

5-2020

## Election Spotlight: Nearly Twenty Years After Hanging Chads, Problems Persist in Florida

Christopher Wood

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### Recommended Citation

Christopher Wood, Note, *Election Spotlight: Nearly Twenty Years After Hanging Chads, Problems Persist in Florida*, 71 Mercer L. Rev. 895 (2020).

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# Election Spotlight: Nearly Twenty Years After Hanging Chads, Problems Persist in Florida\*

## I. INTRODUCTION

The right to vote is as close to sacrosanct as almost any right in our constitutional system.<sup>1</sup> The election-battleground state of Florida has time and time again come under the national spotlight due to its vote counting practices.<sup>2</sup> Florida fell under immense national scrutiny as the entire nation awaited the resolution of the 2000 presidential election.<sup>3</sup> *Bush v. Gore*<sup>4</sup> highlighted many of the inherent issues with the Florida system of allowing individual counties free rein to enact their own election procedures. The lack of any central guidance in election procedures has, in large part, persisted.<sup>5</sup> The latest iteration concerns the second examination of the procedures, or lack thereof, used in validating vote-by-mail and provisional ballots.<sup>6</sup> The established test to measure the constitutionality of an election law, restricting voting, is to weigh the magnitude of the burden on the voter, against the state's justifications for the restriction.<sup>7</sup> The United States Court of Appeals for the Eleventh Circuit applied this test while using the established

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\*I would like to thank Dean Cathy Cox for her advice in guidance. Thank you to my wife Shannon and daughter Myka for their patience and support through this process. Also, thank you to my parents Farrar and Mona for all of their encouragement.

1. *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

2. *See Bush v. Gore*, 531 U.S. 98 (2000); *Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312 (11th Cir. 2019).

3. David E. Rosenbaum, *THE 2000 ELECTION: THE RECOUNT; Bush Holds Slim Lead Over Gore as Florida Recounts*, N.Y. TIMES (Nov. 10, 2000), <https://www.nytimes.com/2000/11/10/us/the-2000-election-the-recount-bush-holds-slim-lead-over-gore-as-florida-recounts.html> (detailing the recount and the aftermath that followed).

4. 531 U.S. 98.

5. *Lee*, 915 F.3d at 1320.

6. *Id.* at 1326.

7. *Id.* at 1319.

framework to consider an emergency stay of a preliminary injunction.<sup>8</sup> A majority of an Eleventh Circuit panel ultimately held—with a single judge dissenting—that an emergency stay was not warranted, though the Court took the time to highlight several factors that continue to plague the Florida election system.<sup>9</sup>

## II. FACTUAL BACKGROUND

During the 2018 election, the state of Florida had two vote-casting options that involved a need to match a signature to the voter's registration card: vote-by-mail and provisional ballots.<sup>10</sup> Both of these ballots required the receiving counties to compare the signature on the ballots with the signature on the respective voter's registration card.<sup>11</sup> The initial comparison was done by the county supervisor, and only if there was an issue with the signatures did it then get reported to the voter and forwarded along to the canvassing board who made the final determination on the eligibility of the ballot.<sup>12</sup>

Florida, however, did not, and does not currently, require each county to enforce this process in the exact same manner, instead allowing each county to set up its own procedures for following the statutorily dictated rules. There is no required training in handwriting or signature analysis for anyone involved in the signature comparison process. Additionally, there is no uniform rule describing when the canvassing board will convene to determine the eligibility of the ballot; instead, the law provides a window starting fifteen days before the election and extending to one day after.<sup>13</sup>

The timeline for curing a mismatched signature is the crux of the issue involved. Vote-by-mail ballots must be delivered to the county supervisor by 7 p.m. on election day. However, an affidavit, and any evidence, to cure a defective signature is due to the county supervisor by 5 p.m. the day before the election. Additionally, the final word of the canvassing board could be given up to one day after the election, presenting the possibility of a situation where ballots are rejected by an

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8. *Id.* at 1318.

