at issue in *Hunter* was held on November 2, 2010. The lawsuit claiming that the failure to count the disputed provisional ballots violated equal protection was filed in federal district court on November 21. Two days later, the local election board officially determined that, absent any judicial reversal of its counting decisions, the Republican candidate would win the election by 23 votes. After much judicial skirmishing, on January 12 the district court blocked final certification of the election, thereby preventing either candidate from taking office until the court's final disposition of the ballot-counting dispute. The Sixth Circuit's ruling came 15 days later, on January 27. But that did not end the matter, as on remand the district court conducted a full trial concerning the nature of poll-worker error affecting the disputed provisional ballots. After this trial documenting even more startling poll-worker error than could have been anticipated, including the inability of one poll-worker to distinguish odd and even numbers correctly (thereby causing voters to receive a "wrong-precinct" ballot because odd-number addresses were in one precinct, while even-numbered addresses—on the opposite side of the same street—were in another), the district court ordered the disputed ballots to be counted; but

this order did not come until February 6, 2012, over a year after the Sixth Circuit's ruling. The Republican candidate appealed the district court's post-trial order, and that second appeal was still pending on July 12, 2012, when the Republican candidate voluntarily withdrew the appeal because he had received a different job and was no longer interested in this particular judgeship. In the interim, the vacancy in this judgeship (caused by the federal district court's injunction) was temporarily filled by the assignment of another sitting judge, someone who was not a candidate in the disputed election. Although waiting 20 months for an accurate count of all votes entitled to be counted might have been appropriate in the context of this particular election, with the public interest best served by the temporary filling of the vacancy until the dispute over the provisional ballots could be conclusively settled, the same kind of delay would not be suitable in the context of other elective offices. It would be inappropriate, for example, to fill the office of governor temporarily for 18 months or more while a dispute over ballots cast in the gubernatorial election raged; in that situation, the electorate would be deprived for a year-and-a-half of having a chief executive who had run for the office in question. Such a situation would be a frustration of the very exercise of democracy.

*b. The Hart–Dworkin debate and its special relevance to vote-counting disputes.* Election law, like any field of law, is subject to basic jurisprudential questions concerning the nature of law itself and what it is that judges do when they interpret authoritative legal texts or apply precedents to pending cases. For the last several decades, the main jurisprudential debate has been between H.L.A. Hart's conception of legal positivism, on the one hand, and Ronald Dworkin's vision of law-as-integrity, on the other. Compare H.L.A. HART, THE CONCEPT OF LAW (1961), with RONALD DWORKIN, LAW'S EMPIRE (1986). This Hart–Dworkin debate has centered upon the nature of judicial reasoning when the "posited" sources of law—enacted statutes, promulgated administrative rules, existing judicial precedents, and so forth—"run out" in the sense that they do not provide a definitive answer to the case at hand: all the existing statutes may be ambiguous on how to treat the situation, or all existing rules and precedents do not appear to cover the precise circumstance of the pending case. Hart's claim was that, in this context, courts exercise "judicial discretion" akin to the policymaking discretion of legislatures or administrative agencies, generating newly posited law in the form of a new precedent. Judges, in other words, *make* new law, not merely apply previously posited law that they are bound to follow, because by definition the situation is one in which the previously posited law fails to provide a definitive answer to the case at hand. Dworkin, by contrast, rejected Hart's conception of judicial discretion, arguing instead that in every case judges are bound by a single "right answer" to be supplied by the law itself—once the law as a whole is properly understood to encompass, not merely the previously existing posited rules and precedents, but also background principles that guide judges to the correct resolution of cases when there are gaps in what the posited law provides. According to Dworkin's "right-answer" thesis, judges never exercise policymaking discretion akin to legislatures and administrative bodies—and thus never *make* law in the way that these other political actors do, even when working in a traditional judge-made "common law" domain—but

instead are bound to follow the result dictated by the best understanding of the law's background principles applicable to the case at hand.

The Hart–Dworkin debate may have specific implications for other areas of law, but it certainly does for the law governing ballot-counting disputes. Insofar as a ballot-counting case is one that Hart would describe as involving "judicial discretion" because the existing posited law does not dictate a specific answer—and thus there is a gap in the existing posited law to be filled—if judges fill that gap by *making new law* in the way that Hart conceives, then whatever the judges decide will in some sense run counter to the due-process principle recognized in Griffin v. Burns, 570 F.2d 1065 (1st Cir. 1978), and Roe v. Alabama, 43 F.3d 574 (11th Cir. 1995). Ballots should be counted according to rules as they existed before these ballots were cast. Ballots should *not* be counted according to *new law* adopted after those ballots have been cast. That basic proposition, fundamentally, is what lies at the heart of the due-process principle in *Griffin* and *Roe*.

Of course, if the situation is genuinely one in which the existing posited law on how to count the ballots has left a gap—either because the relevant statutory and administrative rules are ambiguous on how they apply, or because the existing judicial precedents do not directly cover the pending case—then the problem is unavoidable. The ballot-counting question must be answered one way or another, and yet by stipulation in this particular circumstance the full sum of existing posited law fails to provide that answer. If Hart is correct about what judges do in this situation, they have no choice but to *make new law* in essentially the same way that legislatures and administrative bodies do in the exercise of policymaking discretion.

Yet there are reasons to be troubled if judges exercise policymaking discretion, as Hart conceives it, in the adjudication of ballot-counting disputes. Not only is there the inevitable tension with the due-process principle of *Griffin* and *Roe*, but also there is the underlying reason why counting ballots according to new rules adopted after the ballots have been cast raises due-process concerns. Ballot counting is one area of law in which reliance upon the expectations set by the preexisting rules is particularly strong. This is because the exercise of policymaking discretion in the generation of new rules inevitably involves political judgment. Yet ballot-counting rules help determine who will occupy the elective offices entitled to make political judgments for the society. If politics control what the ballot-counting rules themselves will be, then one side of the political divide in society can shape the ballot-counting rules in a way that gives it an advantage in determining who will exercise the power of elective offices to make all the other political judgments for the society. At the very least, the rules for counting ballots should be established in advance, so that all parties to the electoral competition can adjust ahead of time their competitive strategies according to the settled playing field. If one side to the competition can change the playing field after the competition is underway, that power would create a particularly unfair competitive advantage.

Judges are not supposed to be conventional politicians. This is a deeply imbedded proposition in America's legal system, and is true even with respect to elected state judges. See MODEL CODE OF JUDICIAL CONDUCT (AM. BAR ASS'N 2011). The exercise of their judicial authority is supposed to be different from the kind of political power that legislative and

1 administrative officials exercise. The importance of this deep-rooted proposition is a major reason
2 why Dworkin developed his jurisprudence of law-as-integrity, with its "right-answer" thesis, as an
3 alternative to Hart's conception of judicial discretion. If judges exercise the same sort of
4 policymaking discretion that legislative and administrative officials do, as Hart contended, then
5 judges at bottom are essentially no different from ordinary politicians.

6 While Dworkin resisted this implication for law generally, it would be particularly
7 problematic in the context of ballot-counting cases if judges were essentially ordinary politicians.
8 It would mean that politicians would determine the rules for who gets to hold political office, and
9 politicians would be able to make these determinations after elections already have been
10 conducted. Stalin purportedly once said, "I consider it completely unimportant who . . . will vote,
11 or how; but what is extraordinarily important is this—who will count the votes, and how." (Quoted
12 in Coleman v. Ritchie, 758 N.W.2d 306, 309 (Minn. 2008) (Page, J., dissenting).) Or, as the
13 playwright Tom Stoppard more succinctly put it, "It's not the voting that's democracy, it's the
14 counting." (Also quoted in Coleman v. Ritchie, 758 N.W.2d 306, 311 (Minn. 2008) (Paul H.
15 Anderson, J., concurring in part, dissenting in part).) The key insight here is that the counting of
16 ballots most especially should be governed by the rule of law, understood as rules set in advance
17 of the election, not subject to manipulation by politicians afterwards. Whatever the proper
18 understanding of judges with respect to other categories of cases, it is imperative that in the specific
19 context of ballot-counting cases judges be perceived, not as politicians with discretion on how to
20 decide the cases however they wish, but instead as performing a distinctly judicial role, bound to
21 follow the dictates of the law according to a basic commitment to the rule of law.

22 Thus, without attempting to resolve the Hart–Dworkin debate as a general matter, the
23 principles set forth in Part II of this project—and most especially § 204(d)—endeavor to construct
24 a system that minimizes the circumstances in which judges could be perceived as exercising
25 policymaking discretion in a ballot-counting case. Part II pursues this objective by establishing a
26 hierarchy of principles for judges to follow, with the ultimate principle being one of impartiality,
27 so that judges should never find themselves in a position of being entitled to decide a ballot-
28 counting case according to the same type of policymaking discretion that a legislature or
29 administrative body would be entitled to employ. The hierarchy of principles runs like this: first,
30 according to § 201(a), the posited ballot-counting rules should be as clear and comprehensive as
31 possible, in order to minimize the gaps that would force judges to rely upon background principles
32 to adjudicate a ballot-counting case; second, in the event that a gap does exist, the highest
33 background principle to employ—as set forth in § 201(c), § 203(a), and § 204(c)—is to adjudicate
34 the ballot-counting dispute in the way that most accords with the equal right of all eligible voters
35 to participate in the election. This highest background principle should be capable of resolving
36 decisively most of the circumstances for which the posited rules leave a gap.

37 Still, Part II recognizes that circumstances conceivably exist for which the highest
38 background principle does not suffice to yield an answer. Consequently, Part II provides that when
39 protecting the integrity of an election clearly requires a particular result in a ballot-counting
40 dispute, judges are mandated to adopt that result. But Part II also recognizes that there may be

circumstances in which the twin principles of (1) the equality of eligible voters, and (2) the integrity of the election, may be inconclusive or point in opposite directions. If so, then § 204(d) calls upon judges to engage in an inquiry that is quite different from the exercise of policymaking discretion. Instead, employing a version of the “veil of ignorance” idea made famous by the philosopher John Rawls, judges are to hypothesize the circumstance in which reasonable persons deliberating in advance of the particular election are confronted with the same adjudicatory issue now pending before the court. If the judges can discern how those reasonable persons would have resolved the issue in that hypothetical posture, without knowing how the particular election turned out, then the judges must adopt that resolution. Undertaking this “veil of ignorance” inquiry is the fairest way to resolve the dispute, thereby most consonant with maintaining the election’s legitimacy, for this simple reason: if all parties would have accepted a rule for resolving the dispute in a situation in which none of the parties know in advance whether they would be benefited or burdened by the rule, then it is fair to impose that rule upon parties burdened by it once the dispute actually arises. See John Rawls, A Theory of Justice (1971). Indeed, this very “veil of ignorance” idea was a major predicate for undertaking this American Law Institute project, particularly Parts II and III: the idea was that attorneys who routinely represent Democratic and Republican candidates in ballot-counting disputes may be able more easily to agree upon a set of principles for how best to handle such disputes in advance of their next occurrence, before the attorneys know whether they will be making arguments on behalf of a client who happens to be ahead or behind in the count at the time the dispute is pending.

Although this “veil of ignorance” approach has the virtue of fairness, it too may not yield a definitive answer in some circumstances. See, e.g., Jeremy Waldron, Law and Disagreement (1999) (analyzing reasonable disagreement on issues of implementation even among those who share the same Rawlsian premises concerning matters of justice). Accordingly, § 204(d) further provides that when all of the aforementioned principles—equality, integrity, and legitimacy (as determined by the “veil of ignorance” inquiry)—are inconclusive, then judges should look to see if an administrative body already has issued a well-reasoned determination of the matter that accords with rule-of-law values. If such a well-reasoned administrative determination exists, then the court should adopt that determination as preferable to the judicial exercise of policymaking discretion in a ballot-counting case. (One should not equate this extremely rare and limited circumstance in which judges rely upon a well-reasoned administrative determination as the best means for resolving a ballot-counting dispute with so-called *Chevron* deference. See Chevron v. NRDC, 467 U.S. 837 (1984). While *Chevron* calls for judicial deference upon the finding of statutory ambiguity, § 204(d) contemplates judicial reliance on administrative reasoning in a much narrower situation, when all of the other available background principles have failed to fill a gap left by statutory ambiguity.)

In the event that no such well-reasoned administrative determination exists, judges in a ballot-counting case still should not resort to what could be characterized as policymaking discretion or a political judgment. Instead, judges should view themselves as bound, when all else runs out, by a residual principle of impartiality, which requires them to adjudicate a ballot-counting

case as best they can without favoritism towards any candidate or political party. See MODEL RULES OF JUDICIAL CONDUCT, Rules 1.2, 2.2, 4.1 (AM. BAR ASS'N 2011). It may remain debatable what impartiality requires in a particular context, and in this sense Dworkin's conception of a single "right answer" to the pending case may seem elusive (as it may be in other contexts). Nonetheless, as also mandated by § 205, judges always should strive to adjudicate a ballot-counting case consistent with the ideal that they are not acting politically, but instead are following what the rule of law most appropriately calls for in the particular context.

### § 205. Duty of Nonpartisanship

**(a) All officials responsible for the counting of ballots, or the determination of whether or not particular ballots are eligible to be counted, should undertake these responsibilities so that their decisions and actions are and appear to be uninfluenced by partisanship or personal bias.**

**(b) An official's duty to perform all ballot-counting responsibilities without partisanship or bias, as provided in subsection (a), applies even if the official is elected to office through a partisan election and is entitled to let partisanship affect the exercise of other official duties unrelated to the counting of ballots.**

**(c) To foster compliance with the duty of nonpartisanship, as provided in subsection (a), states should adopt a specific oath whereby each administrative and judicial official subject to this duty swears or affirms to act in accordance with the duty before the official undertakes any responsibility to which the duty applies.**

**(d) Any official unwilling or unable to comply with the duty of nonpartisanship, as provided in subsection (a) and reinforced by the oath adopted pursuant to subsection (c), is not qualified to perform any ballot-counting responsibility.**

**Comment:**

*a. The ideal of nonpartisan vote counting.* Of all the principles important to the counting of ballots in a democracy, the most elusive in the United States is the principle that the institutions and officers of government responsible for the counting of ballots should conduct their proceedings in such a way that their decisions are nonpartisan and also appear as such. The reason for this elusiveness is that most government officials entrusted with significant responsibilities are presumed to be partisan, either because they themselves have been elected to office as partisan candidates or because elected partisans have appointed them to their offices. In most states, the

Secretary of State is the officer of government charged with the responsibility of supervising the administration of the state's elections, and the Secretary of State—like the Governor—is an elected partisan. In many states, the government officials entrusted with running elections at the local level are county or municipal clerks who are similarly partisan.

Moreover, even ostensibly nonpartisan institutions of government, like courts, are increasingly portrayed in the media and thus perceived by some members of the public to be susceptible to partisan bias (whether intentional or not) in their decisions. Judges, to be sure, already are bound by canons of judicial ethics to avoid partisanship in adjudicating cases. The Model Code of Judicial Conduct, for example, provides: "A judge shall not permit . . . political . . . or other . . . relationships to influence the judge's judicial conduct or judgment." Rule 2.4(B). Many states have retained the language of an earlier version, which even more pointedly states: "A judge shall not be swayed by partisan interests." Canon 3(B)(2) (1990). Given the importance of this duty in the context of adjudicating vote-counting disputes, in order to foster the legitimacy of the adjudicated outcomes of these disputes, the goal must be not only actual compliance with this duty but also public perception of this compliance as much as possible.

The contrary perception, regardless of its inaccuracy, is a serious concern because it threatens to undermine public belief in the legitimacy of the electoral process. The U.S. Supreme Court itself, in a widely cited passage from a 2006 unanimous per curiam opinion (Purcell v. Gonzalez, 549 U.S. 1, 7), has stated: "Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy." Thus, one of the foundational principles guiding the development of election law must be to foster the public perception in the legitimacy of the electoral process, which in turn requires a perception that the resolution of vote-counting disputes is based upon nonpartisan adjudication pursuant to the rule of law.

Journalists are more inclined to portray judges in ways detrimental to electoral legitimacy when judges themselves divide sharply along their purported partisan affiliations or backgrounds over the correct outcome to a vote-counting dispute. Although judges must adjudicate vote-counting cases, like all other cases within their jurisdiction, according to the dictates of the law as they best understand them, judges can promote public perception of electoral legitimacy—and thus serve one foundational principle of election law—insofar as they find themselves able to agree on what the law requires in a vote-counting case before them. Although the traditional "political question" doctrine may not apply to a particular vote-counting dispute before a court, and thus the

court cannot avoid adjudicating the dispute properly within its jurisdiction, the court is still well-served in being mindful of the dangers of the "political thicket" (in Justice Frankfurter's memorable phrase in Colegrove v. Green, 328 U.S. 549, 556 (1946)). Consequently, in accordance with the principle of § 201, courts are on their firmest footing in vote-counting cases when they are able to decide those cases pursuant to clearly established rules of law that leave no room for interpretative ambiguity or discretion.

The challenge of maintaining an appearance of nonpartisanship in the resolution of vote-counting disputes is not limited to the role of the judiciary in those disputes, but rather extends to all government officials charged with responsibilities in these cases. If anything, the challenge is greater insofar as these officials, compared with courts, are more readily perceived by the media and the public as partisan actors. Despite the challenge, the principle that vote counting be (and appear to be) nonpartisan is especially important and worth striving for. Elections are competitions between parties. If one party controls the counting of votes and uses that power to manipulate the count in its favor, the competition is inherently unfair.

Consequently, officials charged with the responsibility of counting votes—including the resolution of disputes that arise concerning the counting of votes—should strive to conduct their proceedings so as to maximize the likelihood that the public will perceive that the count is accurate and fair, rather than distorted as a result of a partisan effort to achieve victory through a manipulation of the count. Adhering to the rules as written in advance of the election is a major step that officials can take in service of this goal. If the officials simply do what the law unambiguously demands of them, it is difficult to attribute the officials' decision to partisanship. Ambiguity in vote-counting rules is problematic precisely because it invites charges that the ambiguity has been resolved in accordance with partisan leanings, rather than through the best effort to render an on-the-merits judgment devoid of partisan considerations.

Institutional structures can help alleviate the risk of a public perception that the counting of ballots is being distorted by partisanship. One structure designed to maximize public confidence in the fairness of the vote-counting tribunal is to use equal numbers of officials from the two major parties, together with a single genuinely neutral official who can break partisan ties if and when necessary. (Examples of how genuinely neutral officials may be identified can be found in the Illustrations to § 304, Comment *d.*) Transparency, too, helps to dispel doubts about the fairness of the vote-counting process. If the general public, including partisans on both sides, can see for

themselves how decisions are actually being made regarding the counting of ballots, they can judge for themselves the extent to which the official decisions accord with an impartial determination on the merits, rather than reflect a partisan distortion of the process. To be sure, rabid partisans may attack the process as illegitimate no matter what the facts actually show. Democracy depends, however, not on universal acceptance of the legitimacy achieved through the operation of a fair vote-counting process pursuant to the rule of law, but instead widespread acceptance of this legitimacy. Insofar as possible, states should structure and implement their vote-counting procedures to achieve this widespread consensus.

*b. The ethic of impartiality.* Regardless of the structural arrangements, vote-counting officials still need to approach their task with an ethic of impartiality. This point applies even and especially to those officials elected as partisans. The fact that one has secured office as a partisan candidate does not absolve one of a duty, once in office, to act in the public interest and do so in a way that honors the civic equality of all citizens.

When it comes to the actual decisions they make when counting votes, these officials must make a genuine effort to set aside their own partisan background and attempt to act impartially. Despite the current cynicism about the capacity of government officials to conduct themselves with sufficient civic virtue, vote-counting officials still must be held to a duty to count votes fairly and impartially. As only one aspect of this duty, any official whose own election is the subject of a vote-counting dispute is obviously not suited to participate, given the conflict of interest, as a member of any tribunal that will play a role in adjudicating the dispute. The same principle should also yield the corollary that if an official has been part of a candidate's campaign, then that official should be similarly recused from playing any adjudicatory role in resolving a dispute over whether or not that candidate won the election.

*c. The value of an oath.* A special oath applicable to all officials involved in the vote-counting process can assist in putting officials in the correct frame of mind to conduct the solemn democratic responsibility of counting votes fairly. Historically, oaths have been used to impress upon officials the solemnity of their public functions. The United States continues to use oaths for this purpose. An oath could be tailored to the special responsibilities of the vote-counting process, to be taken by these officials before they undertake these particular tasks, thereby impressing upon them the distinctive seriousness with which the public views their undertaking. For each official, the oath would not need to be administered any more frequently than once for each election

(meaning each time voters cast ballots, as for a November general election, and thus the same oath would apply to all specific items voted upon on the same general-election ballot). To serve its purpose of promoting the public's perception of the election's legitimacy, the oath should be administered in public.

