

Suit to Enjoin Election Officials to Keep Counting Absentee Ballots After the Polls Closed Dismissed Because That Was What They Were Going to Do

Wince v. Thurston

(*Brian S. Miller, E.D. Ark. 4:20-cv-1274 and 4:20-cv-1278*)

A complaint removed to federal court sought an injunction requiring election officials to keep counting absentee ballots if the counting would not be finished when the polls closed. An identical removed action was consolidated with the first. During the injunction hearing, state election officials confirmed that all ballots returned on time would be counted, so the district judge dismissed the actions.

Subject: Absentee and early voting. *Topics:* Absentee ballots; Covid-19; case assignment; removal.

On October 23, 2020, Arkansas state election officials removed an action by two absentee voters to the federal district court for the Eastern District of Arkansas.¹ “Like thousands of Arkansans, they are voting absentee due to health concerns related to the [global infectious] COVID-19 pandemic. . . . They ask that [the] Court enter a preliminary injunction prohibiting election officials from refusing to continue counting absentee ballots after the polls close at 7:30 p.m. on November 3, 2020.”²

Judge James M. Moody, Jr., asked the court to reassign the case on the day that it was removed: “Based upon my schedule and the short timeline, I will not be able to consider the preliminary injunction before November 3rd.”³ Judge Brian S. Miller set the case for hearing on October 28.⁴

On the day before the hearing, Judges Miller and D.P. Marshall, Jr., agreed to consolidate the case with a case removed on October 26 and assigned to Judge Marshall.⁵ According to the defendants, “After [they] removed [the] first action to [the federal] Court, Plaintiffs notified the Court that they intended to file another state-court action bringing identical state constitutional claims This morning Plaintiffs did just that.”⁶

1. Notice of Removal, *Wince v. Thurston*, No. 4:20-cv-1274 (E.D. Ark. Oct. 23, 2020), D.E. 1 [hereinafter First Notice of Removal].

2. Complaint at 2, *Wince v. Thurston*, No. 60CV-20-5928 (Ark. Cir. Ct. Pulaski Cty. Oct. 23, 2020), attached to First Notice of Removal, *supra* note 1; see Amended Complaint, *Wince*, No. 4:20-cv-1274 (E.D. Ark. Oct. 27, 2020), D.E. 9.

3. Order, *Wince*, No. 4:20-cv-1274 (E.D. Ark. Oct. 23, 2020), D.E. 4.

4. Order, *id.* (Oct. 26, 2020), D.E. 8; see Preliminary-Injunction Motion, *id.* (Oct. 27, 2020), D.E. 10.

5. Order, *id.* (Oct. 28, 2020), D.E. 17; Order, *Wince v. Thurston*, No. 4:20-cv-1278 (E.D. Ark. Oct. 27, 2020), D.E. 8; see Motion, *id.* (Oct. 26, 2020), D.E. 5.

6. Notice of Removal, *Wince*, No. 4:20-cv-1278 (E.D. Ark. Oct. 26, 2020), D.E. 1 [hereinafter Second Notice of Removal]; see Complaint, *Wince v. Thurston*, No. 60CV-20-5954 (Ark. Cir. Ct. Pulaski Cty. Oct. 26, 2020), attached to Second Notice of Removal, *supra*.

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Dismissed Because That Was What They Were Going to Do*

During Judge Miller's hearing, Arkansas's board of election commissioners met and confirmed that every absentee ballot received on time would be counted, so Judge Miller denied the plaintiffs before him immediate relief.⁷

Judge Miller dismissed the cases on November 24.⁸

7. Opinion, *Wince*, No. 4:20-cv-1274 (E.D. Ark. Oct. 29, 2020), D.E. 18, 2020 WL 6324743.

8. Order, *id.* (Nov. 24, 2020), D.E. 22.