9. *Id.* at 1327.

10. *Id.* at 1316.

11. *Id.*

12. *Id.* at 1342–43 (Tjoflat, J., dissenting). This point on timing is first discussed by the dissent with the majority seeming to imply that mismatched ballots went directly to the canvassing board bypassing the county supervisor. It is unclear if this is due to some counties following the majorities implied method and only using the canvassing board with no county supervisor middle step. *Id.*

13. *Id.* at 1319–20 (majority opinion).

untrained supervisor, the voters are alerted to the rejection with no time to cure, and then, after the election is finalized, they are told that the canvassing board did not count their votes with no recourse available.<sup>14</sup>

That very scenario is what caused the Democratic Executive Committee of Florida (DECF), and Bill Nelson for U.S. Senate, to seek a preliminary injunction requiring that all vote-by-mail and provisional ballots be counted.<sup>15</sup> The United States District Court for the Northern District of Florida agreed that there was potential for, if not actual, voter disenfranchisement, but granted only a partial preliminary injunction—not counting all of the ballots, but instead granting an additional cure period for those not given an opportunity.<sup>16</sup>

That order from the district court caused the National Republican Senatorial Committee (NRSC), the Florida Secretary of State, and the Florida Attorney General to appeal and seek an emergency stay with the Eleventh Circuit.<sup>17</sup> The NRSC highlighted that the timeline for curing deficiencies in a vote-by-mail ballot was known before a voter decided to use that method of voting, and that the voter assumed the risk of being unable to cure if the voter waited until the last moment to submit the vote-by-mail ballot.<sup>18</sup> Additionally, the NRSC contended that the need to protect against voter fraud and to promote a smooth electoral process warranted the signature comparison procedures and timeline.<sup>19</sup>

The compressed timelines surrounding an election dictate that many of the most impactful decisions come without the benefit of the full litigation process. Instead, this area of law is often interpreted during a motion for a stay or injunction. As such, the factors laid out in *Nken v. Holder*,<sup>20</sup> including a strong showing that a case is likely to succeed on the merits, determine if a motion should be granted or denied.<sup>21</sup> Ultimately, a majority of the Eleventh Circuit decided that the NRSC did not make a strong enough showing and denied the motion for an emergency stay.<sup>22</sup>

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14. *Id.* at 1320–21.

15. *Id.* at 1315.

16. *Id.* at 1317.

17. *Id.*

18. *Id.* at 1344 (Tjoflat, J., dissenting).

19. *Id.* at 1322 (majority opinion).

20. 556 U.S. 418 (2009).

21. *Lee*, 915 F.3d at 1317.

22. *Id.* at 1326.

## III. LEGAL BACKGROUND

When considering an election law in the state of Florida, it is important to consider the state's history of election scrutiny along with the history of the method of voting affected and the applicable test the law will be judged on. For the purposes of illustrating Florida's troubled election history, there is no greater starting point than *Bush v. Gore*. After that context is established, the history of various forms of absentee voting will be discussed. The last aspect crucial to the legal background is the *Anderson-Burdick* test, which is used to judge the practice in question.

## A. Florida's Election History

The modern scrutiny of Florida's election process begins with the critical role the state played in the 2000 presidential election.<sup>23</sup> George Bush and Al Gore were campaigning to become the forty-third President of the United States, and after election day, the electoral votes of the state of Florida were going to push one candidate or the other over the 270 needed. While the state initially called for Bush, the margin of victory was below the threshold to trigger an automatic statewide machine recount. After this recount, Bush was still ahead but the margin had narrowed further.<sup>24</sup> The machine recount also brought into the national discussion some of the problems with paper ballots.