**Illustration:**

1. A state might require all of its officials involved in the process of counting ballots to take this oath: "I solemnly swear [or affirm] that I shall undertake every decision related to determining the outcome of this election with the sole objective to produce an accurate, timely, lawful, and impartial count of all valid ballots, and only valid ballots, that conforms to the choices made on those ballots by the eligible voters who cast them, and that I shall perform this essential function of popular sovereignty in a democracy on behalf of the people of this state without regard to any form of favoritism, partisanship, or self-interest."

## REPORTERS' NOTE

*a. The ideal of nonpartisan vote counting.* The idea that the counting of ballots should be conducted in a nonpartisan way has become a deeply ingrained international norm. For example, the European Commission for Democracy through Law, often called the "Venice Commission" because of its location, has promulgated a Code of Good Practices in Electoral Matters, which provides (in paragraph 68):

> Only transparency, impartiality and *independence from politically motivated manipulation* will ensure proper administration of the election process, from the pre-election period to the end of the processing of results.

http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2002)023rev-e (emphasis added).

In its next two paragraphs, the Code distinguishes "states where the administrative authorities have a long-standing tradition of independence from the political authorities," where existing executive ministries can be entrusted to "appl[y] electoral law without being subjected to political pressures," from less robust democracies, where "there is too great a risk of government's pushing the administrative authorities to do what it wants." In this latter context, the Code mandates (in paragraph 71): "*independent, impartial election commissions* must be set up from the national level to [the] polling station level to ensure that elections are properly conducted." Id. (emphasis in original).

On the development of this international norm, see PIPPA NORRIS, WHY ELECTORAL INTEGRITY MATTERS (2014). See also Chad Vickery, *International Standards*, in GUIDELINES FOR UNDERSTANDING, ADJUDICATING, AND RESOLVING DISPUTES IN ELECTIONS (2011).

*b. Avoiding the appearance of partisanship in the adjudication of electoral disputes.* The risk that the public might perceive the judiciary as motivated by partisanship, even when the judiciary is not actually motivated by partisanship, has long been a concern in the United States. See, e.g., Maeva Marcus, *Is the Supreme Court a Political Institution?*, 72 GEO. WASH. L. REV. 95, 109 (2003) (tracing this concern, and the "political question doctrine" that it generated, all the way back to Marbury v. Madison). Chief Justice Roberts recently raised this concern during the oral argument in the Wisconsin gerrymandering case, Gill v. Whitford. In asking the plaintiffs' counsel about their proposed mathematical measure for detecting gerrymanders, the Chief Justice hypothesized:

> And if you're the intelligent man on the street and the Court issues a decision, and let's say, okay, the Democrats win, and that person will say: "Well, why did the Democrats win?" And the answer is going to be because EG was greater than 7 percent, where EG is the sigma of party X wasted votes minus the sigma of party Y wasted votes over the sigma of party X votes plus party Y votes.
>
> And the intelligent man on the street is going to say that's a bunch of baloney. It must be because the Supreme Court preferred the Democrats over the Republicans.

Transcript at 37. The Chief Justice then expressed the fear that this public perception of judicial partisanship would "cause very serious harm to the status and integrity of the decisions of this Court in the eyes of the country." Id. at 38.

A recent empirical study provides evidence to support the Chief Justice's concern. See Michael S. Kang & Joanna M. Shepherd, *The Long Shadow of Bush v. Gore: Judicial Partisanship in Election Cases*, 68 STAN. L. REV. 1411, 1450 (2016) (recommending "nonpartisan election adjudication that altogether avoids the risk of partisan judging that we document here").

*c. Polarization and the challenge of nonpartisan election administration.* Given the increasingly polarized nature of American politics, the capacity of official institutions that are supposed to operate on a nonpartisan basis—and need to do so for democracy to function—is under severe strain. Nothing illustrates this point more vividly than the challenges of conducting a nonpartisan investigation into the allegations that individuals associated with Donald Trump's presidential campaign may have coordinated efforts with agents of the Russian government to interfere improperly with the electoral process. The challenges include determining what sort of institution, or institutions, are structured in ways to be most likely to facilitate a nonpartisan inquiry: a Senate committee, given the Senate's historical commitment to bipartisan leadership on matters of national urgency that require such leadership; the FBI, given its own tradition of nonpartisanship when conducting politically sensitive investigations; a special counsel within the Department of Justice; or some other institutional arrangement designed specifically for this particular investigation.

Even so, it is abundantly clear that the ability of the federal government ultimately to succeed in this respect is a function not only of the institutional structures that individual officeholders inhabit but also the personal character and degree of ethical virtue possessed by those individual officeholders. See, e.g., Neil S. Siegel, *After the Trump Era: A Constitutional Role*

*Morality for Presidents and Members of Congress*, 107 GEO. L.J. 109 (2018); Justin Levitt, *The Partisanship Spectrum*, 55 WM. & MARY L. REV. 1787 (2014). Not all public officials act with the same degree of commitment to the values of integrity and impartiality. History, both distant and recent, provides ample evidence of this truth. Compare JOHN F. KENNEDY, PROFILES IN COURAGE (1957), with JOHN W. DEAN, BLIND AMBITION (1976). Yet the resolution of disputed elections is one area in which these values are at a premium—especially if a goal is for members of the public, many of whom have cast ballots in the election being disputed, to accept the resolution as consistent with the need for the election to be conducted with democratic legitimacy (namely, that the counting of ballots be equally fair to all the candidates in the race, as well as to all the voters who cast their ballots for those competing candidates).

The successful resolution of a disputed election is thus fostered by strengthening two key factors that interact with each other: first, the institution(s) used to resolve the dispute; and second, the personal virtue of the individual officeholders who inhabit those institutions. The three-judge court that adjudicated the contest of Minnesota's 2008 U.S. Senate election illustrates this kind of positive interaction. See EDWARD B. FOLEY, BALLOT BATTLES: THE HISTORY OF DISPUTED ELECTIONS IN THE UNITED STATES, ch. 12 (2016). The institution was structured to be as inherently nonpartisan as possible: one judge had been appointed by a Democratic governor, another by a Republican governor, and the third by an Independent governor. More than that, the three individuals appointed to the panel decided collegially to conduct themselves in a manner to maximize the perception of nonpartisanship. All of the opinions they released were without dissent. This fact does not mean that the three judges were always unanimous in their initial internal votes on each issue they decided. On the contrary, subsequent accounts of their deliberations indicate that this was not so. See JAY WEINER, THIS IS NOT FLORIDA: HOW AL FRANKEN WON THE MINNESOTA SENATE RECOUNT (2010). Nonetheless, when it came time to release their opinions, they were uniformly without dissent. This public unanimity fostered the public perception that the case was adjudicated fairly and impartially.

There is no duty on the part of a judge to dissent. Sometimes judicial wisdom and virtue indicate that justice and legitimacy are better served by withholding dissent. See, e.g, Joel K. Goldstein & Charles A. Miller, *Brandeis: The Legacy of a Justice*, 100 MARQUETTE L. REV. 461, 467 & n.38 (2016) (discussing when Justice Brandeis would withhold dissent); id. n.38 (citing "Canon of Judicial Ethics in 1920s" as encouraging judges to exercise "self-restraint" in order to promote "consensus"). This point is especially apt in an electoral dispute. Consequently, democracy is ultimately better served if not only the institutions that adjudicate vote-counting disputes are designed to maximize the possibility of nonpartisanship, but also if the individuals who serve on those institutions decide to conduct their own behavior and collective deliberations to foster this nonpartisanship.

**§ 206. Certification of the Election Before the Term of Office Begins**

**(a) A state's administrative procedures for certifying the result of an election, including any recount necessary to verify the accuracy of the result, should be structured and administered so that they can be completed before the date upon which the term of office of the election's winner is scheduled to begin.**

**(b) A strong presumption should exist against issuing any order that will have the effect of delaying the certification of the election beyond the date upon which the winner's term of office is scheduled to begin, unless a court determines that, because of circumstances unforeseen in advance of the election, either (i) the only way to achieve an accurate count of eligible ballots cast in the election is to delay certification for a reasonably short period after the term of office is scheduled to begin, in which case the court shall specify the date, soon after the scheduled beginning of the winner's term, by which the delayed certification must be complete; or (ii) it is impossible to complete an accurate count of eligible ballots in a reasonably timely manner (or at all), in which case the court shall void the election and order a new election.**

**(c) Because a candidate or political party could seek to delay certification of an election, pursuant to subsection (b), for the inappropriate and partisan purpose of taking advantage of a vacancy in the office during the period of the delay, a court should not exercise its limited authority to delay certification of an election under subsection (b) unless necessitated by previously unforeseen circumstances that a reasonable observer regardless of party affiliation would recognize as compelling a delay.**

**(d) Once an election has been certified, no subsequent judicial contest of that election (on the ground that the certified result is in error, pursuant to § 213) shall provide a basis for leaving the office vacant while the contest is pending, but instead the certified winner shall take office provisionally, subject to the possibility of ouster if the adjudication of the contest determines that the certification misidentified the election's winner.**

**(e) In a gubernatorial, mayoral, or other chief-executive election, the need to certify a winner before the date for inaugurating the new chief executive is especially strong, with the risk of a vacancy being exploited for partisan purposes, and accordingly an even stronger presumption should exist against issuing orders that threaten to leave the chief-executive office vacant.**

**(f) Notwithstanding any provision of this Section, in any vote-counting dispute involving a presidential election all administrative and judicial proceedings should comply with the specific provisions of Part III, in order to enable a state to abide by the Electoral College deadlines established by Congress, including 3 U.S.C. § 5.**

**(g) Nothing in this Section should be construed to interfere, in a legislative election, with the authority of the applicable legislative chamber to conclusively determine the election's winner and to seat the winning candidate accordingly, or when necessary to leave the seat vacant on the ground that a winner could not be conclusively identified.**

**Comment:**

*a. The importance of resolving vote-counting disputes before the winner's term of office is to begin.* Elections serve a practical purpose: to choose the individuals who will exercise the power of government in a democracy. Elections fail in this essential purpose if and when they are unable to identify the winning candidate by the date on which that individual's term of office is scheduled to begin. Accordingly, the administrative procedures for determining the winner conclusively should be designed and implemented in ways that enable them to be complete before the winning candidate's term of office begins.

Also, ordinarily, a court should not issue an order that would delay these administrative procedures to the point that they would not be complete until after the winning candidate's term of office is scheduled to begin. As provided in subsection (d), a judicial contest of the election's results can occur after these administrative procedures are complete and a winning candidate receives a certificate of election. This judicial contest, moreover, can occur while the certified winner holds office provisionally, so that the office is not left vacant or otherwise temporarily filled during the pendency of the contest. Because it is still possible to contest the certified result of an election, there is no need to delay certification of the election's results. Although the certified victory may rest on error and thus be overturned in the contest, the certified victory is still presumptively valid unless and until overturned.

Accordingly, it is preferable to fill the seat provisionally with the presumptive winner based on the certified result, rather than to leave the seat vacant or fill it provisionally in some other way. The reason is simple: the presumptively valid certification accords more closely with the purpose of the election, which is to fill the seat with an individual democratically chosen by the electorate. Leaving the seat vacant does not serve this purpose. Nor does filling the seat temporarily with

some other individual who was not even a candidate in the election for this office. Permitting the previous incumbent of the office to "hold over" while the contest of the election is pending is, as American history has shown, a particularly pernicious way to fill the office while the contest is pending; it creates an incentive for the political party whose candidate presumptively lost the election to contest the result if the incumbent who would hold over belongs to the same party. The far better course, and the one most consistent with the best currently available evidence of what the electorate wanted, is to seat the certified winner provisionally and simultaneously permit the opposing candidate to contest the accuracy of the certification.

*b. Pre-certification judicial review.* Occasionally, a problem with the administrative procedures for counting votes will require judicial intervention before certification of the election's results (and thus be unsuited for correction during a subsequent contest). If and when such a problem arises, the trial and appellate courts whose jurisdiction is invoked in order to rectify the problem should endeavor to do all that they can to expedite their proceedings so as prevent a delay that causes the certification to occur after the date on which the term of office begins. If that cannot be done, subsection (b) provides that it is nonetheless permissible for the judiciary to delay certification for a brief period of days if doing so is necessary to rectify a defect in the state's administrative procedures that prevents a reasonably accurate determination of the election's winner before the term of office begins.

This judicial authority, however, is subject to three important qualifications. First, the problem with the administrative procedures requiring judicial intervention must be one that was unanticipated prior to the election. Conversely, if the problem was known before the election but left unremedied, the assumption must be that the legislature intended for the matter to be resolved in a subsequent judicial contest. It would be inherently self-contradictory for the legislature to intend that the certification of an election occur after the winning candidate's term of office is supposed to start. Thus, only if the legislature could not have anticipated that the problem would require postponing certification until after the term of office begins is it appropriate for the court to intervene in this way.

Second, the judicially imposed delay in the certification must be of a brief and specified duration. If it would require extensive or indefinite judicial proceedings to rectify the problem with the state's administrative procedures, then the court needs to choose between two alternatives: (a) permitting certification to proceed as scheduled, and leaving to a subsequent judicial contest

the issue of whether and how to rectify the asserted administrative defect; or (b) voiding the election and ordering a new one. If instead of these two options a court were to postpone certification for an extensive or indefinite period, it would be the least democratic approach to the situation. Permitting the certification to proceed as scheduled would be premised on the judgment that the administrative procedures, despite the asserted defect, have a sufficient degree of accuracy to warrant seating the winning candidate provisionally, while the subsequent judicial contest can sort out the problem and either verify the result or overturn it. Voiding the election before certification would be a judicial judgment that the administrative procedures are so flawed that the election is incapable of providing an adequate democratic pedigree and thus there is no point proceeding to certification; in this way, voiding the election would be a judicial effort to restore democratic legitimacy through a new election as quickly as possible. By contrast, keeping the office vacant for an extended or indefinite period has no connection to democracy, and the same point applies to filling the office for an extended or indefinite period with someone who was not even a candidate for the office.

Third, if a court does delay certification of an election past the scheduled date for the term of office to begin, it is crucial for the legitimacy of the dispute-resolution process that the public not perceive this delay as a partisan ploy. Precisely because such delay can be an advantage to one party over the other, in a close election one party often will attempt to achieve this delay. (The party may prefer a vacancy to having the candidate of the opposing party hold the office in question, or the party may benefit from rules that identify who is to hold the office temporarily during the delay.) The judiciary should do all that it can to avoid being perceived as an instrument in this partisan effort.

*c. Different considerations for different offices.* Although the foregoing principles apply to all elections, they apply somewhat differently to different types of elective offices. Historically, in the United States the ultimate determination of which candidate wins a legislative election—either state or federal—is made by the particular legislative chamber for which the seat is being sought. This legislative prerogative, which stems from British history and Parliament's assertion of authority against the Crown, bears on the role that a court potentially plays in a dispute over the winner of a legislative election. The U.S. Supreme Court has ruled that courts can play a role in the resolution of a disputed legislative election, as long as that role is (a) antecedent to the legislative chamber's ultimate assertion of authority to determine the winner and (b) does not

1 interfere with the legislative chamber's assertion of that authority. Given this, state law may choose
2 not to allow a post-certification judicial contest of a legislative election, leaving any post-
3 certification proceeding to the legislative chamber itself. If so, a court may be inclined to give itself
4 some more leeway in providing for pre-certification judicial review of the state's administrative
5 processes for verifying the count of the ballots. After all, such pre-certification judicial review will
6 be the only time for judicial involvement, and the legislative chamber's own handling of the issue
7 likely will be thoroughly partisan given the history of how legislative chambers have handled these
8 cases. Conversely, however, if pre-certification judicial review risks delaying the certification of
9 the election until after the date when the winner of the legislative seat is to be sworn in, then the
10 pre-certification judicial review could be viewed as interfering with the legislative chamber's
11 ultimate prerogative to be the final judge of the elections of its own members. If the legislative
12 chamber ordered provisional seating of a candidate, notwithstanding the lack of a certification of
13 the election as a result of judicial delay, the court would be powerless to supersede that legislative
14 decree (unless it was a federal court ordering a state legislative chamber to maintain compliance
15 with norms of federal constitutional law).

16 Presidential elections also have their own unique considerations and these are addressed in
17 Part III.

18 Likewise, gubernatorial elections are distinctive insofar as they determine the chief
19 executive of a state. The office of chief executive cannot remain vacant while a dispute over
20 counting ballots remains unresolved. Consequently, if on the date for inaugurating the new
21 governor the winner of the election has not been conclusively determined, the power of the office
22 will need to be exercised one way or another in the interim. As provided in this Section, the best
23 way to handle this interim situation is to inaugurate into the office at least provisionally the
24 candidate who holds the Certificate of Election, leaving to a subsequent contest the possibility of
25 overturning that result by ousting the newly inaugurated candidate and holding a second
26 inauguration ceremony to induct into office the freshly redetermined winner. History shows that
27 permitting holdovers while election disputes are pending is particularly problematic in the context
28 of gubernatorial elections, as is letting the legislature make an alternative temporary appointment.
29 In other words, gubernatorial elections are one type for which the principle articulated in this
30 Section has special force. (In those states with a separately elected Lieutenant Governor, permitting
31 the newly elected Lieutenant Governor to serve as Acting Governor until the gubernatorial election

is resolved is also potentially subject to partisan manipulation; whichever party indisputably won the Lieutenant Governor election has an incentive to delay the resolution of the gubernatorial election in order to have its Lieutenant Governor, as Acting Governor, control the power of the gubernatorial office for as long as possible.)

## REPORTERS' NOTE

A key reason for prompt certification is to preclude using election contests for strategic partisanship, a phenomenon with some historical basis. The last quarter of the 19th century was a period of hyper-partisan polarization in American politics, similar in this respect to the increasing polarization of contemporary American politics. See NOLAN MCCARTY, KEITH T. POOLE & HOWARD ROSENTHAL, POLARIZED AMERICA: THE DANCE OF IDEOLOGY AND UNEQUAL RICHES (2006); for a particularly vivid illustration of this point, see this graph derived from the book: https://www.nationalaffairs.com/storage/app/media/imglib/20100918_Nivolachartlarge2.gif. Disputed elections were especially vehement during that so-called Gilded Age era, and one aspect of that vehemence was the repeated use of the tactic to keep an office vacant for as long as possible while the dispute remained pending if a particular political party was in a position to benefit from that vacancy. One way in which a party could benefit from a vacancy was if the existing rules for filling the vacancy temporarily favored that party rather than the opposing party. For example, some states had rules providing that, in the event that in a gubernatorial election no candidate had been certified the winner by the date upon which the winner was to take office, then the previously incumbent governor was entitled to "hold over" until certification of a winning candidate. In a hyper-partisan environment, this kind of "hold over" rule proved to be a recipe for disaster: whichever political party had the advantage of incumbency had the incentive to dispute a close election if its candidate was trailing and then to use that dispute to prevent certification, so that the incumbent could hold over indefinitely. In Connecticut (1890) and Rhode Island (1893), this tactic was employed successfully to enable the previous incumbent to hold over for the entirety of the new term of office for which the election was held, such that no winner of the election was ever certified, and the purpose of the election was entirely frustrated. See EDWARD B. FOLEY, BALLOT BATTLES: THE HISTORY OF DISPUTED ELECTIONS IN THE UNITED STATES 161 (2016).

In the 20th century, with declining partisan polarization, the use of this tactic was less frequent. But it did not disappear entirely. For example, in 1940, Democrats who controlled Missouri's legislature attempted to fabricate a ballot-counting dispute in order to delay certification of the gubernatorial election, thereby permitting Democrats to retain control over the governorship based on their advantage of incumbency. The Missouri Supreme Court, however, properly refused to permit this partisan "governor steal" by requiring certification of the apparent Republican victory, to be followed by a subsequent contest of the certified result if sufficient evidence materialized. It never did. See id. at 229.

Given the current resurgence of hyper-partisan polarization, it would be lamentable if a renewed use of this delaying tactic surfaced. It would be even more problematic if, contrary to the exemplary role that the Missouri Supreme Court played in 1940, courts in future cases (as occurred in the 19th century) facilitated the partisan delaying tactics that enabled such gubernatorial power-grabs. Whether such judicial facilitation is unwitting or willful, the consequence is an inappropriate thwarting of the electoral process, for at least as long as the certification of the election's winner is delayed in order to permit the incumbent party to hold on to the power of the office without an electoral mandate. Consequently, § 206 has been structured to avoid this frustration of the electoral process.