The ballots in Florida brought the term "hanging chad" into the national lexicon, as it became the name for one of the issues with the ballots being recounted; if the hole was punched for either candidate, but the paper inside the hole, or chad, was still attached, or hanging on, it would create problems for the vote counting machines. Also, some ballots did not contain a presidential vote; these "down ballot" votes are an unusual voting practice. Further, other ballots had multiple selections made for single-selection races, resulting in the ballots being disqualified.<sup>25</sup>

After the machine recount, Gore utilized a Florida election provision that allowed for manual recounts to be requested on a county-by-county basis, requesting manual recounts in four traditionally democrat

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23. Lance deHaven-Smith, *The Battle for Florida: An Annotated Compendium of Materials from the 2000 Presidential Election* 8 (Gainesville: University Press of Florida 2005).

24. *Bush*, 531 U.S. at 100–01.

25. *Id.* at 105–07. In addition to questioning if ballots with "hanging chads" were valid at all, there were also questions as to the method of review each team of recounters was to use because each team of recounter was operating with some degree of independence. *Id.*

counties. Gore's contention was that a hand recount could account for ballots with some of the problems listed above and provide those voters with an opportunity to have their vote counted. Controversy came to a head when the Florida Secretary of State required all counts to be reported within seven days of the election in order to certify the results. This requirement was statutorily dictated to the Secretary of State and held as mandatory by the Florida courts, with the caveat that the returns could later be amended, and the Secretary was allowed to use discretion on if the amended returns would be used in certification.<sup>26</sup>

The Secretary's impending certification gave rise to the legal action that ended in the Supreme Court decision. Bush sought to enjoin the partial hand recount while Gore sought for it to continue and be included in the certified results. Ultimately the Supreme Court held that the lack of a standard recount process, allowing a county by county manual recount, violated the Equal Protection Clause<sup>27</sup> of the Fourteenth Amendment.<sup>28</sup>

Volumes have been written and hours have been spent on television and radio discussing the various impacts of the Supreme Court's decision— they will not be rehashed here.<sup>29</sup> Instead it is important to note that one of the deciding factors was that Florida did not have the same rules and procedures for every county instead, having a system that allowed each county to set its own rules and procedures.<sup>30</sup>

After the nationally scrutinized *Bush v. Gore* decision, there has been another case relating to the specific question of signature matching on vote-by-mail and absentee ballots. That case, *Florida Democratic Party v. Detzner*,<sup>31</sup> first addressed the issue of what should be done in the event of a signature mismatch on a vote-by-mail or absentee ballot.<sup>32</sup> Prior to that decision, voters that utilized vote-by-mail ballots were afforded no opportunity to cure a signature mismatch. The court highlights another inconsistency in Florida's election practice between immediately notifying and allowing voters that failed to sign their vote-by-mail ballots entirely with the opportunity to cure, contrasted with

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26. *Id.* at 101.

27. U.S. CONST. amend. XIV, § 1.

28. *Bush*, 531 U.S. at 111.

29. *See, e.g.*, Lance deHaven-Smith, *The Battle for Florida: An Annotated Compendium of Materials from the 2000 Presidential Election 8* (Gainesville: University Press of Florida 2005).

30. *Id.* at 106.

31. 2016 U.S. Dist. LEXIS 143620 (N.D. Fla. 2016).

32. *Id.* at 3.

the lack of any opportunity to cure afforded to voters that did sign but had a signature mismatch with their voter card.<sup>33</sup>

After the court's ruling, allowing a cure period, the Florida legislature took action to codify the cure procedure. However, this procedure to cure came into question again in *Democratic Executive Committee of Florida v. Lee*, which specifically questioned the notification process and its lack of uniformity across all of the counties of Florida. Time and time again Florida's practice of allowing each county great latitude in election procedures has produced a result that does not treat every vote as equal.