## SUBPART B. SPECIFIC PROCEDURES

**Introductory Note:** Every election, even if the result is not close or disputed, will involve a set of procedures after the ballots have been cast in order to yield a certified winner of the election, who is entitled to take office based upon that certification. These procedures include, first, the initial counting of the ballots, which for ballots cast on Election Day usually occurs at the polling places where those ballots were cast. For mailed-in ballots, initial counting often occurs at the local election authority's headquarters, while ballots cast as part of in-person early voting may be processed at the early-vote site but not actually tallied until the polls have closed on Election Day and then at the local board's headquarters along with the mailed-in ballots. (See §§ 106, 110.) The counting of ballots that occurs at polling places needs to be reported to the local election board's headquarters, to be compiled with the counting that occurs at the headquarters itself, and together these will be reported as the *preliminary returns* of the election for that particular locality. For a statewide election, the preliminary returns from all localities must be compiled into a single statewide preliminary return, which is publicly disseminated by the state's chief elections officer. The preliminary return of an election is often said to be complete when, either on Election Night or the next morning, it is said to include the local returns from 100 percent of precincts.

Even when a preliminary return is complete, it will not include all ballots that ultimately may be counted before certification of the election. First, the preliminary return will not include provisional ballots cast on Election Day, the eligibility of which will be determined subsequently and, for those ballots determined eligible, will be added to the count before certification. Second, the preliminary return will not include any mailed-in ballots that are entitled to arrive after Election Day (see § 109(g)); these, too, will be added to the count subsequently, before certification. Third, the preliminary return will not include any mailed-in ballots that, although they arrived before

Election Day, previously were determined to be ineligible to be counted for one reason or another; these initially disqualified ballots, however, may end up getting counted before certification, either because the voters take advantage of an opportunity to cure whatever deficiency was found or because, upon review, election officials decide that the initial determination of ineligibility was erroneous.

The process of converting the preliminary return of an election into a *certified* return, which permits the certified winner to take office, is often called the *canvassing of the return*, or simply the *canvass*. This canvassing process encompasses verifying the accuracy of the arithmetical computations made in generating a single preliminary return for the election as a whole from the subsidiary preliminary returns from each polling location. The canvassing process need not include a *recount* of any ballots, although some states either permit or require a recount to occur before completion of the canvass if the preliminary return shows the vote totals between the two leading candidates to be close enough (typically within one percent or even closer), while other states defer any recount until after completion and certification of the canvass. Part II is structured to permit a state to use either approach with respect to the relationship between a recount and the certification of the canvass.

Whether or not it includes a recount, a canvass will contain other elements necessary before the declaration of a certified winner. These additional components include evaluating the eligibility of provisional ballots and the counting of those determined to be eligible. Also included will be the processing of any absentee ballots entitled to arrive after Election Day and the counting of those absentee ballots determined to be eligible. Additionally, insofar as a state permits during the canvass the correction of errors concerning absentee ballots, including any errors committed by local election officials in the initial evaluation of their eligibility, such error-correction will yield additional ballots to be counted before certifying the results of the canvass. Once the canvass has been certified, or once a recount undertaken after certification of the canvass results in a new post-recount certification of the election, state law may permit a *judicial contest* of the certified result.

The specific Sections of Subpart B are intended to enable a state to undertake all elements of the overall process that occurs after ballots are cast in an election, which collectively yield either a final result that enables a definitive winner to take office or, instead, an official declaration that no such winner can be identified in the particular circumstances, resulting in the need to fill the vacancy by holding a new election (or through some other means provided by state law).

## § 207. Disputing the Eligibility of Uncounted Ballots

**(a) Whenever preliminary returns indicate that ballots not counted as part of those preliminary returns are sufficiently numerous that they may determine which candidate will win the election, the candidates with the potential to win depending on whether or not these uncounted ballots are counted should have an opportunity before certification of the election to present reasons for or against the counting of these ballots.**

**(b) If a candidate who has been given the opportunity provided in subsection (a) demonstrates the eligibility of a ballot to be counted, that ballot should be counted before the certification of the election, provided that:**

> **(1) in a presidential election subject to expedited proceedings pursuant to Part III, no ballot shall be counted in a way that is irreversible prior to final certification, as provided in § 310(c);**
>
> **(2) in any other election, insofar as specified elsewhere in state law, election officials shall separate ballots counted after the release of preliminary returns from ballots counted beforehand, so that administrative decisions to count ballots after the release of preliminary returns may be reversed in the event that a court subsequently finds such administrative decisions to have been erroneous.**

**(c) If a candidate who has been given the opportunity provided in subsection (a) demonstrates that an uncounted ballot is ineligible to be counted, that ballot should be left uncounted and excluded from the certified result of the election.**

**(d) If an uncounted ballot has been cast by a registered voter who is qualified to participate in the election, the ballot shall be counted and included in the certified result that identifies the winner, unless:**

> **(1) the voter failed to provide a signature accompanying the ballot, when a purpose of the signature is to indicate the voter's honest belief of having lawful right to participate in the election;**
>
> **(2) the voter failed to provide a form of identification insofar as required by state law;**
>
> **(3) the voter cast another ballot in the same election, which already has been counted; or**

**(4) the ballot failed to comply with specific rules, when applicable, governing absentee ballots in § 110, or provisional ballots in § 208.**

**(e) For any ballot that will remain uncounted pursuant to subsection (d)(1) or (d)(2), the voter should have an opportunity to rectify the deficiency, so that the ballot becomes eligible to be counted, as long as this opportunity does not delay certification of the election.**

**(f) If an uncounted ballot has been cast by an unregistered voter who otherwise is qualified to participate in the election, and if the voter attempted to register but was prevented from doing so because of an error committed by a government official (or third party acting under contract or otherwise on behalf of the government), then the voter shall be treated as registered and the ballot counted, unless there is a separate valid reason for not counting the ballot apart from the issue of the voter's registration.**

**(g) If before certification of an election a candidate has been provided the opportunity to present reasons for or against counting an uncounted ballot pursuant to subsection (a), but has not exercised this opportunity, then after certification the candidate should not be permitted to contest the certification based on the ultimate disposition of the ballot (either counted or not) prior to certification.**

**Comment:**

*a. The growing significance of overtime ballots.* An increasingly significant element of the electoral process is the phenomenon of valid ballots entitled to be counted under eligibility rules specified by state law in advance of the election that are not included within the preliminary returns publicly reported by local and statewide election officials on Election Night. These uncounted-yet-potentially-eligible ballots fall into one of several subcategories. First, in some (but not all) states, an absentee ballot is entitled to be counted if the appropriate election officials receive it within a specified number of days *after* Election Day as long as it was postmarked before (or in some instances on) Election Day (and so long as it is otherwise eligible to be counted). These "late-arriving" (but permissibly so) absentee ballots cannot, of course, be included within preliminary returns announced on Election Night but instead must be added to the count before the results of the election are officially certified. Experience has shown that in tight races enough of these late-arriving absentee ballots occasionally exist to alter the outcome of the election, meaning that the candidate ahead in the preliminary returns is not the candidate with the most votes at the time of official certification after all the valid ballots in the election have been counted.

Obviously, it would be inappropriate—and indeed contrary to state law—to certify the results of the election without inclusion of these late-arriving absentee ballots and, instead, require a post-certification judicial contest to challenge the exclusion of these valid ballots from the certified result. That kind of reliance on a judicial contest would be a misuse of its intended purpose, which is confined to efforts to overturn a presumptively correct certification. But a certification would not be presumptively correct if it excluded an entire category of perfectly valid ballots. Accordingly, an administrative procedure is required that counts late-arriving absentee ballots before certification of the election's results.

Second, in each state a portion of absentee ballots returned by voters to election officials are rejected for various types of errors, including lack of signature or identification information. (The percentage of absentee ballots rejected for these kinds of mistakes varies considerably among the states.) By the time the polls close on Election Day, a pile of rejected absentee ballots has accumulated. In theory, these rejected absentee ballots could be left untouched throughout the administrative processes undertaken in order to complete a certification of the election. After all, they already have been evaluated administratively and ruled ineligible to be counted. Any candidate wishing to challenge that administrative ruling could be required to do so in a post-certification judicial contest of the election's result. Indeed, in the past, many states have promulgated their electoral procedures with the expectation that this approach would be the one to follow.

The pressure of a high-stakes disputed election, however, demonstrates that it is unrealistic to expect candidates to wait until a post-certification judicial contest to challenge the rejection of absentee ballots that the candidates believe to be the result of erroneous administrative rulings. If the absentee ballots should have been counted, but mistakenly were not, adversely affected candidates will want to get the mistake rectified and those ballots properly counted before, not after, certification—especially if there are enough of these ballots potentially to make a difference as to which candidate is certified the winner. If the stakes are high enough, candidates in this situation will do all that they can to get the rejected ballots counted pre-certification, including mounting a public-relations campaign over how undemocratic the disenfranchisement of these mistreated voters is, as well as litigation in state or federal court (or both) to force an administrative reconsideration of the rejected ballots before the results of the election are certified. Even if a state's statutory rules are clear that the rejection of absentee ballots should not be reconsidered

until a post-certification judicial contest, the intense pressure to provide a pre-certification remedy to undo mistaken rejections is likely to tempt either courts or administrative officials to "bend" the existing procedural provisions in violation of the principle set forth in § 201 and invent some sort of ad hoc mechanism to get these erroneously rejected ballots counted before a winner is declared. Given this temptation, it is better to design the administrative procedures in advance to require a pre-certification review of all rejected absentee ballots to verify that the rejection was correct and, if not, rectify the mistake.

Third, as a consequence of the Help America Vote Act of 2002 (HAVA), all states are required to offer a provisional ballot to any person who shows up at a polling place claiming to be an eligible voter even if the poll workers have no record of the person's eligibility. All of these provisional ballots must be reviewed by election officials and, if the voters who cast them are found to have been eligible after all, must be counted—and thus included in the final count of all valid votes—before the certification of the election. States vary widely in how many provisional ballots they have in each election (as a percentage of total ballots cast in the election) and also in how many provisional ballots end up being counted (as a percentage of provisional ballots cast, or total ballots cast). The nation's experience with provisional ballots since the enactment of HAVA shows that close races ultimately can turn on the provisional ballots counted after Election Day, as part of the certification process.

Collectively, these three subcategories of uncounted-but-potentially-eligible ballots have increased dramatically in the last decade as a portion of all ballots cast in an election. This dramatic increase has made the administrative procedures for handling these ballots particularly important. The administrative examination of these ballots, to determine whether or not they are eligible to be counted, occurs in a context when everyone, including the candidates and election officials, already knows the preliminary vote totals for each of the competing candidates. Thus, everyone knows how many more votes a trailing candidate needs to overtake a leading candidate. Unlike the counting of ballots on Election Day, when no one yet knows what the preliminary returns will show, candidates can make strategic judgments about how hard to press for either the counting or the rejection of these "overtime" ballots given where they stand in the preliminary returns. Accordingly, the procedures for the administrative review must be well-structured to withstand the strategic pressures that the competing candidates routinely will put on this review in their efforts to win.

*b. Preserving the reversibility of interim decisions in vote-counting disputes.* As provided in § 308, and explained in the Comment thereto, in the context of a disputed presidential election it is essential that ballots not counted as part of the preliminary returns, but found eligible to be counted afterwards, be handled administratively in such a way that they may be uncounted if a court subsequently finds that the determination of their eligibility was erroneous and must be reversed. Accordingly, the principle articulated in subsection (b) of this Section, which calls for the pre-certification counting of any ballot eligible to be counted, contains a proviso that the specific reversibility requirement of § 310(c) governs in any presidential election in which the expedited proceedings of Part III apply. At the same time, subsection (b)(2) leaves it to the discretion of state law whether or not to adopt a similar reversibility requirement for other types of elections. In the absence of such a reversibility requirement, however, the default position set forth in subsection (b) is that all ballots determined to be eligible should be counted before certification of the election.

*c. Absentee and provisional ballots.* Some principles for the counting of previously uncounted ballots apply to both absentee and provisional ballots, and those principles are specified in subsection (d)(1)-(3). As specified in subsection (d)(4), however, distinctive rules for absentee and provisional ballots are set forth in § 110 and § 208, respectively.

**REPORTERS' NOTE**

*a. Coleman v. Franken and other instructive cases.* Coleman v. Franken, 767 N.W.2d 453 (Minn. 2009), involving the 2008 U.S. Senate election in Minnesota, most prominently illustrates the pressure to count wrongly rejected absentee ballots prior to certification of the results, without waiting for a subsequent judicial contest of the certification, even if pre-certification review of these ballots requires procedural innovations beyond what the state's statutes plainly provide. See EDWARD B. FOLEY, BALLOT BATTLES: THE HISTORY OF DISPUTED ELECTIONS IN THE UNITED STATES, ch. 12 (2016). The Washington gubernatorial election of 2004, another prominent race, specifically shows the significance of giving voters the opportunity to correct clerical errors on the envelopes for absentee and provisional ballots. See id. at 309-311. Other less high-profile elections confirm the importance of well-developed pre-certification procedures for the review of potentially eligible uncounted ballots, including provisional ballots. See, e.g., Hunter v. Hamilton County Board of Elections, 635 F.3d 219 (6th Cir. 2011); Ohio ex rel. Skaggs v. Brunner, 549 F.3d 468 (6th Cir. 2008).

Data demonstrates the increasing significance of ballots added to the count during the canvass, after the reporting of preliminary returns. See Edward B. Foley, *A Big Blue Shift: Measuring an Asymmetrically Increasing Margin of Litigation*, 28 JOURNAL OF LAW AND POLITICS

501 (2013); see also Edward B. Foley & Charles Stewart, *Explaining the Blue Shift in Election Canvassing* (2015), available on SSRN, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2653456. Not surprisingly, these ballots were the focus of intense attention in Virginia's November 2017 election, once it became apparent that control of the state legislature could turn on a few exceptionally close races. See Michael Martz & Patrick Wilson, *Monday vote count will set process in motion to decide control of the Virginia House of Delegates*, RICHMOND TIMES-DISPATCH, Nov. 11, 2017, http://www.richmond.com/news/virginia/government-politics/general-assembly/monday-vote-count-will-set-process-in-motion-to-decide/article_5eae6635-1c49-53cf-baee-6ce24cd2b173.html. In the end, because of a tie vote in the pivotal district, the outcome depended on a "coin toss." Jim Morrison, Fenit Nirappil & Gregory S. Schneider, *Virginia court tosses one-vote victory that briefly ended GOP majority in [Virginia] House*, WASH. POST, Dec. 21, 2017, https://www.washingtonpost.com/local/virginia-politics/court-tosses-out-one-vote-victory-in-recount-that-had-briefly-ended-a-republican-majority-in-virginia/2017/12/20/ed979a70-e5b9-11e7-a65d-1ac0fd7f097e_story.html?utm_term=.88c78367dc54.

*b. The idea of electoral "estoppel."* It has been a longstanding principle of election law that ballots that could have been challenged as ineligible before they were counted cannot subsequently be challenged as ineligible after they have been counted. See Bell v. Gannaway, 227 N.W.2d 797 (Minn. 1975). This principle has special force whenever the since-counted, but now-disputed, ballots have been commingled with all other counted ballots, and hence these ballots cannot physically be uncounted even if they were ruled ineligible. See Steven F. Huefner, *Remedying Election Wrongs*, 44 HARV. J. ON LEGIS. 265 (2007). The challenge of finding a suitable remedy for ineligible ballots that already have been irretrievably counted is exceptionally problematic whether or not the candidates in the election did have an opportunity to question the ballot's eligibility before it was counted. Accordingly, the equities of the situation dictate that, whenever such an opportunity did exist, there was an obligation on the part of the candidate to take advantage of that opportunity and thus effectively to be "estopped" from complaining about the ballot's ineligibility if the candidate failed to do so. Without explicitly labeling this principle as a form of "estoppel," the courts invoked this concept in the post-certification judicial contests of both the Washington 2004 gubernatorial election and the Minnesota 2008 U.S. Senate election. See BALLOT BATTLES, ch. 12; Coleman v. Franken, 767 N.W.2d 453, 468 (Minn. 2009) (citing Bell v. Gannaway for the proposition that "because the contestant did not challenge the ballot envelope before it was opened and the ballot inside deposited in the ballot box with other ballots," it necessarily follows that "contestant's challenge to this absentee ballot came too late").

### § 208. Determining the Eligibility of Provisional Ballots

**Insofar as provisional ballots, as required under the Help America Vote Act of 2002, remain an element of the election processes of a state, their inherently provisional status makes them an inviting focus of litigation and thus a special challenge to the resolution of**

**postelection disputes, which requires specific procedures in addition to those set forth in § 207:**

**(a) Before certification of an election, the state's election officials shall conduct proceedings to determine the eligibility of all provisional ballots cast in the election.**

**(b) Prior to any proceeding conducted pursuant to subsection (a), each voter required to cast a provisional ballot shall be informed of (i) the reason or reasons why the voter was required to cast a provisional ballot and (ii) the time, place, and method of the voter's opportunity to present evidence or legal justification for why the provisional ballot must be counted.**

**(c) Prior to any proceeding conducted pursuant to subsection (a), a candidate in an election for which the provisional ballots may determine the winner is entitled to receive (i) a list of the names and addresses of all voters who cast a provisional ballot in the election and (ii) notice of the time and place of the proceedings required by subsection (a).**

**(d) In any proceeding conducted pursuant to subsection (a), a candidate entitled to receive notice of the proceeding pursuant to subsection (c) may present evidence or legal justification for why a voter's provisional ballot is, or is not, eligible to be counted and may do so whether or not the voter who cast the provisional ballot also chooses to participate in the proceeding.**

**(e) In any proceeding conducted pursuant to subsection (a), any voter or candidate may be represented by counsel, and counsel may represent multiple voters or candidates.**

**(f) Prior to the conclusion of all proceedings conducted pursuant to subsection (a), the state's election officials shall publicly identify (i) the total number of provisional ballots eligible to be counted, (ii) the total number of provisional ballots ineligible to be counted, and (iii) for each category of reasons why a provisional ballot is ineligible to be counted, the number of rejected provisional ballots in that category.**

**(g) A provisional ballot is eligible to be counted if, based on all available evidence at the proceeding required by subsection (a), including an examination of the state's voter-registration database, the provisional ballot was cast by a registered voter, unless:**

**(1) the available evidence demonstrates the voter is disqualified from participating in the election by reason of age, alienage, place of residence, or other specifically designated basis for disqualification;**

**(2) the provisional ballot is ineligible for the reasons specified in § 207(d)(1)-(3);**

**(3) the provisional ballot was not cast in a proper polling location for that voter except when the evidence demonstrates that poll workers (or other individuals exercising authority on behalf of the government) induced the voter to cast the ballot at the improper location, in which case the votes cast on the ballot shall count for all those, but only those, offices and issues for which the individual voter was entitled to participate; or**

**(4) the provisional ballot was cast after the regularly scheduled time for closing of the polls by a voter who was not already in line at the time, except when a valid court or administrative order has extended the polling hours and the ballot was cast within the additional time granted by the order and that order has not been reversed or vacated.**

**(h) The state's election officials shall administer the provisions of this Section, including the public proceedings required by subsection (a), in a manner that protects each provisional voter's right to a secret ballot, as required by § 202(e).**

**Comment:**

*a. The voter-protecting purpose of provisional ballots.* The Help America Vote Act of 2002 (HAVA), adopted in response to the difficulties of the 2000 presidential election, requires all states to offer provisional ballots to all individuals who seek to vote at the polls and assert their belief that they are eligible to participate in the election. This requirement, although it has produced unintended consequences that create special challenges in exceptionally close elections, was a specific response to an especially disturbing feature of what happened in Florida during the 2000 election: the removal, or purging, of eligible voters from the state's voter-registration rolls using a list of names known to be inappropriate to the task of purging the registration rolls. The consequence of this pernicious purge was that some number of eligible voters went to the polls, only to be turned away without any opportunity to cast a ballot. These eligible voters, in short, were completely and wrongfully disenfranchised. After the understandable outrage over this subversion of the electoral process, Congress adopted the provisional-voting sections of HAVA to make sure that no such disenfranchisement ever occurs again. Henceforth, all voters who believe themselves to be properly registered and seek to vote must receive a provisional ballot, and if it

turns out upon subsequent investigation that they are correct, then their provisional ballot must be counted and included along with all other counted ballots in the official tally used to certify the outcome of the election. (Although some scholars have proposed that it may be possible to achieve the voter-protection objectives of HAVA's provisional voting requirements through an alternative set of administrative procedures that occur entirely before ballots are cast, rather than requiring contentious post-voting procedures as provisional balloting inevitably does, it is unlikely that Congress will repeal HAVA's provisional voting requirements in the foreseeable future, and this Section is drafted accordingly.)

In order to effectuate the disenfranchisement-preventing purposes of HAVA's provisional voting requirements, each state must establish a procedure whereby provisional voters are able to offer evidence and reasons in support of why they believe themselves to be eligible and registered. To make that procedure meaningful, provisional voters must know the reason or reasons why they are being required to cast a provisional rather than regular ballot. Is it because the poll workers do not believe the voter to be registered? Or because the voter did not provide a required form of voter identification? Or some other reason? The provisional voter then must be able to respond to this explanation by offering additional information or justification for why the provisional ballot should count rather than be rejected. If it is simply a matter of supplying missing identification, the voter may be able to supply it in time for the ballot to be counted—and must be given an opportunity to do so. Likewise, if the poll workers were mistaken in thinking that the voter was not properly registered, the voter may be able to clear up the confusion by showing a voter-registration card or another official notice of registration status, or by having local election officials recheck the state's voter-registration database and other available records. As experience in recent years has shown, this kind of rechecking can determine that the voter, rather than the poll workers, was in fact correct.

The administrative proceedings required by subsection (a), in which a provisional voter is able to offer evidence or reasons to support the voter's belief that the provisional ballot is eligible to be counted, need not be elaborate and may be informal. Indeed, for sake of administrative efficiency and voter convenience, the proceedings may be internet-based (or telephone-based), permitting voters to submit information and explanation by email or through a website portal. In many instances, there may be no need for a voter to appear in person. But whether or not the proceeding involves the opportunity for face-to-face communication between the provisional voter

and the administrative officials who will make a determination of the provisional ballot's eligibility, each provisional voter must receive adequate notice of the time, place, and method by which the provisional voter is entitled to present evidence and reasons to support the counting of the ballot.

*b. The public interest in the correct disposition of provisional ballots.* While the provisional voters themselves obviously have the most direct interest in having their ballots ruled eligible to be counted, the electorate as a whole has an interest in ascertaining that no voter has been improperly disenfranchised. If provisional ballots are rejected when they should be counted, the harm is not only to the provisional voters themselves, but also to the integrity of the electoral process as a whole. The candidate who received the most votes from eligible voters may not be declared the winner—improperly so—if election officials mistakenly have rejected provisional ballots and these mistakes are not rectified. Consequently, the transparency essential to assure that the electoral process operates according to the rules and consistent with democratic legitimacy requires that the public know how many provisional ballots are ruled ineligible and for what reasons.

Like other members of the public, the candidates themselves are entitled to know this information. Moreover, the candidates have an obvious incentive to have eligible provisional ballots counted and, conversely, ineligible provisional ballots rejected—depending, of course, on whether the candidates happen to be ahead or behind in the count based on preliminary returns. As the experience of the last decade amply demonstrates, candidates will file lawsuits to obtain the names and addresses of provisional voters in order to conduct their own investigations concerning whether or not these provisional ballots are eligible to be counted. Rather than relying on such litigation, which after much commotion invariably results in court orders providing the candidates with this information because of the imperative of transparency, it would be far better for states to specify by statute an orderly procedure by which candidates may obtain this information.

After receiving the names and addresses of provisional voters, candidates are free to contact those voters in an effort to assist the voters to provide evidence and reasons why their provisional ballots should be counted rather than rejected. Obviously, candidates or their representatives are not entitled to harass provisional voters who prefer to be left alone. But if and when provisional voters voluntarily agree to let candidates assist them in an effort to get their provisional ballots counted, candidates should be permitted to provide this assistance. To this end,

like the voters they are endeavoring to assist, the candidates should receive notice of the time, place, and method by which such evidence and reasons may be presented to election officials on behalf of the provisional voters.

*c. Transparency and privacy in the context of provisional ballots.* In enacting HAVA, Congress understandably was concerned that the secrecy of a provisional voter's ballot be maintained. Accordingly, subsection (h) embraces this sound principle. The applicable language of HAVA, however, arguably extends beyond the secrecy of the votes cast on the provisional ballot itself, to require nondisclosure (except to provisional voters themselves) of the reasons why a voter was required to vote a provisional rather than a regular ballot or why a provisional ballot is ruled ineligible to be counted. The HAVA language on this point is:

> The appropriate State or local official shall establish and maintain reasonable procedures necessary to protect the security, confidentiality, and integrity of personal information collected, stored, or otherwise used by the free access system established [to permit provisional voters to learn whether their ballots were counted and, if not, why not]. Access to information about an individual provisional ballot shall be restricted to the individual who cast the ballot.

52 U.S.C. § 21082(a).

This language could be interpreted to prevent states, without a provisional voter's consent, from sharing with candidates the reasons why the poll workers believed the provisional voter to be ineligible to cast a regular ballot or, subsequently, why election officials believe the provisional ballot is ineligible to be counted. (To be clear, it is also possible to interpret the same language in HAVA to mean only that no government official may disclose the contents of the votes cast on the provisional ballot itself—in other words, which candidates the provisional voter voted for—but on this reading HAVA does *not* prevent disclosure to interested candidates why a particular provisional voter's ballot was rejected. This Section does not take a position on which of these is the better interpretation of this HAVA provision. Instead, this Section has been written so that it is consistent with whichever interpretation of HAVA ultimately may prevail.) Accordingly, subsection (c) does not give candidates the right to receive, without a provisional voter's consent, this information concerning the reason for the provisional ballot's rejection. But the language in HAVA does not preclude candidates from receiving the names and addresses of provisional voters. A provisional voter's name and address do not constitute "information about [the voter's]

provisional ballot" itself. A voter's name and address is routine public information maintained as part of the state's voter-registration lists. Because the aforementioned imperative of transparency requires that candidates learn the identity of the provisional voters, it is necessary to construe this language in HAVA as not precluding candidates from receiving provisional voters' names and addresses. Likewise, because maintaining the integrity of the electoral process requires the public to know in the aggregate how many provisional ballots are rejected and why, but does not require the public to know for each individual provisional voter the reason why that voter's ballot was rejected, subsection (f) limits public disclosure to this aggregate data, consistent with HAVA.

*d. Out-of-precinct provisional ballots.* One policy issue on which states have sharply diverged is whether a provisional ballot should be rejected solely because it was cast at a polling location other than the one to which the voter is assigned based on residency. Some states will permit the provisional ballot to count for those offices and issues on the ballot for which the provisional voter is entitled to participate. Other states, however, will disqualify the provisional ballot entirely for being cast at the wrong polling location. Subsection (g)(3) is drafted to be consistent with whatever position a particular state law takes on this issue: insofar as another section of state law specifies that a polling place is improper given a particular voter's address, then subsection (g)(3) permits disqualification of the provisional ballot to that extent; conversely, insofar as state law permits a provisional ballot to be cast at a particular polling location, it obviously would be unlawful to reject the provisional ballot for having been cast at that location. The discretion afforded to state law in subsection (g)(3), however, is subject to one important proviso: no provisional ballot should be disqualified for being cast at an improper polling place if government officers (including poll workers) were responsible for the provisional ballot being cast at that location. An eligible voter who casts an otherwise valid ballot should not be disenfranchised solely because the government itself wrongly induced the voter to cast the ballot at the incorrect location.

**Illustrations:**

1. Alice lives at 123 *South* Elm Street in Centerville. On Election Day, she goes to the correct polling place for her address. A poll worker there mistakenly instructs Alice to go to a different polling place, the one for a person who resides at 123 *North* Elm Street. When Alice goes to the second polling place, as instructed, the poll workers there cannot find her in the poll book and thus give her a provisional ballot. Even if state law generally

requires a provisional ballot to be cast at the voter's correct polling location in order for any portion of that ballot to count, in this situation Alice attempted to cast her ballot at the correct polling location but was instructed not to do so by a poll worker there, who instead sent her to the incorrect location. In this situation, notwithstanding any other provision of state law, Alice's provisional ballot should count for all offices and items on the ballot for which Alice was entitled to vote.

2. Bob lives at 456 *South* Elm Street. Prior to Election Day, he received a postcard from his local election board instructing him to go to Centerville High School on Election Day. Although Bob thought this odd because in the past he had always voted at St. Agnes Church, on Election Day Bob dutifully did as instructed. But the postcard was a mistake; a worker at the board's office erroneously sent the postcard appropriate for someone living at 456 *North* Elm Street. When Bob arrived at the incorrect polling location, a poll worker noticed the error and, explaining it to Bob, told him that (as he originally thought) he was supposed to cast his ballot at St. Agnes Church. Bob told the poll worker that he did not have time to get back in his car and drive to St. Agnes Church; otherwise, he would likely be late to work. The poll worker then told Bob that he could go to St. Agnes Church after work, as the polls were open until 7 p.m. But Bob explained that he was working a 12-hour shift that day and thus would not get off work until after the polls closed. Consequently, Bob insisted on casting a provisional ballot at Centerville High School before heading to work, even though the poll worker told him he really should go to St. Agnes Church instead, because Bob thought that casting a provisional ballot was better than not casting a ballot at all. Although this situation presents a closer case than Illustration 1, the better view is that even if the state has a general rule that requires a provisional ballot to be cast at the voter's proper polling location to be counted, Bob's provisional ballot should count for all offices and issues for which he was entitled to vote because it was the mistaken postcard that induced Bob to go to the wrong polling place, and Bob did not have a reasonable opportunity to correct the government's mistake.

*e. Clerical errors.* As specified in subsection (g)(2) and § 207(d)(1)-(2), a provisional ballot may be disqualified because the voter failed to provide a signature or a required form of identification. But apart from these defects that concern the validation of the voter's identity, no provisional ballot should be rejected solely because the voter committed a clerical error while

completing a form on the secrecy envelope in which the voter's provisional ballot is placed. Provisional voting should not be a bureaucratic trap that disenfranchises eligible voters. If election officials are able to determine that the provisional voter is eligible and registered—and therefore would have been able to cast a regular ballot were it not for some uncertainty about this at the polling place—there is no good reason to invalidate the ballot, and thereby disenfranchise the voter, solely because of an immaterial clerical error that occurred only because of the polling-place confusion in the first place. The clerical error, by definition, is immaterial when election officials are able to verify the voter's eligibility to participate in the election. It is antithetical to the basic values of a democracy to disenfranchise an admittedly eligible voter just because the voter made an inconsequential clerical mistake.

**REPORTERS' NOTE**

*a. The potential pitfalls of provisional ballots despite their voter-protecting purpose.* Although provisional ballots provide a safety-value mechanism to protect eligible and registered voters from administrative errors that otherwise would wrongfully disenfranchise these voters, provisional ballots by their very nature offer litigators an obvious target for fighting over the outcome of a close election. Scholars have proposed that, by redesigning administrative procedures for verifying a voter's eligibility and registration status in advance of Election Day, it may be possible to offer voters the essential safety-value benefits of provisional ballots while avoiding their litigation-inducing drawbacks. See The Century Foundation, Balancing Access And Integrity (2006), https://tcf.org/assets/downloads/tcf-baicomplete.pdf. Provisional ballots have also been controversial for other reasons. Some voting-rights advocates have characterized them as "placebo ballots" on the ground that they induce voters into thinking that their ballots will count when, in many instances, the provisional ballots instead will be rejected. See Edward B. Foley, *Uncertain Insurance: The Ambiguities and Complexities of Provisional Voting,* in Voting In America: American Voting Systems In Flux: Debacles, Dangers, And Brave New Designs (Morgan E. Felchner ed., 2008).

Moreover, because provisional voting is more complicated than conventional voting—with its various rules concerning the completion of provisional ballot envelopes, the separation of provisional and regular ballots, and so forth—provisional ballots have proven to be a particular challenge for poll-worker training and the administration of polls on Election Day. Given the sharply different rates at which provisional ballots are cast in demographically similar localities, there is reason to fear that poll workers in some places are failing to give voters provisional ballots in situations where voters are entitled to receive them. See generally Provisional Ballots, MIT Election Data Science Lab, available at https://electionlab.mit.edu/research/provisional-ballots; Edward B. Foley, *The Promise and Problems of Provisional Voting*, 73 Geo. Wash. L. Rev. 1193 (2005).

From a voter's perspective, of course, it would always be preferable to cast a regular ballot, which will be counted on Election Day without any question as to its validity, rather than a provisional ballot, which necessarily will be subjected to further scrutiny and will need to be validated based on further information in order to be counted. Nonetheless, from the voter's perspective, it is also always preferable to be given a provisional ballot, which at least has the chance to be counted, than to be denied the opportunity to cast a ballot altogether. Given this fundamental goal of protecting voters from wrongful disenfranchisement, this Section presumes that provisional voting will remain a feature of American elections and thus should be administered according to its essential purpose insofar as feasible.

*c. Transparency and privacy in the context of provisional ballots.* In the dispute over Washington's 2004 gubernatorial election, the Democrats went to state court in order to obtain the names of 929 voters whose provisional ballots were subject to disqualification for "questioned signatures." Washington State Democratic Central Committee v. King County Records, http://moritzlaw.osu.edu/electionlaw/docs/WSDCC/WSDCCorder2.pdf. Viewing the names as a matter of public record under state law, the trial court explained that its decision was "guided by" the fundamental "democratic" principle of "the public's right to an open and transparent process." Id. at 2. The court considered the government's contention that "the federal Help America Vote Act (HAVA) somehow prevented disclosure." Id. at 3. But the court concluded that the government's position rested on a misreading of HAVA: "When read in context and together with other state and federal election statutes, it is clear that HAVA only precludes disclosure of *for whom* (or for what) the provisional voter voted, not whether the ballot had been counted or the identity of that provisional voter." Id. (emphasis in original).

*d. Out-of-precinct provisional ballots.* The Sixth Circuit has concluded that it would be unconstitutional to disqualify a provisional ballot on the ground that it was cast in the incorrect *precinct* if the provisional voter went to the correct polling *location* (in a situation where more than one *precinct* shared the same polling *location* on Election Day). NEOCH v. Husted, 696 F.3d 580 (6th Cir. 2012). But the Sixth Circuit has also held that it would not be unconstitutional to disqualify a provisional ballot if the voter cast that ballot at the wrong polling location. SEIU v. Husted, 698 F.3d 341 (6th Cir. 2012). Without taking a position on the constitutional question, this Section provides as a matter of sound policy concerning election administration that a provisional ballot should not be disqualified for being cast at the wrong polling location if, but only if, the voter can demonstrate that the government was responsible for the ballot being cast at the wrong location. The example in Illustration 1 is drawn from the facts involving a particular provisional voter whose ballot was pivotal in a disputed 2012 election for a seat in Ohio's general assembly. See Edward B. Foley, Ballot Battles: The History of Disputed Elections in the United States 1-2 (2016).

The Sixth Circuit has also determined that, although it would be unconstitutional to disqualify an *absentee* ballot because of immaterial clerical errors that the voter made on the envelope in which the ballot was transmitted, it would not be similarly unconstitutional to disqualify a *provisional* ballot for a similar clerical error. NEOCH v. Husted, 837 F.3d 612 (6th

1 Cir. 2016). Again, without taking a position on the constitutional question, this Section provides
2 as a matter of policy that it would be inappropriate to disqualify a provisional ballot solely because
3 of an immaterial clerical error made by the voter when filling out the form on the envelope used
4 to transmit the provisional ballot, given that the immateriality of the clerical error (by definition)
5 in no way prevents the government from ascertaining that the voter was eligible and registered to
6 participate in the election and that there is no other reason, apart from the immaterial clerical error
7 itself, to disenfranchise the voter in this election. This Section, to be clear, does nothing to prevent
8 the government from requiring that the voter be successfully registered in order for the provisional
9 ballot to count, and therefore if a would-be voter makes a clerical error when attempting to
10 register—and if that clerical error prevents the voter from being successfully registered under state
11 law—then a provisional ballot in that instance would not be eligible for counting. See Florida
12 NAACP v. Browning, 522 F.3d 1153 (11th Cir. 2008). But, as provided in § 207(f), if the
13 government itself is responsible for the error that prevented a voter from being registered, when
14 the voter did all that was possible in an effort to register, then the voter shall be deemed registered
15 and consequently the provisional ballot must count.

16 **§ 209. Verification of the Returns**

17 **(a) Before certification of the election, the officials responsible for compiling all the**
18 **returns into a single official result shall verify the accuracy of all mathematical calculations**
19 **necessary to produce the total number of votes received by each candidate in the election.**

20 **(b) As part of the verification required by this Section, the officials shall compare the**
21 **number of ballots cast in person at each polling location with the number of voters who**
22 **signed the poll book at that location and received authorization to cast a ballot; and if the**
23 **number of ballots cast in person exceeds the number of poll-book signatures, the officials**
24 **shall determine whether clear and convincing evidence establishes that the excess number of**
25 **ballots reflects:**

26 **(1) a deliberate attempt to inflate an identified candidate's total number of**
27 **votes, in which case the officials shall deduct the excess number of ballots from that**
28 **candidate's total number of votes, or**

29 **(2) an administrative error in which, after duplicate ballots were made, both**
30 **the duplicates and corresponding original ballots were counted, in which case the**
31 **officials shall deduct the duplicate ballots from vote totals of the candidates for whom**
32 **those duplicate ballots were cast,**

**but except for the specific circumstances provided in subsections (b)(1) and (b)(2) no adjustment to the vote totals shall be made because of the numerical discrepancy between poll-book signatures and ballots cast.**

**(c) As part of the verification required by this Section, the officials shall conduct an audit of the returns, including a recount of randomly selected precincts, according to statistically sound principles.**

**Comment:**

*a. Terminology and its relevance.* In many states, the process of verifying preliminary returns in order to produce a certified result of the election is called the canvass. Part III also uses this term as one element of the expedited procedures for resolution of a disputed presidential election. This Section, however, avoids using the term canvass and instead is drafted specifically in terms of conduct undertaken prior to certification to verify the accuracy of the returns. The reason it is drafted this way is to avoid any confusion, depending upon how different states use the term "canvass" and the particular procedures they include within the canvassing process. For example, some states will conduct recounts prior to the conclusion of the canvass, whereas other states will complete their canvass before conducting any recounts. Part III necessitates a specific choice in this regard with respect to presidential elections for the reasons stated therein. Otherwise, however, states should have the flexibility to organize the relationship of their canvass, recounts, auditing, and other verification procedures as they think best. This Section is drafted to facilitate that flexibility.

*b. Reconciliation.* Most states have a process, often called reconciliation, whereby election officials check the number of ballots cast in each polling place with the number of voters who signed the poll book as a prerequisite for receiving an authorization to vote. In some states, this reconciliation process compares three different numbers from each polling place on Election Day: (1) ballots cast; (2) poll-book signatures on Election Day at the polling place; and (3) authorization-to-vote "tickets" issued. Historically, some states used a procedure called "random withdrawal" if reconciliation determined that there were more ballots cast than voters authorized to cast them. Under random withdrawal, election officials would randomly pull ballots out of the ballot box used at the particular polling location until the number of ballots left in the box was equal to the number of voters authorized to cast them.

Random withdrawal, however, has fallen on disfavor as a procedure that, more often than not, will decrease rather than increase the degree to which the number of ballots counted accurately corresponds to voting preferences of the number of eligible voters who cast them. The reason is that, all else being equal, a discrepancy discovered during reconciliation between the number of ballots cast and the number of voters who either signed the poll book or received an authorization-to-vote ticket is more likely to be caused by an administrative error that resulted in the voter's failure to sign the poll book or to receive the ticket. In other words, even in the absence of perfect reconciliation, each ballot cast is more likely to be from an eligible voter than to be some sort of ineligible ballot; using the random-withdrawal procedure to remove that ballot from the count is thus more likely to disenfranchise an eligible voter than to protect the integrity of the election from an ineligible ballot. Consequently, subsection (b) necessarily precludes the use of "random withdrawal" and specifies that no adjustment to the vote count should be made in the aftermath of reconciliation unless either of two conditions is met. First, if there is additional evidence—apart from the numerical discrepancy itself—that the extra ballots are the product of an intentional effort to manipulate the result of the election by the casting of ineligible ballots, then the proper remedy is a deduction of votes from the candidate on whose behalf this intentional wrong was committed (the amount of the deduction equaling the number of ineligible extra ballots added). Second, on rare occasion an administrative mistake may be made while using an authorized procedure to duplicate ballots that the voting machines cannot read (if, for example, the ballot is torn or otherwise mutilated). When such duplication occurs, obviously only the duplicate is supposed to count, not both the duplicate and the original. Occasionally, however, administrative error can cause both the duplicate and the original to end up being counted. If the process of reconciliation shows that this kind of error occurred, then the proper remedy again is a deduction of the mistaken double-counting from the candidate that benefited from it.