### *B. Vote-By-Mail and How We Got There*

The right to vote is an essential element of our democratic republic.<sup>34</sup> The traditional method of voting involves eligible voters reporting to their respective voting precincts on election day to cast their ballots in person. Those ballots would then be taken to be tallied and reported, resulting in the election outcome. The idea of personally appearing at the polling place to cast a ballot first became an issue to address when a large swath of the voting populace was away at war.<sup>35</sup>

The need for another method of voting was first addressed during the American Civil War.<sup>36</sup> Absentee ballots were distributed to both Union and Confederate soldiers in the field to allow them to cast a ballot that would be counted in their respective home jurisdictions.<sup>37</sup> This method was expanded to the civilian populace in the late 1800s, allowing eligible voters that were away from home or too seriously ill to cast a vote via absentee ballot.<sup>38</sup>

The Second World War saw this issue addressed again resulting in the codification of the ability of service personnel stationed overseas to cast votes through absentee ballots.<sup>39</sup> Unfortunately, these initial laws were marred with racial tensions regarding African American voting

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33. *Id.* at 4–5.

34. *Yick Wo*, 118 U.S. at 370.

35. *Voting by Mail and Absentee Voting*, MIT ELECTION DATA & SCIENCE LAB, <https://electionlab.mit.edu/research/voting-mail-and-absentee-voting> (last visited Dec. 16, 2019). In addition to Massachusetts Institute of Technology (MIT), this election science project is also affiliated with Auburn University, University of New Mexico, Brigham Young University, The Ohio State University, Caltech, University of Pennsylvania, University of Connecticut, Reed College, University of Florida, College of William & Mary, University of Minnesota, and the University of Wisconsin.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

rights in the south.<sup>40</sup> These less effectual laws were later replaced with more successful versions encouraging service personnel to take advantage of the absentee voting option.<sup>41</sup>

The state of California was the first to allow civilians to request, and cast, an absentee ballot with no excuse.<sup>42</sup> From that moment forward, absentee and vote-by-mail options have expanded, with some states going so far as to adopt an all-mail voting process.<sup>43</sup> The state of Florida, while not an all-mail voting state, does offer vote-by-mail ballots to any registered voter without the need for an excuse.<sup>44</sup> There are still some states that do not offer absentee, or vote-by-mail, ballots without an excuse, but these states are now in the minority.<sup>45</sup> Corresponding to the expansion of the vote-by-mail system has come a mirrored expansion of the scrutiny on the system for potential voter fraud.<sup>46</sup>

The Florida system in place to prevent voter fraud in relation to vote-by-mail ballots revolves primarily around signatures. The first iteration of this system was for the signature on the vote-by-mail ballot to be compared to the signature on the voter registration card of the voter, if the two signatures did not match then the ballot would be set aside and remain uncounted, but not destroyed.<sup>47</sup> This process was brought into question and found to be unconstitutional by the courts.<sup>48</sup> The subsequent response of the Florida legislature was to rewrite the code sections dealing with signature matching procedures and instead allowing those using vote-by-mail ballots the opportunity to cure any signature mismatch. However, the legislature did not take that opportunity to allow voters using provisional ballots any procedure to cure a signature mismatch on those types of ballots. This new code and procedure was again brought into question and litigated in the very same district court as the previous controversy, resulting in the current appeal examined here.<sup>49</sup>

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40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.* The number of voters taking advantage of vote by mail voting systems has continued to rise while the number of voters casting their votes in person on election day has declined. *Id.*

44. *Id.*

45. *Id.* Three states have an all-mail voting system, twenty states still require an excuse, the state of Georgia offers a no excuse absentee ballot similar to Florida. *Id.*

46. *Id.*

47. *Democratic Exec. Comm. of Fla.*, 915 F.3d at 1316.

48. *Id.*

49. *Id.* at 1316–17.



The factors used in considering a stay were first enumerated by the Supreme Court of the United States in *Hilton v. Braunskill*<sup>50</sup> in 1987.<sup>51</sup> This four-factor test allowed the court to standardize stay considerations. Additionally, the four-factor test allowed the likelihood of victory to be weighed against the injuries to other parties as well as the public interest in the result.<sup>52</sup> The Supreme Court declined to adopt a more restrictive test, advocated for by the government, in *Nken v. Holder*,<sup>53</sup> instead reiterating the four-factor test.<sup>54</sup> This was seen as allowing the courts a broader ability to consider multiple facets of a stay motion or appeal.<sup>55</sup>

When considering the fundamental right of voting, the building blocks are the First<sup>56</sup> and Fourteenth<sup>57</sup> Amendments. Being constitutional amendments, they carry the highest authority available, as such it was initially argued that any limitation on the right to vote outside those enumerated in the amendments themselves should not be allowed.<sup>58</sup> Unfortunately, these initial amendments were read so as to not include suffrage of all citizens, but this was later rectified with the Fifteenth<sup>59</sup> and Nineteenth<sup>60</sup> Amendments.

### C. *Anderson-Burdick Test*

The current method of considering any limitation on voting rights is a compilation of two Supreme Court cases and the rules therein.<sup>61</sup> This test has been coined *Anderson-Burdick* and allows the court to weigh the burden imposed on the voter against the justification offered by the state.<sup>62</sup> The first case, *Anderson v. Celebrezze*,<sup>63</sup> first established the idea that election laws that restrict voting in some way should be tested

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50. 481 U.S. 770 (1987).

51. *Id.* at 776.

52. *Id.*

53. 556 U.S. 418 (2009).

54. *Id.* at 420.

55. *Id.*

56. U.S. CONST. amend. I.

57. U.S. CONST. amend. XIV.

58. *See Burdick v. Takushi*, 504 U.S. 428 (1992).

59. U.S. CONST. amend. XV.

60. U.S. CONST. amend. XIX.

61. *Democratic Exec. Comm. of Fla.*, 915 F.3d at 1318.

62. *Id.*

63. 460 U.S. 780 (1983).

by weighing the burden on the voter against the justifications of the state.<sup>64</sup>

*Anderson* dealt with an independent political candidate attempting to get on the ballot in Ohio. The state of Ohio had an earlier deadline for independent candidates to register than it did for candidates of the two major parties.<sup>65</sup> The Supreme Court held that the restriction was not warranted by the state's justifications, highlighting the problem with unequal treatment of independent candidates to those of the two major parties.<sup>66</sup> In addition to providing the basis for testing an election law burdening voters *Anderson* also shows the Supreme Court's deference for rules and regulations that are equal in their application.<sup>67</sup>

The second case, *Burdick v. Takushi*,<sup>68</sup> refined the test further specifying that heavy burdens on voters must be countered with narrowly drawn restrictions on the part of the state, while also granting that reasonable restrictions can be justified by the state's regulatory interests.<sup>69</sup> This allowed for election laws to be considered on an individual basis and not all be subject to strict scrutiny and narrow drafting.<sup>70</sup>

*Burdick* involved a ban on write-in votes by the state of Hawaii. All write-in votes had been banned in the state of Hawaii when Alan Burdick sought to vote by write-in. Burdick brought suit to force Hawaii to provide for a method of write-in voting.<sup>71</sup> The Supreme Court ultimately held that a ban on all write-in voting was justified by the state's reasons and did not compel them to reinstate the method of voting.<sup>72</sup> Again, the Court specified that the burden was equal across all voters.<sup>73</sup>

The joint *Anderson-Burdick* test has allowed courts to establish that not all limitations on the voting system are unconstitutional, but rather, the burdens that the limitations impose must be measured against the justifications offered by the state.<sup>74</sup> This allows all citizens

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64. *Id.* at 789.

65. *Id.* at 782.

66. *Id.* at 787–88.

67. *Id.* at 793.

68. 504 U.S. 428 (1992).

69. *Id.* at 439.

70. *Id.* at 441.

71. *Id.* at 430.

72. *Id.* at 441.

73. *Id.*

74. *Democratic Exec. Comm. of Fla.*, 915 F.3d at 1318.

the right to vote and any limitations on those rights a method with which to be reviewed.