*c. Audits.* An audit is different from a recount. An audit should occur in every election, no matter how big the apparent margin of victory based on the preliminary returns. An audit consists of reviewing a randomly selected sample of ballots from the election, to determine that they were counted properly. A well-designed audit, which accords with sound statistical principles, can provide confidence that the vote totals in the election are accurate without the need to conduct a recount of all ballots. Conversely, if an audit exposes a problem, the number of randomly sampled ballots can be increased in order to ascertain whether or not the problem is one that threatens the

accuracy of the determination of which candidate is the election's winner. In an extreme case, when problems exposed by an audit were severe, the audit would need to turn into a full recount of all ballots in the election in order to provide the requisite confidence in the accuracy of the result (or, as necessary, to alter the result based on the findings of the audit-turned-recount). In those circumstances when the audit exposes no such problem, election officials ordinarily would be able to complete the audit prior to the deadline for certifying the results of the election; when, however, the audit reveals the necessity of a full recount, then a state—depending on how it chooses to structure the relationship between certification and a recount—either could delay certification until completion of the recount or issue a preliminary certification that is subject to revision upon completion of the recount.

## REPORTERS' NOTE

*a. Random withdrawal.* In Ollmann v. Kowalewski, 300 N.W. 183 (Wis. 1941), the Wisconsin Supreme Court invalidated the use of "random withdrawal" solely because of a discrepancy in the number of ballots cast and the number of voters who had "checked in" to vote. The court explained that "before the [withdrawn] ballot could be excluded from the count some evidence should have been adduced to support an inference of its invalidity." 300 N.W. at 186. The court further observed: "It is more likely that the election clerks made a mistake in checking someone who voted, than that" either "the Kowalewski ballot was cast by one not on the registration list" or "that anyone cast two votes." Id. Because to withdraw the ballot would be to "disfranchise the voter" who cast it, the proper course would be to count the ballot as cast in the absence of any proof that the ballot itself was unlawful. See also Johnson v. Trnka, 154 N.W.2d 185 (Minn. 1967) (where two specific ballots are known to be invalid and can be removed from the count, those ballots should be excluded, rather than using random withdrawal to equalize the number of counted and valid votes).

*b. Reconciliation.* In 2010, Minnesota had a recount in its gubernatorial election, and the procedures used to reconcile the number of ballots and the number of voters at specific polling locations became a point of contention. The Republican candidate wanted the number of voter signatures in the pollbook to be used for this purpose, not the number of "authorization to vote" receipts that voters received after the verification of their registration in the pollbook. The Minnesota Supreme Court, however, rejected that petition, holding that the use of voter receipts was permissible. In re Petition regarding 2010 Gubernatorial Election, 793 N.W.2d 256 (Minn. 2010).

*c. The 2016 presidential recounts.* Reconciliation also emerged as an issue during the recounts of the 2016 presidential election sought by Green Party candidate Jill Stein. In Michigan, according to an analysis conducted by the *Detroit Free Press*, there were 782 more ballots cast than voters who cast them across 248 of Detroit's 662 precincts. See *Detroit's election woes: 782 more votes than voters*, DETROIT FREE PRESS, Dec. 18, 2016,

https://www.freep.com/story/news/local/michigan/detroit/2016/12/18/detroit-ballots-vote-recount-election-stein/95570866/. The largest discrepancy in any single precinct was 12. The recount revealed other problems with the administration of the election in Detroit, including 362 ballots that inexplicably were never counted. But none of these administrative problems were large enough to affect the outcome of the presidential race in Michigan.

*d. Mistakes in vote tabulation.* The 2011 election for a seat on the Wisconsin Supreme Court involved one of the most dramatic vote-tabulation errors in recent years. The preliminary returns on Election Night showed the Democratic challenger, Joanne Kloppenburg, ahead of the Republican incumbent, David Prosser, by 204 votes. But the Clerk of Waukesha County, Kathy Nickolaus, had failed to include some 14,000 votes from Brookfield (the county's third-largest city). When two days later during the canvassing of returns the mistake was discovered and the missing votes added, Prosser leaped ahead by over 7000 votes. Prosser's lead held up through the rest of the canvass and a subsequent recount, and Kloppenburg conceded defeat without pursuing a judicial contest of the result. See Jason Stein & Don Walker, *Kloppenburg concedes election to Prosser,* MILWAUKEE JOURNAL-SENTINEL, May 31, 2011, http://archive.jsonline.com/news/wisconsin/122872838.html/; see also RICHARD HASEN, THE VOTING WARS 1-3 (2012) (introducing the book with a hypo based on this mistake, to illustrate how the same thing could occur in a presidential election).

*e. Risk-limiting audits.* Although statistical experts have long recommended routine use of "risk-limiting audits" to verify the accuracy of vote tabulation, public awareness of the great value of this type of procedure has increased dramatically, first with its inclusion in the 2014 report of the Presidential Commission on Election Administration and then, most especially, in the wake of the Russian efforts to hack America's electoral infrastructure during 2016. See Nathaniel Persily et al., *The American Voting Experience: Report and Recommendations of the Presidential Commission on Election Administration*, Presidential Commission on Election Administration 66 (Jan. 2014); Scott Shackleford et al., *Making Democracy Harder to Hack*, 50 U. MICH. J.L. REFORM 629, 665 (2017). Colorado became the first state to conduct a statewide risk-limiting audit in 2017. Jesse Paul, *Colorado's first-of-its-kind election audit is complete, with all participating counties passing*, DENVER POST, Nov. 22, 2017, https://www.denverpost.com/2017/11/22/colorado-election-audit-complete/.

## § 210. Recounting of Previously Counted Ballots

**(a) In an election for a statewide or congressional office, if the verification of returns shows that the difference in vote totals between the two candidates receiving the largest number of votes is less than one-quarter of one percent of all counted ballots, the chief elections officer shall supervise a recount, at the state's expense, of all previously counted ballots in the election.**

1 **(b) In all elections other than those specified in subsection (a), if the verification of**
2 **returns shows that the difference in vote totals between the two candidates receiving the**
3 **largest number of votes is less than one-half of one percent of all ballots counted, the chief**
4 **elections officer of the state shall supervise a recount, at the state's expense, of all previously**
5 **counted ballots in the election.**
6 **(c) In any election, if the audit conducted pursuant to § 209(c) demonstrates the need**
7 **to recount all the previously counted ballots in the election, the chief elections officer shall**
8 **supervise the recount, at the state's expense.**
9 **(d) If a recount is not required by subsection (a), (b), or (c), a candidate may request**
10 **the chief elections officer to conduct a recount, at the candidate's expense, provided that the**
11 **candidate received at least four percent of the votes cast according to preliminary returns**
12 **and the request satisfies any deadline that state law sets pursuant to the obligation to**
13 **complete any recount in accordance with § 206(a); and if the recount conducted pursuant to**
14 **this Section reverses the outcome of the election and shows the requesting candidate to have**
15 **received more votes than any other candidate, then the state shall reimburse the requesting**
16 **candidate for the cost of the recount.**
17 **(e) In a recount pursuant to this Section, the state's chief elections officer may**
18 **deputize local election officials to conduct the preliminary phase of the recount, provided**
19 **that any candidate entitled to participate in the recount has a right to challenge any decision**
20 **made during the preliminary phase and the challenge shall be reviewed by a single statewide**
21 **authority established pursuant to the recount procedures promulgated by the chief elections**
22 **officer.**
23 **(f) In a recount pursuant to this Section, the candidates entitled to participate are the**
24 **leading candidate and any candidate whose vote total is separated from the leading**
25 **candidate's vote total by a margin less than 10 percent of all ballots counted, and a candidate**
26 **who requests a recount under subsection (d).**
27 **(g) All challenges made under subsection (e) shall be reviewed according to a uniform**
28 **statewide standard, pursuant to which the preliminary decision may be treated as**
29 **presumptively correct, but shall be reversed upon a showing by the challenging candidate**
30 **that the preliminary decision either rested on legal error or was contradicted by the**
31 **preponderance of available evidence.**

**(h) A recount required by this Section may occur after an initial certification of the election as verified pursuant to § 209, provided that the chief elections officer publicly announces a new certification of the election upon completion of the recount.**

**(i) Any recount started under this Section may be terminated before its completion under the following conditions:**

**(1) for a recount started under subsection (a) or (b), if both candidates whose vote totals are within the specified margins agree in writing to terminate the recount;**

**(2) for a recount started under subsection (c), if the state chief elections officer declares in writing that the recount no longer is necessary and *either* (i) at the time of termination the margin between the two leading candidates is not close enough that it would require a recount under subsection (a) or (b), *or* (ii) the two leading candidates agree in writing that the recount no longer is necessary;**

**(3) for a recount started under subsection (d), if the candidate who requested the recount declares in writing that the recount no longer is sought (in which case the candidate nevertheless remains obligated to pay the expense of the terminated recount).**

**Comment:**

*a. Different types of recounts.* State law generally distinguishes between (i) automatic recounts paid for by the government; and (ii) requested recounts paid for by the candidate making the request. The threshold for an automatic recount should vary depending upon the type of election involved. For a statewide election involving one million votes, a quarter-percent threshold would trigger an automatic recount if the margin between the two leading candidates is less than 2500 votes. Experience shows that it is extraordinarily difficult to overturn an election in a recount when the margin exceeds 1000 votes. Consequently, setting the threshold for an automatic recount in a statewide race at a quarter-percent is not unduly restrictive.

Likewise, in a local race involving 20,000 votes, a threshold of a half-percent would trigger an automatic recount if the margin is less than 100 votes. The history of recounts in local elections shows that this threshold, too, is not unduly onerous. In most local races, it is extremely difficult to overturn an election in a recount when the margin exceeds 100 votes.

1 If it preferred, a state legislature could retain the structure of subsections (a) and (b) while
2 adjusting the percentages—for example, from a quarter-percent to a half-percent for statewide
3 races, and from a half-percent to one percent for local races. Likewise, especially for states having
4 municipalities with large populations, the legislature might wish to set the threshold for triggering
5 an automatic recount on the basis of the number of ballots cast in the election rather than the type
6 of elective office at issue. For example, in subsection (a) the introductory clause "In an election
7 for a statewide or congressional office" could be replaced with "In an election with more than
8 400,000 ballots cast" (which would limit automatic recounts to elections of that size having
9 margins of 1000 ballots or more).
10 Moreover, it is important to understand the relationship between the automatic recounts
11 triggered by the margins specified in subsections (a) and (b), on the one hand, and a recount
12 necessitated by an audit as required by subsection (c). If an audit conducted pursuant to § 209(c)
13 shows the need for a full recount of all ballots in the election, then this full recount will be
14 conducted at the state's expense pursuant to subsection (c), and this is true regardless of the
15 applicable triggering percentage in subsection (a) or (b). In other words, for example, in a statewide
16 race involving a million votes, the margin might be 50,000, which would be 20 times higher than
17 the triggering threshold for an automatic recount under subsection (a), but if an audit of the election
18 reveals sufficient problems that based on sound statistical principles it was necessary to conduct a
19 full recount of the election, then this recount would occur at the state's expense regardless of the
20 fact that the 50,000-vote margin far exceeded the triggering threshold. In this way, the requirement
21 of a recount whenever an audit demonstrates the need for one permits the threshold for an
22 automatic recount to be stricter than otherwise would be appropriate. This provision for audit-
23 induced recounts assures that a recount will actually occur whenever one is necessary to verify the
24 accuracy of the results in the election.
25 In addition to automatic and audit-induced recounts, this Section provides for candidate-
26 requested recounts at the candidate's expense. The state may charge the candidate whatever
27 amount is necessary to cover the full cost of conducting the recount. Given the availability of audit-
28 induced recounts whenever sound statistics demonstrate the possibility that a recount is necessary
29 to verify the accuracy of the result, a candidate-requested recount should never be needed for this
30 verification purpose. Instead, a candidate-requested recount is available to provide for a
31 candidate's peace of mind in circumstances when an audit does not indicate that a recount is

warranted. Consequently, it is extraordinarily unlikely that a candidate-requested recount will lead to a reversal of the result in the election. Nonetheless, should such a reversal occur, then the state should reimburse the candidate for the expense of the recount, which proved necessary to an accurate result after all.

In addition, occasionally a candidate will wish to pursue a recount, not in the hope of winning an election, but rather in the hope of achieving a threshold—usually five percent of the total votes cast in the election—in order for the candidate to qualify for public financing or for the candidate's party to qualify for a spot on the ballot in the next election without the need for gathering signatures. Accordingly, subsection (d) is drafted to permit a candidate who receives four percent of the vote according to preliminary returns to seek a recount, thereby giving this candidate a chance (albeit unlikely) of using the recount to reach the critical five percent threshold. Any candidate below even four percent in preliminary returns would have no realistic possibility of reaching five percent in a recount, and thus under subsection (d) would not be permitted to force the state to undertake a recount even at the candidate's own expense. There are administrative and social costs of conducting a futile or quixotic recount even when the candidate is willing to pay for it, and limiting candidate-requested recounts to only those candidates who achieve four percent of the vote in preliminary returns strikes a reasonable balance among the relevant competing interests. Of course, a state that would prefer to permit candidates with an even smaller share of the preliminary returns to demand that the state perform a candidate-funded recount would be free to adjust this particular provision accordingly.

Note: In the specific context of a presidential election, only a candidate within the one percent margin specified in § 303(a)(1) would be entitled to trigger the special Expedited Presidential Recount procedures set forth in Part III; a minor-party presidential candidate would *not* be entitled to force a state to undergo the especially onerous procedures of an Expedited Presidential Recount (and of course would not be entitled to seek a recount weeks after Election Day). See also § 303, Comment *b*, Illustration 6 (candidate in position similar to Jill Stein would *not* be entitled to force Expedited Presidential Recount). Section 303, however, permits a state's chief elections officer to declare an Expedited Presidential Recount, upon a judgment that the public interest warrants one, even if a minor-party candidate is not entitled to demand one.

*b. Uniformity.* Given the principle of equal treatment of equivalent ballots, it is necessary that all ballots in a recount be reevaluated according to the same uniform standard. The recount

may involve teams of local recount officials conducting the preliminary reevaluation of local ballots according to the uniform standard, but in order to maintain uniformity all challenges to decisions made by local recount officials should be reviewed by a single authority responsible for the entire recount. This single authority may be a multi-member panel established by the state's chief elections officer for the purpose of conducting the recount. Whatever the structure or composition of this statewide recount authority, it should make all of its recount decisions in accordance with the principles of impartiality set forth in § 205.

**REPORTERS' NOTE**

This Section is informed by previous work on the development of best practices for the administration of recounts, work that has been undertaken by election experts in the wake of the high-profile statewide recounts that have occurred since 2000, including those in Minnesota in both 2008 (the U.S. Senate election) and 2010 (the gubernatorial election). See, e.g, Citizens for Election Integrity, Minnesota (CEIMN), RECOUNT PRINCIPLES AND BEST PRACTICES (2014), https://ceimn.org/recount-best-practices.

In 2016, FairVote conducted an analysis of all 27 statewide recounts that occurred between 2000 and 2015. That analysis found that the result changed in only three of these 27: the 2004 gubernatorial election in Washington, the 2006 auditor election in Vermont, and the 2008 U.S. Senate election in Minnesota. The larger the number of votes cast in the election, the smaller the shift in vote totals as a result of the recount: in elections with over two million votes, the average shift was only 0.016% of the total; whereas in elections with under one million votes, the average shift was 0.039% of the total (a still very small percentage). See FairVote, A Survey and Analysis of Statewide Election Recounts, 2000-2015, http://www.fairvote.org/recounts.

The recount of the 2016 presidential election in Wisconsin (the only state where Jill Stein, the Green Party candidate, was successful in obtaining a complete statewide recount), was in line with the FairVote analysis: Donald Trump increased his lead over Hillary Clinton in Wisconsin by 131 votes. See Daniel Marans, *What Jill Stein's Recount Effort Actually Accomplished*, HUFFINGTON POST, Dec. 13, 2016, https://www.huffingtonpost.com/entry/jill-stein-election-recount_us_58507032e4b092f08685ff68; Jason Stein, *Recount confirms Trump's victory in Wisconsin*, MILWAUKEE JOURNAL SENTINEL, Dec. 12, 2016, https://www.jsonline.com/story/news/politics/elections/2016/12/12/recount-drawing-close-wisconsin/95328294/.

In the dramatic battle for control of Virginia's House of Delegates in 2017, recounts occurred for four seats. In one, involving the 68th district, the Republican incumbent, Manoli Loupassi, trailed the Democratic challenger, Dawn Adams, by 336 votes after certification of the canvass. See Graham Moomaw & Andrew Cain, *Loupassi, who previously conceded to Adams, files for recount in Richmond-area House race*, ROANOKE TIMES, Dec. 1, 2017, http://www.roanoke.com/news/politics/general_assembly/loupassi-who-previously-conceded-to-

adams-files-for-recount-in/article_983978e8-cccf-5cef-8947-2cd3471278cf.html. At the end of the recount, Adams increased her margin over Loupassi to 347 votes (out of just over 39,000 total ballots cast in the race). Ned Oliver, *Recount confirms Democrat Dawn Adams' victory over Loupassi in Richmond-area House of Delegates seat*, Richmond Times-Dispatch, Dec. 20, 2017, http://www.richmond.com/news/local/government-politics/recount-confirms-democrat-dawn-adams-victory-over-loupassi-in-richmond/article_1b8d481c-a6be-5bc9-ae2b-50a6ec8c72ed.html.

In the second, involving the 40th district, the Democratic challenger, Donte Tanner, trailed the Republican incumbent, Tim Hugo, by 106 votes in the initial certification. Fenit Nirappil, *With Control of the Virginia House at stake, Democrats seek recounts in two races*, Wash. Post, Nov. 29, 2017, https://www.washingtonpost.com/local/virginia-politics/with-control-of-virginia-house-at-stake-democrats-seek-recounts-in-two-races/2017/11/29/b4106954-d52d-11e7-95bf-df7c19270879_story.html?noredirect=on&utm_term=.52a0ab129c11. The recount reduced the margin of victory in Hugo's reelection to 99 votes. Antonio Olivo, *Republican delegate prevails after recount in key Va. House race with 100-vote margin*, Wash. Post, Dec. 14, 2017, https://www.washingtonpost.com/local/dc-politics/republican-delegate-prevails-after-recount-in-key-va-house-race-with-100-vote-margin/2017/12/14/9e468df0-e0eb-11e7-9eb6-e3c7ecfb4638_story.html?utm_term=.cb7c9446b672.

The third Virginia recount in 2017, involving the 28th district, occurred in the wake of controversy and litigation over 137 ballots that were cast in the wrong election as a result of administrative error: 86 voters who should have voted in the 28th district were mistakenly given ballots for the 88th district, while 61 voters who should have voted in the 88th were wrongly given ballots for the 28th. Democrats filed suit in federal court in an effort to have this administrative error declared a violation of the Fourteenth Amendment, but the court rejected the claim as a basis for enjoining the state's procedures for certifying the election. Graham Moomaw, *Federal judge rejects Va. Democrats' bid to bar state elections officials from certifying result in House District 28*, Richmond Times-Dispatch, Nov. 22, 2017, http://www.richmond.com/news/virginia/government-politics/federal-judge-rejects-va-democrats-bid-to-bar-state-elections/article_29ba15fb-9744-5c37-8bef-1a119d8528c4.html; see also Fenit Nirappil & Rachel Weiner, *Judge won't block Republican in tight Virginia House race tainted by ballot mix-up,* Wash. Post, Jan. 6, 2018, https://www.washingtonpost.com/local/virginia-politics/judge-hears-arguments-in-tight-virginia-house-race-where-voters-got-wrong-ballots/2018/01/05/bea83732-f0be-11e7-b390-a36dc3fa2842_story.html?utm_term=.2604e456c0a1. Accordingly, the vote totals for the 28th district showing the Republican Bob Thomas with an 82-vote lead over Democrat Joshua Cole were certified without any alteration involving the disputed ballots. The recount, which also did not endeavor to remedy the administrative error concerning the disputed ballots, reduced the Republican's lead to 73 votes. Max Smith, *Thomas wins recount in disputed Stafford Co. House race*, WTOP (Dec. 21, 2017), https://wtop.com/stafford-county/2017/12/va-sets-date-draw-name-hat-fourth-recount-begins/slide/1/. The Democrats subsequently abandoned their Fourteenth

Amendment claim in federal court, and did not attempt to overturn the result of the recount on any state-law grounds.

The fourth Virginia recount, involving the 94th district, was the most dramatic of all. The initial certification showed Republican incumbent, David Yancey, beating Democratic challenger, Shelly Simonds, by only 10 votes. Nirappil, supra. After the recount, however, Simonds pulled ahead by just one vote. But a three-judge panel of the state's judiciary, which had the authority to review the recount under Virginia law, agreed with the Republican's claim that one ballot, which had been excluded as an overvote, should have been counted in that candidate's favor. The consequence was a tie, which was subsequently broken by lot. Jim Morrison, Fenit Nirappil & Gregory S. Schneider, *Virginia court tosses one-vote victory that briefly ended GOP majority in House*, WASH. POST, Dec. 21, 2017, https://www.washingtonpost.com/local/virginia-politics/court-tosses-out-one-vote-victory-in-recount-that-had-briefly-ended-a-republican-majority-in-virginia/2017/12/20/ed979a70-e5b9-11e7-a65d-1ac0fd7f097e_story.html?utm_term=.52b8601055f6.