#### IV. COURT'S RATIONALE

In *Democratic Executive Committee of Florida v. Lee*, the Eleventh Circuit reviewed the grant of a preliminary injunction by the district court for abuse of discretion. Within that review, legal conclusions were reviewed *de novo* and findings of fact reviewed for clear error.<sup>75</sup> When considering a motion for stay the controlling test is found in *Nken v. Holder*, laying out a four-factor test, with the first two factors being of highest priority:

(1) whether the stay applicant has made a strong showing that it is likely to succeed on the merits, (2) whether the applicant will be irreparably injured absent a stay, (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding, and (4) where the public interest lies.<sup>76</sup>

##### A. *Strong Showing*

The first factor of the *Nken* test is the most important of the first two factors, which are both set out as the most important of the entire *Nken* four-factor test. In determining the likelihood of success, the court examined the signature requirements' constitutionality against the First and Fourteenth Amendments. When looking specifically at an election law the controlling test is *Anderson-Burdick*, measuring the magnitude of the burden to the voter against the state's offered justifications.<sup>77</sup> Interpreted to create a system where the higher the injury or burden on the voter, the greater the state's justification must be.<sup>78</sup>

##### 1. **Burden on the Voter**

The vote-by-mail system in Florida, while designed to allow a greater number of people with the opportunity to vote, was in fact leading to a greater number of potential disenfranchised voters. The Florida system of allowing each county to decide its own procedures created a "crazy quilt of enforcement" that ultimately led to disenfranchisement. The timeline of curing a signature rejection, specifically the gap therein, did not allow for every legitimately cast vote to be counted. The procedure

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75. *Id.* at 1317.

76. *Id.*

77. *Id.* at 1317–18.

78. *Id.* at 1319.

of examining the signatures being set by each county individually did not allow for an even application of the law throughout the state.<sup>79</sup> Perhaps the greatest illustration of the burden this system placed on the voters of Florida is found through U.S. Congressman Patrick Murphy,<sup>80</sup> the Congressman's vote-by-mail ballot was rejected for lack of signature match, and he was given no time to cure, falling victim to the gap in the timeline to cure.<sup>81</sup>

## 2. State's Justification

Florida's justification for the signature match system was twofold: first, to prevent voter fraud; and second, to ensure an efficient, timely election.<sup>82</sup> Both of these were held as valid and important considerations for the state but ultimately, in the eyes of the court, did not outweigh the actual and potential disenfranchisement of voters.<sup>83</sup>

The United States Court of Appeals for the Eleventh Circuit ultimately held that protecting against voter fraud and having an efficient election were both possible within a system providing fair signature matching procedures.<sup>84</sup> The court rejected the idea that fraud was more likely to take place if the order still required there to be a signature match procedure and only allowed voters more time to cure within that procedure.<sup>85</sup> This change from the relief petitioned for to one derived by the court alone is a major point of the dissent that will be discussed in more depth later.<sup>86</sup> Also, the court dismissed the idea that processing the 4,000 ballots in question would cause a great delay or burden for a state that processes in excess of nine million ballots.<sup>87</sup>

## 3. Weighing the Burden versus the Justification and Laches

The final aspect of the *Anderson-Burdick* test is to weigh the burden against the justifications.<sup>88</sup> The court handled this analysis quickly, as the justifications offered by the state were disregarded earlier in the discussion.<sup>89</sup> Also, the court devoted the introduction to the case to

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79. *Id.* at 1319–20.

80. *About Patrick*, CONGRESSMAN PATRICK MURPHY, <https://www.murphyforflorida.com/about-patrick/> (last visited Dec. 16, 2019).

81. *Democratic Exec. Comm. of Fla.*, 915 F.3d at 1321.

82. *Id.* 1321–22.

83. *Id.* at 1326.

84. *Id.* at 1331.

85. *Id.* at 1322 (majority opinion).

86. *Id.* at 1342 (Tjoflat, J., dissenting).

87. *Id.* at 1322.

88. *Id.*

89. *Id.* at 1325–26.

outlining the importance of the right to vote, and how any voter disenfranchisement must be avoided, setting up a lopsided weighing of the two.<sup>90</sup> Specifically stating that a single voter that was disenfranchised was one too many, the court held that the burden and injury to the voter greatly outweighed the justifications offered by the state.<sup>91</sup>

The laches claim was also quickly dismissed by the court, which noted that the NRSC was unable to meet the requirements of a laches argument—inexcusable delay and undue prejudice.<sup>92</sup> The court first pointed to the legislative change in the statute a mere one year prior then, highlighted that it was the DECF's prior litigation that had caused that very change.<sup>93</sup> The court followed with another summary dismissal of the undue prejudice that the NRSC might have faced then concluded with a reiteration of the holding that the laches claim fell short.<sup>94</sup>

### *B. Republicans' Irreparable Injury*

The second stage of the *Nken* four-factor test considered by the court involved examining the potential irreparable injury of the NRSC if the stay is not granted.<sup>95</sup> This argument was made by the NRSC on three fronts, all of which were rejected by the court.<sup>96</sup>

First, the NRSC contended that allowing the ballots in question to be cured would create a chaotic restart of the election.<sup>97</sup> The court flatly rejected that argument as overstated, pointing back to the small number of ballots in question.<sup>98</sup> After dismissing that injury, the court moved onto the second argument: the potential of fraudulently including ballots that were in fact not belatedly notified of the need to cure.<sup>99</sup> The court assuaged those concerns by highlighting that a voter would be under the threat of perjury if there was a proven false claim of belated notification.<sup>100</sup>

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90. *Id.* at 1315.

91. *Id.* at 1321.

92. *Id.* at 1326.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.* at 1326–27.

97. *Id.* at 1326.

98. *Id.*

99. *Id.*

100. *Id.*

The last argument of a potential injury made by the NRSC was that the injunction would cause it to have to expend substantial resources trying to encourage voters to go back out and cure their rejected signatures.<sup>101</sup> This was the first potential injury that the court did not dismiss, instead the court held that the potential injury did not overcome the NRSC's earlier inability to prove the likelihood of their success on the merits.<sup>102</sup>

### *C. Other Parties and Public Interest*

The court then combined the last two, lesser factors of the *Nken* test into one discussion.<sup>103</sup> Ultimately, only addressing directly the idea that the public interest advocates for allowing the injunction and denying the stay.<sup>104</sup> The court held that a stay would disenfranchise voters, and that was too high a price to pay.<sup>105</sup> Additionally, the court held that the public knowledge of legitimately cast votes not being counted would damage the public's faith in the legitimacy of the election.<sup>106</sup>

### *D. The Dissent*

Judge Tjoflat dissented from the majority, taking issue with two aspects of the case.<sup>107</sup> First, with the manner in which relief was granted by the district court, and second, with the reading and interpretation of the statute by the district court.<sup>108</sup>

The dissent focuses on the relief that the DECF requested, that all vote-by-mail and provisional ballots be counted without regard for signature matching.<sup>109</sup> The DECF was of the opinion that a non-standard signature test was in totality unconstitutional and should be thrown out, requesting that all vote-by-mail and provisional ballots be counted including those that had previously had a cure offered and remained ineligible.<sup>110</sup> When considering the relief requested, counting all ballots regardless of eligibility, the potential damage of voter fraud begins to equalize the scales with the potential for voter

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101. *Id.* at 1327.

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.* at 1332 (Tjoflat, J., dissenting).

108. *Id.* at 1334.

109. *Id.* at 1341–42.