**§ 211. Recount Procedures**

**(a) States should use forms of voting technology that permit the recounting of ballots in a way that fosters both (i) the accurate determination of the electoral choices made by the voters and (ii) public confidence that the recount will achieve this accuracy.**

**(b) A form of voting technology facilitates the objectives set forth in subsection (a) insofar as it minimizes the risk that the ballot as marked by the voter does not correspond to the electoral choice that the voter intended to make by so marking the ballot.**

**(c) A recount under § 210 shall involve both (i) a reexamination of all marked ballots to verify the electoral choices represented by the marks on the ballot, and (ii) a retallying of all votes verified by the reexamination set forth in subsection (c)(i).**

**(d) In an election involving the use of paper ballots, or paper records of electronic ballots, the reexamination required by subsection (c)(i) shall consist of a visual inspection of each paper ballot or record, and the retallying required by subsection (c)(ii) shall consist of counting all the reexamined votes either by hand or by machine, whichever method is determined by the chief elections officer in advance of Election Day to be more accurate.**

**(e) In an election involving the use of paper ballots, the chief elections officer in advance of the recount shall publish a guide specifying, with pictorial illustrations, how each anticipated type of ballot marking (including partially filled-in ovals, checked rather than filled-in ovals, and the like) shall be treated.**

**(f) In an election involving electronic ballots without a paper record, the reexamination required by subsection (c)(i) shall consist of an inspection of electronic records, including digital photographs of each voter's marked ballot if available, and the retallying required by (c)(ii) shall consist of retabulating the confirmed vote totals by rerunning the electronic program necessary to produce such vote totals.**

**(g) If during a recount it appears that previously counted ballots have been lost due to administrative error, and if there is no evidence that the lost ballots were ineligible, then for the purpose of the recount the original tally of the lost ballots will be included in the recount if (but only if) there is available at the time of the recount an original tally that identifies for which candidates these lost ballots were cast.**

**(h) All recount proceedings involving the reexamination of ballots, the retallying of vote totals, or the resolution of challenges made during a preliminary phase of the recount, shall be open proceedings as provided in § 202, and candidates entitled to participate in the recount shall be permitted to designate representatives to inspect any ballot and piece of voting equipment as necessary to determine the accuracy of the recount, provided that:**

> **(1) No member of the public, other than the representative of a participating candidate, is entitled to touch any ballot or piece of voting equipment; and**
>
> **(2) If a candidate's representative becomes unduly disruptive of the recount proceedings, the officials conducting the recount may require the candidate to replace that particular representative with another; and any disruptive member of the public may be removed and barred from the recount proceedings.**

**(i) A write-in vote shall count for a write-in candidate despite a misspelling of the candidate's name as long as the misspelling is sufficiently close to the actual spelling to make clear that the write-in vote was an electoral choice for the write-in candidate.**

**(j) A ballot shall not be rejected as containing an unlawful identifying mark unless some indication apart from the ballot itself demonstrates that the mark on the ballot functioned as a name or symbol enabling the identification of the voter who cast it; when the mark in question is a recognizable name, the additional information may consist of *either* a poll book or other election-related materials showing that a voter with that name cast a ballot at the same polling location *or*, in the case of a mailed-in ballot, a secrecy envelope bearing the same name as the ballot and in which the particular ballot had been transmitted.**

**(k) In any recount pursuant to § 210 and this Section, a ballot should be counted as marked, regardless of any claim that the mark does not correspond to the voter's subjective intent concerning the voter's desired electoral choice. Any such claim arising from the ballot having a faulty design or otherwise being defective, or the voter having received erroneous instructions concerning the casting of the ballots, or because of some other form of mistake, shall be considered (to the extent that such claim may be cognizable) in a judicial contest of the election pursuant to § 213.**

**Comment:**

*a. New and improved voting technology.* Current technology permits voting equipment to combine the most advantageous features of electronic and paper ballots. An electronic touchscreen enables a voter to mark a ballot in a way that avoids all ambiguity concerning the choice that the voter actually made. Conversely, a paper printout of the voter's choices both (a) permits the voter to verify that the choices recorded by the machine are the choices that the voter wished to make, and (b) permits the paper record to serve as the basis for a recount, to verify the accuracy of the vote totals in the election. A well-designed voting system would contain both of these desirable features, having voters make their initial selections on a touchscreen and then providing a paper printout of these selections for the voters to confirm. As states replace antiquated voting equipment, they should employ new systems that combine both of these features. In particular, in light of the security concerns associated with electronic voting machines that lack any paper record of the votes cast on those machines, states that still have such equipment should make it their priority to replace these vulnerable machines with new systems that include a paper record of each cast ballot. The purchasing of new voting equipment should also take account of the most up-to-date information concerning cybersecurity and protection from potential malicious efforts to subvert the integrity of the voting process.

*b. The respective roles of humans and machines in recounts.* Under subsection (d), whenever paper records of the ballots cast are available, a recount requires visual examination of these paper records to confirm the accuracy of the votes. Once this visual examination of all counted ballots is complete, the recount can confirm (or as necessary correct) the total number of votes for each candidate by retallying the ballots either by hand or by machine, depending upon which method the state's chief elections officer determines in advance of Election Day to be more accurate. Experience shows that counting by hand can often lead to unintentional inaccuracies.

Once the marks on the ballots are confirmed by visual inspection, it may be more accurate to let a machine retally the vote totals, rather than attempt to count all the ballots by hand.

*c. Objective-based assessment of marks on ballots.* The purpose of the recount shall be to determine the objective marks on the ballot. In a well-designed system, these objective marks will correspond to the voter's subjective intent. Nonetheless, when there is a flaw in the design of the ballot, a mark made by the voter may diverge from the voter's subjective intent in making that mark. Whether or not there is a remedy for this divergence is an issue for a judicial contest of the election pursuant to § 213. For the purpose of an administrative recount under this Section, each ballot shall be recounted in accordance with its objective marks—as determined by a visual examination of the ballot when possible—without any consideration of whether the voter may have intended something other than what is indicated by the objective marks.

The infamous "butterfly ballot" used in Palm Beach County for the 2000 presidential election illustrates this principle. Given the faulty design of the ballot, it is highly probable that many voters accidentally cast their ballots for Pat Buchanan when they subjectively intended to cast their ballots for Al Gore. Nonetheless, by looking at these ballots, there would be no way to distinguish a ballot that was actually intended to be cast for Buchanan from one that was mistakenly intended to be cast for Gore. Accordingly, in a recount all the ballots objectively marked as being cast for Buchanan must be counted for Buchanan, regardless of the subjective intent of the voters who cast them. If any remedy is available for the faulty ballot design that caused many voters to cast their ballots mistakenly, that remedy must come in the context of a judicial contest of the results of the election, and is beyond the scope of an administrative recount of the ballots. The same reasoning applies to claims that voters mismarked their ballots because of erroneous instructions.

**REPORTERS' NOTE**

Increased concerns about the vulnerabilities of existing voting technology in some states, given the threat of cyberattack, have resulted in renewed calls for systems that provide either paper ballots or paper records. See Lawrence Norden & Wilfred U. Codrington III, *America's Voting Machines at Risk—An Update*, BRENNAN CENTER FOR JUSTICE (Mar. 8, 2018), https://www.brennancenter.org/analysis/americas-voting-machines-risk-an-update. Congress recently addressed these concerns by allocating $380 million for upgrading voting technology. Editorial, *The Senate has released election-security recommendations. Now it's time to act.,* WASH. POST, Mar. 24, 2018, https://www.washingtonpost.com/opinions/the-senate-has-released-election-security-recommendations-now-its-time-to-act/2018/03/24/94f073f2-2e10-11e8-8688-

e053ba58f1e4_story.html?utm_term=.c43e69bde423 (characterizing the congressional action as an important first step, with need for additional measures); see also Press Release, Brennan Center for Justice, New Election Security Funds are Breakthrough for Democracy (Mar. 23, 2018) ("Of the 13 states that use paperless DREs, the new funds will not allow full replacement in at least 11 of those states."), https://www.brennancenter.org/press-release/new-election-security-funds-are-breakthrough-democracy.

The 2006 election for Florida's 13th congressional district serves as a reminder of how contentious a recount can become when there are suspicions about the voting technology involved, even without the added concern of hacking efforts by foreign governments. In that election, vote totals showed the Republican with 369 more votes than the Democrat. But part of the district was in Sarasota County, and 18,000 ballots there did not record a vote in the congressional race, a far greater percentage of "undervotes" than elsewhere in the district. Although a faulty ballot layout on the computer touchscreens that the Sarasota voters saw was the most likely culprit, the Democrat raised questions about whether faulty computer technology might have caused the machines to lose the votes. A GAO study conducted on behalf of Congress found no flaw in the machines, but the dispute lasted until February of 2008—over half the length of the congressional term—when the federal House of Representatives finally dismissed the Democrat's challenge to the outcome of the race. Kirsten B. Mitchell, *House dismisses Jennings' challenge; ending investigation of 2006 election*, SARASOTA HERALD TRIBUNE, Feb. 27, 2008, 1B.

Minnesota's experience with two major statewide recounts, in 2008 (U.S. Senate) and 2010 (gubernatorial), has contributed to the development of a detailed manual for conducting recounts, which the U.S. Election Assistance Commission offers other states as a model: Minnesota Secretary of State, 2016 Recount Guide, https://www.eac.gov/assets/1/28/recount-guide.pdf. One especially valuable feature of this guide is its visual depiction of actual ballots from previous recounts, to serve as illustrations on how similar ballots should be handled in future recounts. See id. at 16-17. This administrative "codification" of precedent is an exemplary implementation of the basic principle in § 201 of specifying insofar as humanly possible the rules for counting votes before they are cast. But even if circumstances arise in the midst of a recount that were not foreseen in advance, and thus are not specifically covered by the existing recount manual, it is still possible to develop a precedent-based system during the recount itself. Minnesota, again, serves as a useful illustration. In the 2008 recount of the U.S. Senate election, Chief Justice Eric Magnuson served on the state's canvassing board. During the board's review of challenged ballots, Chief Justice Magnuson drew himself a page of disputed scenarios as they arose. This pictograph then began to serve as a set of precedents that the entire canvassing board relied upon as subsequent ballots presented similar scenarios to the ones that Chief Justice Magnuson had depicted. The board's use of his sheet in this way caused the entire recount to exhibit "the rule of law"—and for the public to perceive the recount as following "the rule of law"—in a way that would have been lacking in the absence of the pictograph. (For a photo of Chief Justice Magnuson's sheet, see EDWARD B. FOLEY, BALLOT BATTLES: THE HISTORY OF DISPUTED ELECTIONS IN THE UNITED STATES 321 (2016).)

Senator Lisa Murkowski of Alaska won reelection in 2010 as a write-in candidate, after losing the Republican primary to Joe Miller, an insurgent "Tea Party" candidate. The margin of Murkowski's victory was 10,252 votes. In the recount that Miller pursued, the predominant issue was whether to count write-in ballots that did not spell "Murkowski" correctly. The state's director of elections, Gail Fenumiai, adopted a rule that would count a ballot if, but only if, the misspelling was phonetically equivalent to the correct spelling. Kim Murphy, *Alaska counting its write-in votes*, L.A. TIMES, Nov. 11, 2010, at A12. This ruling survived challenges brought by Miller in both state and federal court. Miller v. Treadwell, 245 P.3d 867 (Alaska 2010); Miller v. Treadwell, 736 F. Supp. 2d 1240 (D. Alaska 2010).

## § 212. Final Administrative Certification of an Election

**(a) The winning candidate shall receive a Certificate of Election, entitling the candidate to hold the office for which the election was held, upon completion of:**

**(1) the resolution of all disputes concerning the eligibility of uncounted ballots pursuant to § 207, including provisional ballots pursuant to § 208;**

**(2) the verification of returns pursuant to § 209; and**

**(3) any recount conducted pursuant to §§ 210 and 211.**

**(b) As provided in § 206, and except for the limited circumstances specified in § 206(b), the winning candidate shall receive the Certificate of Election before the term of office begins.**

**(c) A Certificate of Election issued under this Section provides the predicate for a judicial contest of the election pursuant to § 213.**

**(d) For any legislative election, in accordance with § 206(g), the Certificate of Election pursuant to this Section shall constitute evidence, which the winning candidate may present to the applicable legislative chamber, of the completion of the administrative proceedings upon which the Certificate of Election is premised, and upon which the winning candidate is presumptively to be seated unless the legislative chamber provides otherwise pursuant to its ultimate authority to determine the outcome of any election to a seat in the chamber.**

**Comment:**

*a. Final certification.* The Certificate of Election marks the end of the administrative procedures for the counting of votes and constitutes the official declaration of which candidate won the election. The Certificate of Election serves as the basis upon which a losing candidate may file a contest of the election in an effort to overturn that officially declared result. If a judicial

contest is successful and determines that the losing candidate in fact should have been declared the winner, then a new and superseding Certificate of Election must be issued. In the absence of a judicial contest, the election is over once the Certificate of Election is issued and the time for filing a contest has expired, and as a matter of law it is not over until that time.

## REPORTERS' NOTE

In a disputed legislative election, when a candidate presents in the legislative chamber a certificate of election from the state's administrative authority empowered by state law to issue the certificate, the legislative chamber may choose to seat the certified candidate provisionally, or alternatively to leave the seat vacant, in either case subject to the outcome of whatever procedures the chamber undertakes concerning the validity of the election. In 1974, for example, when faced with two disputed elections, the U.S. Senate chose to keep one seat vacant (New Hampshire's), while at the same time deciding to seat the certified winner provisionally in the other (Oklahoma's). See EDWARD B. FOLEY, BALLOT BATTLES: THE HISTORY OF DISPUTED ELECTIONS IN THE UNITED STATES 250 (2016). This Section establishes the default position that a certified winner should be seated in the legislature, subject to the legislature's authority to provide otherwise.

## § 213. Judicial Contest of a Certified Election

**(a) After a candidate has received a Certificate of Election, another candidate in the same election may file a judicial contest of the election on the ground that the Certificate of Election is mistaken in its identification of the election's winner because fraud, error, or other form of impropriety, or some combination of these defects:**

**(1) has caused a miscalculation of the votes in the election and a correct calculation, with the improprieties eliminated, would entitle the contestant to be the winning candidate; or**

**(2) has affected enough counted votes to make it impossible to identify the winning candidate, thereby rendering the election null and void.**

**(b) If the contestant alleges fraud as either the whole or a partial basis for the contest, the court adjudicating the contest shall award a new Certificate of Election, superseding the original Certificate of Election, if the contestant demonstrates by clear and convincing evidence that:**

**(1) deliberate wrongdoing in the casting or counting of ballots was perpetrated on behalf of the certified winner, or was perpetrated with the intent either to defeat another candidate or to undermine the integrity of the election itself, and**

**(2) the number of fraudulent or otherwise ineligible ballots previously counted, or the number of votes falsely added to or deducted from the counting of ballots, accounts for the certified winner's margin of victory over the contestant, and**

**(3) the contestant is the candidate with the highest number of valid votes, after the ineligible ballots or falsely counted or omitted votes as specified by subsection (b)(2) have been deducted from or added back to the certified result.**

**(c) If the contestant has demonstrated deliberate wrongdoing as specified in subsection (b)(1), but is unable to demonstrate that the improprieties were extensive enough to account for the margin of victory as specified by subsection (b)(2), then the court shall award a new and superseding Certificate of Election if but only if the preponderance of the evidence, including evidence concerning the degree to which the deliberate wrongdoing was an orchestrated effort to affect the outcome of the election regardless of the actual electoral choices made by eligible voters, makes it more likely than not that the certified result of the election would have been different in the absence of the improprieties.**

**(d) If a contestant has not alleged fraud (either as the whole or partial basis of the contest), or if the contestant's allegation of fraud has failed to provide grounds for judicial relief under subsection (b) or (c), the court shall consider the contestant's claim according to the following standard: if the contestant demonstrates that the number of ineligible ballots counted exceeds the certified winner's margin of victory as reflected in the Certificate of Election, then either:**

**(1) the court shall award the contestant a new Certificate of Election, superseding the original Certificate of Election, if but only if the contestant offers evidence establishing for whom the votes on the ineligible ballots were actually cast, and after deducting these invalid votes the contestant has the highest number of valid votes; or**

**(2) the court shall declare the election null and void, rescinding the original Certificate of Election, if but only if the contestant, although unable to offer evidence establishing for whom the votes on the ineligible ballots were actually cast, is able to**

1 **present persuasive statistical analysis showing that more likely than not enough**
2 **ineligible ballots were cast in favor of the candidate who received the original**
3 **Certificate of Election to account for that candidate's margin of victory over the**
4 **contestant.**
5 **(e) Notwithstanding subsection (d), a contestant is precluded from claiming that**
6 **previously counted ballots are ineligible if the contestant (or the contestant's party acting on**
7 **behalf of the contestant among the party's other candidates in the same election) had an**
8 **adequate opportunity to challenge the eligibility of those ballots, or the eligibility of the voters**
9 **who cast them, before they were counted, and the contestant failed to exercise that**
10 **opportunity.**
11 **(f) As part of a contest under this Section, a contestant may claim that uncounted**
12 **ballots were wrongly excluded from the certification of the election if but only if the**
13 **contestant (or the contestant's party acting on behalf of the contestant among the party's**
14 **other candidates in the same election) did not have an adequate opportunity, in an**
15 **adjudicatory proceeding before an impartial tribunal prior to certification, to claim that**
16 **these ballots were entitled to be counted.**
17 **(g) A court shall declare an election null and void on the ground that eligible voters**
18 **were denied the opportunity to cast any ballot, whether provisional or regular, if but only if:**
19 **(1) the contestant demonstrates that the eligible voters attempted to cast a**
20 **ballot but were prevented from doing so either by election officials (including by the**
21 **use of faulty technology that prevented voters from casting a countable ballot, or by**
22 **failing to permit voters to cast provisional ballots as required by law, or because of**
23 **some other mistaken understanding of applicable rules) or by persons acting on**
24 **behalf of another candidate or political party; and**
25 **(2) the number of eligible voters so prevented under subsection (g)(1), either**
26 **alone or in combination with other errors cognizable in a contest under this Section,**
27 **exceeds the certified winner's margin of victory; and**
28 **(3) additional evidence demonstrates that, more likely than not, the certified**
29 **winner would not have won the election if these voters had not been denied the**
30 **opportunity to cast a ballot.**

1 **(h) A court shall declare an election null and void on the ground that voters received**
2 **defective ballots, or erroneous official instructions on how to cast their ballots, if but only if:**
3 **(1) neither the contestant nor a representative of the political party of which**
4 **the contestant is a nominee had the opportunity in advance of the election to review**
5 **and, if necessary object to, the defective ballots or erroneous instructions; and**
6 **(2) the contestant demonstrates that the number of voters who received the**
7 **faulty ballots or erroneous official instructions, either alone or in combination with**
8 **other errors cognizable in a contest, exceeds the certified winner's margin of victory;**
9 **and**
10 **(3) additional evidence demonstrates that, more likely than not, the contestant**
11 **would have won the election if these voters had not received the faulty ballots or**
12 **erroneous instructions.**
13 **(i) No court, as part of a contest under this Section, shall consider a claim that the**
14 **election is void because of a natural disaster or other calamity, and any such claim shall be**
15 **confined to a petition filed prior to certification of the election pursuant to § 214 (unless the**
16 **calamity occurred after the polls closed in the election, affected the ability to identify a**
17 **winner, and was unable to be raised in a petition prior to certification under § 214).**

18 **(j) In a state where an election has legal significance for a purpose other than to**
19 **identify the winning candidate entitled to hold office, including an election to identify more**
20 **than one candidate eligible for a subsequent runoff election (or to determine whether a**
21 **candidate's party is eligible for a spot on the ballot in a subsequent election without the need**
22 **to submit a petition and accompanying signatures), any candidate who has received a final**
23 **administrative determination that the candidate has failed to obtain the number of votes**
24 **necessary to achieve the legally significant outcome desired (e.g., inclusion in the runoff or**
25 **ballot access for the candidate's party in a future election) may file a judicial contest under**
26 **this Section in an effort to obtain the legally significant desired outcome if, but only if, the**
27 **candidate alleges a mistake or impropriety in the counting of ballots that caused the**
28 **candidate to fall short of the necessary number of votes.**

29 **Comment:**

30 *a. A contest defined.* A judicial contest of an election is an effort to overturn the result of
31 an election on the ground that the results rest on outcome-determinative error or fraud. A contest

seeks either of two remedies: (1) a court order that the contestant should have been declared the winner and thus a new Certificate of Election should supersede the initial one; or (2) a court order voiding the election, with the need to hold a new election or to fill the elective office by some other means, as provided by a separate provision of state law. Whichever remedy the contest seeks, and a contest can simultaneously seek the latter as a fallback to the former, it is necessary that the contest demonstrate that the amount of error or fraud is enough to undermine the certified outcome. For a contest, it does not suffice that there be some error or fraud affecting the count of ballots in the election; rather, there must be a sufficient amount of error or fraud, or both, that in the aggregate it affects more votes than the certified margin of victory and, consequently, that the certified victory can no longer stand.