110. *Id.* at 1333.

disenfranchisement.<sup>111</sup> The district court and the majority of the circuit court decided that this did not need to be considered, instead opting to insert a new relief previously unsought by the DECF.<sup>112</sup>

The second point of contention that the dissent highlights was the reading and interpretation of the statute.<sup>113</sup> The district court, and subsequently the majority of the circuit court, took the view that allowing the canvassing board to convene the day after the election presented a gap that would strip some voters of the ability to correct a signature mismatch.<sup>114</sup> Contrastingly, the dissent read the statutory requirement of the county supervisor to immediately examine the signature and inform the voter as leaving no gap other than one of the voters' own making by submitting the ballot at the last moment.<sup>115</sup>

It is the conclusion of the dissent that the district court overreached its authority in creating a form of relief for which the DECF did not petition.<sup>116</sup> Additionally, the dissent called into question the very reason for litigation, the potential cure gap.<sup>117</sup> In conclusion the dissent recommends deferring to federalist principles, allowing Florida to conduct its elections as it sees fit.<sup>118</sup> However, it is important that in all of the dissents discussion of remedy changes and statutory misinterpretation it does not speak to the wisdom of a standardless system of signature examination merely relying on that being a problem for Florida to sort out itself.

#### V. IMPLICATIONS

If history is to be our guide, then one of the implications of this case will be a rewrite of the signature match requirement in the vote-by-mail and provisional ballot code sections.<sup>119</sup> The same district court that heard this case also heard a previous case when the code provided no cure option for a signature mismatch.<sup>120</sup> The legislative response to that ruling was to amend the code and provide for a method of curing a signature mismatch.<sup>121</sup> A similar course of action will probably be taken

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111. *Id.* at 1341–42.

112. *Id.* at 1342.

113. *Id.* at 1343.

114. *Id.* at 1331 (majority opinion).

115. *Id.* at 1342 (Tjoflat, J., dissenting).

116. *Id.* at 1332.

117. *Id.* at 1344.

118. *Id.* at 1348.

119. *Id.* at 1316 (majority opinion).

120. *Id.*

121. *Id.*

with the most recent ruling, changing the timeline for curing a signature mismatch to prevent the possibility of a voter being told their ballot had been rejected with no time to cure. This could be easiest accomplished by clarifying that the county supervisor must compare the signatures as soon as the ballots are received and must immediately provide the voter with notice of a mismatch and instructions on how to cure. Additionally, language in the statute that creates confusion on whether the canvassing board gets the first look at the signatures should be stricken from the statute.

The implications of this case do not stop at the relatively small matter of signature matches on vote-by-mail ballots but rather extend to all of the electoral process in Florida and beyond. Having already been cited in Georgia, the idea of allowing all voters using ballots that have a signature match requirement the opportunity to cure a signature mismatch will probably become the standard.<sup>122</sup> Any statute short of that standard would seem to be unconstitutional unless found sufficient by the Supreme Court.

Preventing voter fraud is the underlying issue behind the need for a signature match process and will continue to be the focus of many election laws moving forward. Throughout the republic there has been a move away from a purely analog system of voting incorporating more and more of the digital world. The purpose of the absentee or vote-by-mail ballot is to allow those voters that cannot get to the polls on election day a method of casting their vote, and as we continue to drag our electoral process into the digital age it very well may become a moot method of casting a vote. However, the issues addressed by this case on the need to verify the identity of the voter casting the ballot will persevere. Voters are likely to be given the opportunity to prove their eligibility to vote.

Narrowing the focus to the state of Florida, specifically the ability of each county to develop its own system of compliance, this case may lead to an alteration of this practice as well. This system of each county acting on its own has plagued the Florida electoral process in multiple ways and this may serve as the catalyst for change. It would be wise for the Florida legislature to enact gradual changes that provide for a more standardized system across the entire state. This would help eliminate some of the seemingly arbitrary decisions on the specific issue of signature matching while also ensuring a more efficient and consistent reporting of election results. It cannot be that the Florida legislators, nor their constituents, enjoy being the butt of so many punch lines

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122. *Ga. Muslim Voter Project v. Kemp*, 918 F.3d 1262 (11th Cir. 2019) (this later Georgia case also involved signature matching on absentee ballots).



every two to four years. Surely steps will be taken to standardize Florida's electoral process in the near future.

**Christopher Wood**