**Illustrations:**

1. Candidate A was certified the winner of the election over Candidate B by a margin of 87 votes. Candidate B contests the election and proves that 200 fake votes for Candidate A were fraudulently added to the returns from one polling place in the election. No other errors or frauds are proved in the contest. Because the 200 fake votes for Candidate A exceed the 87-vote certified margin of victory, Candidate B would have won more votes if the fraud had not occurred. Accordingly, the court hearing the contest shall declare that Candidate B is the true winner of the election and award Candidate B a new Certificate of Election superseding the initial certificate that had declared Candidate A the winner. Note also: there is no need for Candidate B to prove that Candidate A personally had knowledge of this fraud. Instead, to obtain this remedy, it suffices for Candidate B to prove that the fraud was perpetrated on behalf of Candidate A.

2. Candidate C was certified the winner of the election over Candidate D by 50,000 votes. Candidate D contests the election and proves that 24 fraudulent ballots were cast for Candidate C; the perpetrators had identified 24 deceased individuals on the voter rolls and fraudulently cast ballots using the names of these deceased individuals. No other errors or frauds are proved in the contest. In this situation, the court dismisses the contest notwithstanding the proven fraud because the amount of the fraud—24 votes—is far lower than the certified margin of victory. The contest court may order the 24 fraudulent votes to be deducted from Candidate C's official vote total. But the contest court may not order a new Certificate of Election for Candidate D or void the election.

*b. Uncertain extent of fraud.* In some instances, even when the contestant has demonstrated substantial fraud in the election, it may not be possible to determine definitively whether or not the number of fraudulent ballots exceeds the certified margin of victory. In this situation, subsection (c) provides that the court shall award a new Certificate of Election to the contestant if, but only if, the contestant establishes by a preponderance of the evidence that it is more likely than not that the contestant would have prevailed in the election (by winning more valid votes) if the fraud had not occurred.

**Illustration:**

3. Candidate E was certified the winner of the election over Candidate F by 350 votes. Candidate F contests the election and proves that campaign operatives organized a scheme to pay absentee voters $5 to vote their absentee ballots for Candidate E. Candidate F is able to prove that this illegal vote-buying scheme affected at least 200 ballots cast for Candidate E and may have affected as many as 600 votes. Testimony from the operatives associated with the vote-buying scheme conflict on the size and scope of the illegal operation. Given this circumstance, the court should award Candidate F a new Certificate of Election if the court finds, based on the preponderance of the evidence, that more likely than not the vote-buying scheme was large enough to yield at least 350 illegally purchased ballots. Otherwise, the court should let the initial Certificate of the Election stand and dismiss the contest for lack of sufficient proof. (As with Illustration 2, without overturning the winner's victory, the contest court could make an adjustment in the official vote total for the winning candidate.)

*c. Proving that error affected election's result.* When a contest claims that error undermines the Certificate of Election, the contestant can obtain relief only upon an additional showing concerning the effect that the error has on the certified margin of victory. In order to obtain relief in the form of a new Certificate of Election declaring the contestant the winner, the contestant must show that more mistakenly counted ballots were cast for the contestant's opponent than the opponent's certified margin of victory. It does not suffice for the contestant to show only that the number of mistakenly counted ballots exceeds the certified margin of victory. The contestant must prove that enough of these mistakenly counted ballots to change the outcome were cast for the candidate who was certified the winner. This proof is exceedingly difficult given the secrecy of

1 the ballot. Nonetheless, absent this proof, there is insufficient basis for awarding the election to
2 the contestant even if the contestant has proved an error larger than the certified margin of victory.
3 Despite a voter's right to a secret ballot, that secrecy can be waived if the voter agrees to testify,
4 and the court finds the testimony credible. (The voter should not be compelled to provide this
5 testimony, given the right to a secret ballot.) In some circumstances, moreover, there may be
6 extrinsic evidence demonstrating for which candidate a voter voted.

7 **Illustration:**

8 4. On Election Day, Joe Voter tweeted that he voted for Candidate G in the race for
9 Amityville's mayor. In a subsequent contest of the election, Candidate H proves that Joe
10 Voter's ballot was ineligible to be counted because he was not a resident of Amityville.
11 Even if Joe Voter refuses to testify in court on whether his tweet was truthful, Candidate
12 H should be entitled to introduce the tweet into evidence as probative on this question,
13 along with additional evidence (like Joe Voter's party registration status or other tweets)
14 tending to show the accuracy of the Election Day tweet. If the court finds it more likely
15 than not that Joe Voter actually voted for Candidate G, then the court should deduct one
16 vote from Candidate G's total. If this deduction, along with others like it, causes Candidate
17 G to have fewer valid votes than Candidate H, then the court should award a new Certificate
18 of Election to Candidate H.

19 *d. Voiding an election upon sufficient evidence.* Even if a contestant cannot demonstrate
20 for which candidate ineligible ballots were voted, the court should void the election if the
21 contestant shows not only that the number of ineligible ballots exceeded the certified margin of
22 victory but also that sound statistical analysis indicates more likely than not that the contestant
23 would have won the election if the ineligible ballots had not been counted. This kind of statistical
24 analysis should not suffice to award a new Certificate of Election to the contestant, but it should
25 suffice to void the election, requiring a new election (or some other remedy specified by state law
26 when the election must be declared void because of a fundamental defect that prevents an accurate
27 determination of the electorate's choice).

28 Note that this statistical analysis is necessary to obtain the remedy of voiding the election.
29 It should not be enough merely to show more ineligible ballots than the certified margin of victory.
30 Absent any evidence to the contrary, there is no reason to think that the distribution of these invalid

ballots would not fall randomly and evenly between the two competing candidates—and thus no reason to disturb the result of the election just because there are more invalid ballots than the certified margin. But if the contestant can offer statistically sound evidence why it is likely that more invalid ballots were cast for the certified winner than the contestant, and further why it is likely that enough of these invalid ballots were cast for the certified winner to determine the outcome of the election, then the contestant should be entitled to a court order that voids the certified result.

**Illustration:**

5. Candidate I was certified the winner over Candidate J by a margin of 50 votes. Candidate J proves that 1000 ineligible ballots were wrongfully counted in the election, but is unable to prove which candidate received each of those 1000 invalid votes. Although 1000 is far larger than 50, if the invalid ballots were split in half between the two candidates, 500 for each, then there would be no reason to overturn the election based solely on the existence of 1000 ineligible ballots. If there are only two candidates in the race and no other available evidence, then the baseline assumption is that the two candidates would split the invalid ballots in the same proportion as all counted ballots. (Thus, if the certified margin of 50 votes means that Candidate I won 50.0025% and Candidate J won 49.0075%, then one would expect each candidate to have received essentially half of the invalid votes.) But if Candidate J proves that all 1000 ineligible ballots were cast by voters under the age of 18, and further proves that these underage voters likely voted for Candidate I in a 60-40 ratio, then Candidate J has shown that Candidate I likely netted 200 extra votes from these invalid ballots; and because 200 exceeds 50, it is likely that Candidate I was declared the winner because of the invalid ballots. Given this proof, the court should order the election void.

*e. Estoppel (challenging counted ballots).* No candidate should be able to overturn an election based on the ground that officials mistakenly counted ineligible ballots if the candidate has an adequate opportunity to challenge the counting of those ballots before they were counted. This estoppel principle is important because of the difficulties associated with removing previously counted ballots from the certified result. But the opportunity must be genuine for the estoppel principle to apply.

**Illustration:**

6. Candidate K was certified the winner over Candidate L by only two votes. There is evidence that three votes cast for Candidate K were invalid because the three voters were convicted felons whose voting rights had not been restored under the laws of the state. If the state had no easy procedure that permitted Candidate L to challenge the eligibility of these three felon voters prior to the counting of their ballots, then Candidate L should be entitled to prevail in a contest and have the court award a new certificate of election declaring Candidate L the winner. But if the state made it easy to identify these three voters as ineligible felons, and also made it easy for Candidate L to challenge the eligibility of these voters before they cast their ballots, then Candidate L should be precluded from making the same challenge in a subsequent contest.

*f. Estoppel (challenging uncounted ballots).* Ordinarily, as provided in § 207, a candidate should have an adequate opportunity, prior to certification of the election's results, to challenge the wrongful exclusion of ballots that should have been counted. If so, then the candidate should be precluded from making the same claim in a subsequent judicial contest of the certified outcome. Estoppel appropriately applies in this situation as well as the one in Comment *e*. Nonetheless, if for whatever reason, a candidate has lacked an adequate opportunity to challenge the exclusion of arguably valid ballots before certification, then the candidate should be entitled to make this claim as part of a subsequent contest.

*g. Wrongful denial of opportunity to cast a ballot.* Subsection (g) addresses those circumstances in which voters have been wrongly prevented from casting a ballot that is capable of being counted, and thus their situation differs from those voters who have cast a ballot that has not been counted. In the latter case, the remedy for the wrongful exclusion of a ballot that should have been counted is straightforward: simply count the ballot and thus avoid wrongful disenfranchisement of that voter. By contrast, when there is no ballot to be counted from an eligible voter who attempted to cast one but was wrongly prevented from doing so, the challenge of remedying the wrongful disenfranchisement is more complicated.

This problem can arise in a variety of contexts. Voters might be denied the opportunity to cast a provisional ballot when they asked for one (a circumstance that never should occur but can if poll workers fail to understand their duties). A polling place may run out of ballots or its voting machines may fail to function (because of administrative error in operating the machines), and the

1 voters who went to the polls may need to leave before the capacity to cast ballots is restored. A
2 different sort of malfunction in one or more voting machines may occur: it may appear to be
3 working properly as voters cast their ballots, but in fact the machine may be failing to record the
4 votes cast, thus in effect voiding each voter's ballot as it was cast, without any notice of the
5 problem until afterwards, when the poll workers discover that all the votes cast on the
6 dysfunctional machines are nonexistent (and thus uncountable).
7 Voters may also be wrongly disenfranchised by intimidation, harassment, or deception
8 perpetrated by agents of a political party or campaign. If valid voters go to the polls intending to
9 participate in the election, but (hypothetically) are confronted outside the entrance by armed thugs
10 threatening to harm them if they attempt to enter the polling place, that disenfranchisement is a
11 subversion of democracy even if the government itself, through its poll workers or otherwise, did
12 not participate in the coercive intimidation that caused the disenfranchisement. To be sure, in some
13 circumstances, it may be questionable whether aggressive or threatening behavior at or near a
14 polling place crosses the line and becomes disenfranchising intimidation, but in principle the
15 judiciary must be prepared to declare an election null and void if and when such conduct is enough
16 to affect the outcome of the election or renders the result of the election incapable of reflecting
17 accurately the will of the electorate who went to the polls.
18 Subsection (g) delineates a court's power to provide a remedy for wrongful
19 disenfranchisement when there are no ballots available to be counted from these disenfranchised
20 voters. First, the appropriate remedy is limited to voiding the election and, if provided elsewhere
21 in state law, holding a new one. It would be inappropriate for the court to award the election to the
22 contestant on the ground that the contestant would have received enough votes from these
23 disenfranchised voters. Without actual ballots to count, the court cannot be sure that the
24 disenfranchised voters would have cast them for the contestant. The better course is to nullify the
25 results of the election and hold a new election.
26 Second, voiding the election is proper only if the contestant shows both that the number of
27 disenfranchised voters exceeds the certified margin of victory, and that it is likely that enough of
28 these disenfranchised voters would have voted for the contestant to make a difference in the
29 outcome of the election. Without this second showing, there is no point to judicial invalidation of
30 the certified results even if there are more improperly disenfranchised voters than the certified
31 margin of victory. In the specific context of voters disenfranchised because of intimidation

perpetrated on behalf of the certified winner, it arguably might be appropriate to presume that the disenfranchised voters would have voted for an opposing candidate; otherwise, why disenfranchise these voters? Still, the contestant should be put to the obligation of providing some evidence, in the context of the specific election, to expect that enough of these disenfranchised voters would have voted for the contestant to overtake the certified winner in the number of valid votes. In some elections, there might be three or more candidates, with the disenfranchised voters splitting their support among candidates other than the certified winner. In weighing the available evidence, a judge appropriately might find it more likely that the certified victory is the result of disenfranchisement when the disenfranchisement was intentionally perpetrated on behalf of the winning candidate, as compared to the disenfranchisement caused by administrative error or technological failure. Nonetheless, the judge should examine the available evidence before voiding an election because of wrongful disenfranchisement.

**Illustration:**

7. Candidate M was certified the winner of a city-council election by 15 votes over Candidate N. In one precinct in the election, however, one voting machine failed to record any votes for any candidates. Based on the poll-book signatures, 400 voters used the malfunctioning machine in an attempt to cast ballots, and there is no paper record of these ballots. It is also known that the distribution of votes on the three other machines in the same precinct was 75 percent for Candidate N and 25 percent for Candidate M. This evidence strongly indicates that, had the malfunctioning machine been working properly, it would have produced 300 votes for Candidate N and 100 votes for Candidate M, or a net of 200 lost valid votes for Candidate N. Given that these 200 lost votes exceed the certified margin of 15, the court should void the result of the election. (Note: if all the voting machines at the same precinct had malfunctioned, recording no votes in the entire precinct, the election should be voided if, but only if, there is extrinsic evidence—including party registration and previous turnout data for that precinct—that, more likely than not, the malfunctioning wiped out valid votes that would have resulted in a different outcome in the election.)

*h. Faulty ballot design.* The infamous "butterfly ballot" used by Palm Beach County, Florida, in the 2000 presidential election, undoubtedly caused many voters mistakenly to cast

ballots for Pat Buchanan when they intended to cast those votes for Al Gore. As a strategic matter, it would have done Gore no good for a court to void the election on account of this faulty ballot design; the Florida legislature then would have been in position to appoint the state's presidential electors directly, and it is highly unlikely that the legislature would have appointed presidential electors pledged to Gore's candidacy. But the question remains whether, if a similarly faulty ballot design in a future nonpresidential election causes enough voters to miscast their ballots, should a court void the election with the possibility of holding a new one? Plausible arguments can be made on both sides of this question, but something of a consensus emerged in the aftermath of 2000: if competing candidates and political parties have had an opportunity in advance of the election to challenge the design of the ballot, then their failure to do so should preclude their ability to raise this challenge in a subsequent judicial contest. Conversely, if there was no opportunity to challenge the faulty design in advance of the election, then a candidate should be permitted to make the challenge if the evidence shows that the faulty design induced enough mistakes to change the result of the election from what it would have been in the absence of the faulty design.

*i. Breakdown of voting process.* If an emergency occurs that disrupts the voting process, and if the disruption is sufficiently severe to raise a question whether the election legitimately can reflect the will of the electorate, then the time to address the question is on Election Day itself or immediately thereafter, as provided in § 214. It would not be appropriate to wait until a post-certification contest of the election to claim that the results should be nullified on the ground of the emergency.

**REPORTERS' NOTE**

For a comprehensive analysis of the issues and case law concerning judicial contests of elections, see Steven F. Huefner, *Remedying Election Wrongs*, 44 HARV. J. LEG. 265 (2007).

Illustration 1 is drawn from the 1948 U.S. Senate Democratic primary election in Texas between Lyndon Johnson and Coke Stevenson. See Josiah M. Daniel III, *LBJ v. Coke Stevenson: Lawyering for Control of the Disputed Texas Democratic Party Senatorial Primary Election of 1948*, 31 REV. LITIG. 1 (2012). Stevenson did not contest Johnson's 87-vote certified victory in state court, but instead attempted to overturn the result in federal court based on the argument that ballot-box stuffing violates the Fourteenth Amendment. That constitutional claim was unsuccessful, stopped by a dramatic last-minute stay order from Justice Hugo Black. This Section takes no position on the federal constitutional issues involved. Rather, the Section provides that if in a state-court contest of election a candidate is able to prove by clear and convincing evidence the kind of fraud that Stevenson alleged (involving 200 fake votes added to a particular ballot box), and if the opposing candidate fails to prove any offsetting fraud or error, then the state court should

overturn the certified outcome of the election and declare the contestant the true winner. See also Qualkinbush v. Skubisz, 826 N.E.2d 1181 (Ill. App. Ct. 2004) (consistent with subsection (b) of this Section, awarding election to contestant after deducting 38 fraudulent absentee votes perpetrated on behalf of certified winner). Cf. Hardin v. Montgomery, 495 S.W.3d 686 (Ky. 2016) (consistent with Illustration 2, when margin of victory is 28 votes, proof of a single fraudulent ballot is insufficient to overturn the result of the election).

Illustration 3 is based on the 1997 election for mayor of Miami. In re Protest of Election Returns and Absentee Ballots, 707 So. 2d 1170 (Fla. Dist. Ct. App. 1998). The trial court found, based on statistical evidence, that "a massive, well conceived and well orchestrated absentee ballot voter fraud scheme" likely caused one candidate to prevail over another. Id. at 1172. Rather than voiding the election, as the trial court had ordered, the court of appeals declared the adversely affected candidate the valid winner of the election. The court explained: "were we to approve a new election as the proper remedy following extensive absentee voting fraud, we would be sending out the message that the worst that would happen in the face of voter fraud would be another election." Id. at 1174. Although the court described its ruling as basing the election outcome solely on a tally of Election Day votes, excluding all absentee ballots whether tainted or not, it would be better to understand the court's decision as an identification of the accurate winner once the likely effect of the absentee-ballot fraud was removed from the count. If, for example, the statistical evidence had shown only that the fraudulent scheme had affected only a small portion of the absentee vote, and the certified winner would have prevailed anyway on the strength of valid absentee ballots, the court of appeals made clear that it would not have nullified all the absentee ballots and declared a winner solely on the basis of the in-person Election Day vote. After all, to impose that result in that alternative scenario would be to disenfranchise all the valid voters who participated in the election, which was exactly what the court of appeals was endeavoring to avoid. Id. ("public policy dictates that we not void those constitutionally protected votes").

McCavitt v. Registrars of Voters of Brockton, 434 N.E.2d 620 (Mass. 1982), is a leading case for the proposition that, because the votes cast on a ballot are entitled to remain secret, a voter cannot be compelled to testify as to the content of the votes cast on the voter's ballot even when the ballot is ineligible and thus should not have been counted. The case involved a mayoral election for the town of Brockton, in which the certified margin of victory after a manual recount was 12 votes. In a subsequent judicial contest, that margin narrowed further to six votes before the court considered the propriety of counting 11 absentee ballots that were not properly notarized in accordance with state law. The Massachusetts Supreme Court ruled that for seven of these ballots the breach of required notarization procedures was sufficiently serious that these ballots should not have been counted. The court held, however, that the voters who had cast these ineligible ballots could not be required to testify as to how they had voted. Observing that the breach had been a "mere failure to follow directions," without any evidence of "fraud" or "intentional wrongdoing," the court explained: "We decline to burden the good faith absentee voter with the possibility that a technical mistake in the execution of an absentee ballot may require the voter to reveal for whom he or she voted." Id. at 630. (The court further ruled that because "ballot secrecy

safeguards society's interest in the integrity of elections, we hold that the right to a secret ballot is not an individual right which may be waived by a good faith voter." Id. at 631. On this further point, this Section parts company with this decision, believing that a state court should be permitted to take the voluntary testimony of a voter, if that testimony will aid the court in the proper resolution of the election contest.) Because the votes on the seven invalid ballots remained secret, and the margin of victory stood at six, the Massachusetts Supreme Court felt compelled to declare the election void. Based on the proceedings at trial, the state supreme court believed that the wrongful inclusion of these seven ballots "placed in doubt" the result of the election (rather than the seven ballots splitting evenly between the two candidates, thereby leaving the result of the election the same), and thus the outcome could not stand. Id. at 631. Cf. Huggins v. Superior Court, 788 P.2d 81 (Ariz. 1990) (agreeing with *McCavitt* that "good faith voters" generally should not be compelled "to disclose invalid votes," but refusing to rule out completely the receipt of such testimony").

The rule in New Mexico, among other states, is that a voter who is not entitled to participate in the election but does so anyway "forfeits the right of [ballot] secrecy" and, upon waiver of the privilege against self-incrimination, may testify as to the content of the unlawful vote. Kiehne v. Atwood, 604 P.2d 123 (N.M. 1979); accord Willis v. Crumbly, 268 S.W.3d 288 (Ark. 2007).

The estoppel principle articulated in Bell v. Gannaway has been discussed in Reporters' Note *b* to § 207. See also Vacco v. Spitzer, 179 Misc. 2d 584, 685 N.Y.S.2d 583 (Sup. Ct. 1998) (in an election for the state's attorney general, when the law "provides a mechanism to challenge a voter's registration at the time of that registration or at the polls," a contest will not be permitted to invalidate those votes afterwards").

In an election where "approximately forty percent of the registered voters were not given the opportunity to vote," the Wisconsin Supreme Court voided the result without need for additional evidence on whether this massive disenfranchisement likely affected the outcome. McNally v. Tollander, 302 N.W.2d 440, 441 (Wis. 1981). In Whitney v. Cranford, 119 S.W.3d 28 (Ark. 2003), the Arkansas Supreme Court invalidated an election in which the margin of victory was 55 votes, and 183 voters eligible to participate in the election had been given ballots on which this race was mistakenly omitted; self-consciously departing from its general principles, the court did not require evidence that the 183 affected voters more likely would have voted in the particular race for a candidate other than the certified winner. Although it is understandable that a court would want to remedy this kind of voter disenfranchisement resulting from administrative error, this Section takes the position that voiding the election is not warranted unless there is at least some evidence that the disenfranchisement likely affected the election's outcome. In Gunaji v. Macias, 31 P.3d 1008 (N.M. 2001), the New Mexico Supreme Court, rather than invalidating the election, invalidated all the votes from a single precinct upon a showing that some of the voters in the precinct were given erroneous ballots that omitted the particular race in question; but this precinct-specific remedy is problematic if the particular precinct is demographically different from the electorate as a whole (in which case excluding the one precinct has the potential of inappropriately skewing the results of the race).

By contrast, in Bauer v. Souto, 896 A.2d 90 (Conn. 2006), the Connecticut Supreme Court ordered an entire new citywide election, overturning the trial court's order of a precinct-specific remedy, when a single voting machine had malfunctioned in a single precinct. The failure of the one voting machine had rendered the results from that particular precinct unreliable. But given that the election was for an at-large seat on the city council, making the election citywide and not district-specific, the court concluded that the only proper remedy was a citywide revote. The court reasoned that "the new election should be the result of an effort to approximate, as closely as is reasonably possible, the first election." Id. at 98.

The assumption underlying this Section is that in a judicial contest of an election the trier of fact would be the court itself, without a jury. Because these cases need to be tried on an especially expedited basis, the use of a jury would be disadvantageous insofar as it likely would slow down the proceedings.

### § 214. Pre-Certification Petition to Nullify Election Because of Calamity

**(a) In the event of a natural disaster or other calamity that prevents five percent or more of the eligible electorate from either casting a ballot in the election or having their ballots counted, the chief elections officer of the state shall determine the appropriate remedy, including:**

**(1) extension of polling hours on Election Day or extending the election for one or more additional days, either for the entire electorate or the portion of the electorate affected by the calamity, depending upon which remedy accords with all voters having substantially equal opportunities to cast a ballot in the election; or**

**(2) rescheduling Election Day to a different day for the entire electorate, thereby voiding any ballots cast during the original Election Day (but not requiring the voiding of absentee or in-person early voting).**

**(b) If a candidate, or political party acting on behalf of one or more candidates, believes the chief elections officer erred in the exercise of the authority provided in subsection (a), including an improper failure to invoke this authority, then no later than 24 hours after the time when the polls originally were scheduled to close on Election Day (or, if the local courts of the state are closed at that time, then within 24 hours after the courts reopen), the candidate may file a judicial petition seeking a remedy.**

**(c) If the court finds a petition filed under subsection (b) to be meritorious, the court may:**

**(1) modify any extension ordered by the chief elections officer, so long as such modification is consistent with the objective of promoting the equal opportunity of all eligible voters to participate in the election;**

**(2) order the chief elections officer to reschedule Election Day pursuant to subsection (a)(2); or**

**(3) declare the election null and void, with the chief elections officer to determine how to proceed in light of this declaration.**

**(d) No court shall grant a petition under this Section unless the court finds that the natural disaster or other calamity rendered it impossible to hold a free and fair election that would adequately reflect the will of the electorate.**

**Comment:**

*a. Weather and other outside forces that disrupt the voting process.* This Section applies to natural disasters or other calamities that prevent eligible voters from casting ballots in an election. It does not apply to the disenfranchisement of voters caused by defects in the operation of the electoral process itself, which instead is covered by § 213(g). For this Section, rather than § 213(g), to apply, the problem must be external to the electoral process itself.

The problem also must be highly visible as the voting process is underway, or on the verge of beginning. The question then is whether the election can be held given the existence of the calamity and, if so, whether some accommodation—like extension of polling hours—must be made to voters affected by the calamity. This question ordinarily should be answered by the state's chief elections officer and not by the state's judiciary. Nonetheless, if a court determines that a chief elections officer handled the question improperly, the court may order the chief elections officer to take a different approach. In particular, if the court determines that the chief elections officer's handling of the question was tainted by partisanship, then the court should intervene insofar as necessary to assure a nonpartisan response to the calamity.

The goal of this Section is to assure that every eligible voter has an adequate opportunity to cast a ballot in the election. If this goal is achieved, then there is no reason to permit a judicial contest of the election's result on the ground that some voters were unable to participate. Similarly, if there has been a failure to achieve this goal, the judicial remedy for this failure should be immediate—on Election Day or shortly thereafter—in order to restore conditions in which all eligible voters do have an adequate opportunity to participate. Even if the election needs to be

1 nullified, and a new one held, it would be wrong to wait for a judicial contest of the certified result
2 to judicially impose this remedy. Instead, if it is apparent on Election Day itself that it is impossible
3 to provide all eligible voters an adequate opportunity to participate, then the voiding of the election
4 should occur immediately, so that the new election can be held as quickly as possible.

5 **REPORTERS' NOTE**

6 Over the last two decades, election observers have become increasingly aware of the need
7 to prepare in advance for the possibility of a natural disaster or other calamity affecting the voting
8 process on Election Day. September 11, 2001, was itself the day of a mayoral primary election in
9 New York City. With voting already underway when the terrorist attack struck the twin towers,
10 Governor George Pataki canceled the election, and it was rescheduled for two weeks later. Adam
11 Nagourney, *Pataki Orders Postponement of Primaries Across State*, N.Y. TIMES, Sept. 12, 2001,
12 at A8; Adam Nagourney, *Primary Election Rescheduled for Sept. 25*, N.Y. TIMES, Sept. 14, 2001,
13 at A2.
14 Superstorm Sandy hit the East Coast, especially New Jersey and New York, a week before
15 Election Day in 2012. Because of the massive disruption, New Jersey implemented emergency
16 measures that permitted voters to transmit ballots by fax or email. Both states permitted voters to
17 cast provisional ballots at any precinct. The experience caused election officials to realize that
18 much more advanced planning was necessary than had occurred beforehand. Thomas Kaplan,
19 *Using Hurricane Sandy as a Lesson for Future Elections*, N.Y. TIMES, Nov. 13, 2013, at A28.
20 In 2016 and since, the threat that a cyberattack might catastrophically disrupt the process
21 of casting or counting ballots in an American election has caused preparations for a possible
22 Election Day emergency to take on a whole new dimension and sense of urgency. See Michael
23 Levenson, *Election officials prepare for cyberattacks*, BOSTON GLOBE, Mar. 27, 2018,
24 https://www.bostonglobe.com/metro/2018/03/27/election-officials-prepare-for-
25 cyberattacks/P6s1LhwLIfiOFSt6s0qYEM/story.html (describing "war game" exercise at
26 Harvard's Kennedy School).
27 The possibility of severe weather interfering with voting on Election Day is, of course,
28 hardly a new phenomenon. See, e.g., State ex rel. School Dist. No. 56 Traverse County v.
29 Schmiesing, 66 N.W.2d 20 (Minn. 1954). In keeping with the basic principle set forth in § 201,
30 state law should specify in advance to the greatest extent possible how such situations should be
31 handled when they arise, including the degree of severity that would warrant an extension of
32 polling hours. Insofar as state laws leave unspecified what to do in some such circumstances,
33 election officials and state judges when required to handle the emergency in the moment should
34 always be mindful of the fundamental obligation to treat all voters equally, which in some instances
35 requires extending polling hours for the entire electorate rather than only those specific localities
36 most affected by the weather emergency. See Edward B. Foley, *Federal Court Extension of Polling*
37 *Hours*, http://moritzlaw.osu.edu/electionlaw/freefair/articles.php?ID=397. Above all, these
38 decisions should not be or appear partisan, a concern that was raised in 2016 over the related issue

of whether to extend the voter-registration deadline because of a severe hurricane. See William Wan, *Hurricane victims face another challenge: Exercising their right to vote*, WASH. POST, Oct. 10, 2016, https://www.washingtonpost.com/national/hurricane-victims-face-another-challenge-exercising-their-right-to-vote/2016/10/10/6aa39238-8f23-11e6-9c85-ac42097b8cc0_story.html; see also Paula Dockery, *New voters can thank Judge Walker*, SUN SENTINEL, Oct. 31, 2016, at 9A (governor's refusal to grant extension "came across as not only illogical but highly partisan").

Given the importance of voting, and the time-is-of-the-utmost-essence nature of these Election Day emergency proceedings, it is understandable that judges would move quickly to fashion a remedy for what might initially appear as wrongful disenfranchisement. But judges, and especially federal judges, need to recognize the limited scope of their jurisdiction in these cases. Insofar as the predicate for a request to a federal judge to extend polling hours is that without injunctive relief a federal constitutional violation will occur, it is important to remember—however simple it may be—that bad weather itself, no matter how severe, is not itself unconstitutional. A constitutional violation, if one exists, would result from the inadequacy of the state government's response to the weather emergency, and that determination requires some examination of the applicable state laws and how state officials implement those laws in the particular instance. Cf. In re Primary Election 2016, 836 F.3d 584 (6th Cir. 2016) (vacating federal district court's ex parte TRO to extend polling hours because of traffic accident, based on "anonymous phone call," without even waiting for an actual plaintiff or lawsuit). Moreover, of potential relevance to determining whether a state has acted unconstitutionally is evaluating the totality of options voters have for casting ballots, including early voting and by mail (as explored in Part I). Likewise, insofar as state law requires polls to remain open for those voters who remain waiting in line at the regularly scheduled closing time, it is necessary to consider whether a judicial decree is warranted to grant extra polling hours to voters who are not already in line at that time.

For additional recent analysis of the issues relating to this Section, see generally Michael T. Morley, *Election Emergencies: Voting in the Wake of Natural Disasters and Terrorist Attacks*, 67 EMORY L.J. 545 (2018).

## § 215. Chain-of-Custody

**(a) Throughout the entire electoral process, from before ballots are cast to the time of final certification of the election (except when absentee ballots are in transmission to and from voters), government officials responsible for the custody of ballots should use professionally developed procedures for maintaining strict and vigilant security over the ballots, in order to minimize any risk of ballot-tampering.**

**(b) When appropriate, government officials shall employ bipartisan, dual-lock (and other dual-control) procedures, which require representatives of both major political parties**

**within a jurisdiction to simultaneously unlock access to secured ballots (and otherwise share dual custody of ballots during transmission to and from polling locations).**

**(c) In any state in which more than two political parties had candidates in the last gubernatorial election receiving more than 20 percent of the vote, all such parties shall be entitled to participate in the procedures of subsection (b) on equal terms with the two parties whose candidates received the highest number of votes in that gubernatorial election.**

**(d) If during a recount it is discovered that ballots to be recounted are missing, and if there is presumptively reliable extrinsic evidence of the votes that were recorded on those ballots, including tally sheets from the polling place where the ballots were cast (and the number of voters who signed the poll books exceeds the number of non-missing ballots by the same number as the number of missing ballots), then the recount shall include these votes based on the presumptively reliable evidence, provided that there is no other evidence that rebuts the presumption of reliability.**

**(e) Apart from § 110(e)(9) concerning the arrival of unsealed absentee ballots, a breach of a state's chain-of-custody rules concerning the transportation and storage of ballots should cause the ballots in question to be ineligible to be counted only if evidence exists that the breach exposed the ballots to tampering that is incapable of being remedied in a recount or contest.**

**Comment:**

*a. Chain-of-custody.* Breaches in chain-of-custody, while serious infractions of rules designed to protect the integrity and accuracy of elections, do not automatically mean that the ballots in question were subject to tampering. For example, it would be a flagrant breach of chain-of-custody to transport a ballot box or voting machine in a taxi unaccompanied by any election official, as occurred in one recent election. But if the ballot box or voting machine remained sealed, and there is no additional evidence to indicate that the ballots actually were tampered with while being driven unaccompanied in the taxi, then these ballots should not be disqualified from being counted just because of the flagrant breach in the chain-of-custody. To disqualify ballots in this situation would be to disenfranchise otherwise eligible voters who did nothing wrong, just because of the egregious misconduct of the election officials.

Thus, whenever government officials wrongfully breach a chain-of-custody rule, every effort should be made to count otherwise eligible ballots in accordance with the electoral choices

that the voters made on those ballots, so that ballots are ruled uncountable only when the breach has made it untenable to trust the ballots as accurately corresponding to the electoral choices of the voters who cast them.

In a high-profile recount, it is advisable to store ballots in locked rooms containing 24-hour security cameras that continuously transmit real-time images over the internet, so that the security of the ballots is publicly transparent at all times.

**REPORTERS' NOTE**

Occasionally, stories surface of election officials who mistakenly leave ballots in the trunks of their cars. See, e.g., Tim Hrenchir, *Worker finds ballots in trunk*, TOPEKA CAPITAL-JOURNAL, Nov. 25, 2008, at 1B. Some of those stories turn out to be false. *Overtime: Chapter 2, Part 2: The Franken vs. Coleman ballots in the trunk—and other myths exposed*, ST. PAUL PIONEER PRESS, Sept. 9, 2009, updated Nov. 12, 2015, https://www.twincities.com/2009/09/09/overtime-chapter-2-part-2-the-franken-vs-coleman-ballots-in-the-trunk-and-other-myths-exposed/. But even where they are true, and constitute an inappropriate breach in the chain-of-custody, the overriding consideration is whether the administrative impropriety warrants invalidation of the affected ballots and, consequently, the disenfranchisement of innocent voters.

Maine effectively used 24/7 security cameras to guard ballots during the recount of its 1970 gubernatorial election. See EDWARD B. FOLEY, BALLOT BATTLES: THE HISTORY OF DISPUTED ELECTIONS IN THE UNITED STATES 247 (2016). The public was able to monitor the display from these cameras, thereby contributing greatly to the transparency and security of this recount.

## § 216. Multiple Ballots Cast by a Single Individual

**(a) No voter is entitled to cast more than one ballot in the same election.**

**(b) If a voter properly voids a ballot before casting another, this single subsequent ballot is not an instance of casting multiple ballots and, if otherwise eligible, is entitled to be counted.**

**(c) If in the same election a qualified voter has cast more than one ballot, and only one of these ballots has already been counted, all other ballots cast by the same voter shall be disqualified.**

**(d) If in the same election a qualified voter casts both an absentee and an in-person ballot (including an in-person ballot required to be provisional), and neither has yet to be counted, the absentee ballot shall be void, and the in-person ballot shall be counted if it is otherwise eligible to be counted.**

**(e) If in the same election a qualified voter casts more than one absentee ballot, or more than one in-person ballot, but the voter failed to void a previously cast ballot before casting another as specified in subsection (b), and if none of these multiple ballots have yet been counted, then all shall be disqualified; provided that if the voter can convincingly demonstrate that this casting of multiple ballots of the same type (either absentee or in-person) was an innocent mistake and not a deliberate attempt to cast more than one vote, and if election officials can determine which of the multiple ballots was the last one cast, then this last one shall count if otherwise eligible.**

**(f) If in the same election two or more ballots cast by the same voter have already been counted, then in a contest pursuant to § 213:**

> **(1) if it is established that these ballots were a deliberate effort to alter the results of the election in favor of a particular candidate (or party), then the number of the votes cast by this voter shall be deducted from the total votes counted for that candidate (or the party's candidate in the election that is the subject of the contest);**
>
> **(2) otherwise, all but one of the voter's ballots shall be deemed ineligible and deducted from the certified results of the election in accordance with § 213(d).**

**(g) In any federal election, if the same voter casts a ballot in more than one state, then the voter's ballot in each state shall be disqualified with respect to all federal offices on the ballot whether or not the voter's ballot cast in any state is disqualified in any other respect.**

**Comment:**

*a. Casting both an absentee and a provisional ballot.* In recent years, as a result of the increased use of provisional ballots pursuant to the Help America Vote Act of 2002, a phenomenon has occurred in which some voters will cast an absentee ballot and, then, unsure of whether that absentee ballot will be counted, will go to their polling place on Election Day to cast a provisional ballot. Some instances of this behavior are innocent. For example, a voter might not believe the absentee ballot will arrive on time. Or perhaps a voter believed that he or she made a mistake in completing the ballot.

Nonetheless, the behavior is detrimental insofar as voters adopt the mindset that they are entitled to cast both an absentee and provisional ballot in the same election and it is the job of the election officials to detect this double-voting and prevent both ballots from being counted. Instead, voters should take responsibility for voiding their absentee ballot if they wish subsequently to vote

a provisional ballot instead. Election officials are encouraged to establish procedures that require voters, at the time of casting a provisional ballot, to indicate whether or not they have already cast an absentee ballot in the same election and, if so, then to notify the voter that casting the provisional ballot will void the absentee ballot. In any event, whether or not such procedures exist and such notice is given, the rule should be that the casting of a provisional ballot automatically voids an uncounted absentee ballot.

*b. Casting multiple ballots of the same type.* Subsection (e) is a deterrent against a voter casting more than one of the same type of ballot, absentee or provisional. Unlike the situation in subsection (d), in which a voter casts one of each type (presumably because of confusion over the status of the absentee ballot), there is no justification for a voter casting two or more of the same type of ballot. Consequently, abuse of this sort should result in all such ballots being disqualified. Note, however, that if a voter properly voids a ballot of a particular type (absentee or provisional), then under subsection (b) casting a second ballot even of the same type is not an instance of multiple voting.

## REPORTERS' NOTE

One egregious example of multiple voting by a single individual involved a Cincinnati poll worker who in three different elections cast ballots in her sister's name as well as her own and in one election cast both an absentee and in-person ballot for herself. Kimball Perry*, Ohioan gets 5-year prison term for illegal voting,* CINCINNATI ENQUIRER, July 17, 2013, https://www.usatoday.com/story/news/nation/2013/07/17/cincinnati-illegal-voting/2530119/; Barry M. Horstman, *Vote fraud charges possible*, CINCINNATI ENQUIRER, Feb. 23, 2013, at A1.

For existing state laws that prohibit double-voting, see National Conference of State Legislatures, *Double Voting*, http://www.ncsl.org/research/elections-and-campaigns/double-voting.aspx.

With the rise of Americans, particularly retirees, residing in different states for winter and summer months, the phenomenon of possible double-voting by so-called "snowbirds"—caused by voters being registered to vote in more than one state—has drawn increased attention in recent years. See, e.g., Roger Roy & Beth Kassab, *Double Votes Taint Florida, Records Show*, ORLANDO SENTINEL, Oct. 22, 2004, http://articles.orlandosentinel.com/2004-10-22/news/0410220246_1_databases-registered-to-vote-double-voters. Recent scholarship, however, indicates that the overall national rate of double-voting, whether by snowbirds or otherwise, is relatively rare, likely no more than 0.02% of all ballots cast in 2012. See Sharad Goel et al., *One Person, One Vote: Estimating the Prevalence of Double Voting in U.S. Presidential Elections*, https://scholar.harvard.edu/files/morse/files/1p1v.pdf. Of course, any deliberate double- voting, knowing that the voter is entitled to cast only one ballot, is electoral misconduct that should not be

1 allowed. Cf. Editorial, *Election integrity; Our view: Irregularities unlikely serious but deserve*
2 *state prosecutor's scrutiny*, BALTIMORE SUN, Apr. 8, 2010, http://articles.baltimoresun.com/2010-
3 04-08/news/bs-ed-0409-voting-20100408_1_ballots-voter-fraud-state-elections.