

## An Opportunity to Cure Absentee Ballot Signatures That Do Not Match Voter Registration Records

*Florida Democratic Party v. Detzner*  
(Mark E. Walker, N.D. Fla. 4:16-cv-607)

On October 3, 2016, a little over one month in advance of the 2016 general election, a political party filed a federal complaint in the Northern District of Florida against Florida’s secretary of state, seeking an opportunity to cure when a voter’s signature on a mailed absentee ballot is judged not to match the signature on file.<sup>1</sup> According to the complaint, a mismatched signature caused the ballot to be excluded from the election, but an absent signature triggered an opportunity to cure the defect before the election although “because Florida’s system of signature review involves human reviewers, it is necessarily fallible.”<sup>2</sup> With its complaint, the party filed an emergency motion for a preliminary injunction, noting that the “canvassing of returned vote-by-mail ballots is to begin on October 24.”<sup>3</sup>

The party experienced technical difficulties filing the case electronically,<sup>4</sup> perhaps because the party’s attorneys were not registered with the court as electronic filers.<sup>5</sup> For that reason, there was a delay in Judge Mark E. Walker’s learning that he had been assigned the case.<sup>6</sup> On October 6, Judge Walker set a telephone conference for the following day and ordered the party to immediately serve the secretary’s attorneys.<sup>7</sup>

Judge Walker has a standard order for use in emergency cases, which he tailors to each case.<sup>8</sup> The docket sheet includes instructions for telephone participation by news media as well as the parties.<sup>9</sup> In the future, Judge Walker will include in the participation notice an instruction that he issued orally: participants may not record the proceeding.<sup>10</sup> In the future, Judge Walker will also instruct participants not to tweet or blog about the proceeding while it is occurring.<sup>11</sup>

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1. Complaint, *Fla. Democratic Party v. Detzner*, No. 4:16-cv-607 (N.D. Fla. Oct. 3, 2016), D.E. 5; see Steve Bousquet, *Florida Sued Over Mail Ballots*, Tampa Bay Times, Oct. 4, 2016, at 5; Steve Bousquet, *Mail Voting Heads to Record*, Tampa Bay Times, Oct. 6, 2016, at 1.

2. Complaint, *supra* note 1, at 14.

3. Motion, *Fla. Democratic Party*, No. 4:16-cv-607 (N.D. Fla. Oct. 3, 2016), D.E. 1.

4. Interview with Hon. Mark E. Walker, Oct. 31, 2016.

Tim Reagan interviewed Judge Walker for this report by telephone.

5. Notice, *Fla. Democratic Party*, No. 4:16-cv-607 (N.D. Fla. Oct. 5, 2016), D.E. 8.

6. Interview with Hon. Mark E. Walker, Oct. 31, 2016 (noting the importance of the clerk’s office keeping a judge informed about emergency filings assigned to the judge).

7. Order, *Fla. Democratic Party*, No. 4:16-cv-607 (N.D. Fla. Oct. 6, 2016), D.E. 12.

8. Interview with Hon. Mark E. Walker, Oct. 31, 2016.

9. *E.g.*, Docket Sheet, *Fla. Democratic Party*, No. 4:16-cv-607 (N.D. Fla. Oct. 3, 2016) (D.E. 20).

10. Interview with Hon. Mark E. Walker, Oct. 31, 2016.

11. *Id.*

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At the conference, the secretary asked for a week to develop a factual record in response to the party's filings.<sup>12</sup> Judge Walker set a briefing schedule culminating in a hearing on October 18.<sup>13</sup>

Later, Judge Walker set an additional hearing for October 14 and took testimony then from the local county supervisor of elections.<sup>14</sup> Judge Walker is a fan of Federal Rule of Evidence 614, which provides for the court's calling and examining a witness.<sup>15</sup> In this case, Judge Walker learned information that he otherwise would not have learned about how the controversy and its possible resolution would likely play out for local election officials.<sup>16</sup>

Reviewing the secretary's October 14 opposition papers,<sup>17</sup> Judge Walker observed that they contained only legal arguments that the secretary customarily asserts in voting rights cases, including a pleaded defense of sovereign immunity.<sup>18</sup>

Moreover, . . . the Florida Secretary of State has not responded to this case on the merits and thus has not contested a single fact presented by the Plaintiff. . . .

. . . If one were skeptical, it would appear that the Florida Secretary of State requested as much time as he felt he could possibly justify so that he could use every second available to run out the clock.<sup>19</sup>

On Saturday, October 15, Judge Walker decided, therefore, that he would rule without additional hearing.<sup>20</sup>

On Sunday, October 16, Judge Walker issued a 33-page opinion granting the party a preliminary injunction.<sup>21</sup>

Judge Walker noted that the "county canvassing boards [that review absentee ballot signatures] are staffed by laypersons that are not required to undergo—and many do not participate in—formal handwriting-analysis education or training."<sup>22</sup> Judge Walker concluded that "there is no reason why mis-

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12. Order at 2, *Fla. Democratic Party*, No. 4:16-cv-607 (N.D. Fla. Oct. 15, 2016), D.E. 30 [hereinafter Oct. 15, 2016, Order].

13. Minutes, *id.* (Oct. 7, 2016), D.E. 21.

14. Minutes, *id.* (Oct. 14, 2016), D.E. 27; Opinion at 7, *id.* (Oct. 16, 2016), D.E. 34, 2016 WL 6090943; Docket Sheet, *supra* note 9 (D.E. 24); see Steve Bousquet, *Federal Judge Could Reshape Vote in Florida*, Tampa Bay Times, Oct. 12, 2016, at 1.

15. Interview with Hon. Mark E. Walker, Oct. 31, 2016; see Docket Sheet, *supra* note 9 (D.E. 24).

16. Interview with Hon. Mark E. Walker, Oct. 31, 2016.

17. Motion to Dismiss, *Fla. Democratic Party*, No. 4:16-cv-607 (N.D. Fla. Oct. 14, 2016), D.E. 29; Opposition Brief, *id.* (Oct. 14, 2016), D.E. 28.

18. Oct. 15, 2016, Order, *supra* note 12, at 2–3.

19. *Id.* at 5; see Arek Sarkissian, *Judge Critical of Detzner*, Orlando Sentinel, Oct. 17, 2016, at B2.

20. Oct. 15, 2016, Order, *supra* note 12, at 6 (noting that the party's reply brief was due by Sunday evening, October 16, instead of Monday morning, October 17); see Mike Schneider, *Judge Issues Sharp Rebuke in Ballot Suit*, Orlando Sentinel, Oct. 16, 2016, at B1.

21. Opinion, *supra* note 14; see Gray Rohrer, *Judge: Let Voters Fix Signatures on Ballots*, Orlando Sentinel, Oct. 18, 2016, at A1.

22. Opinion, *supra* note 14, at 5.

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matched-signature ballots cannot be treated the same as no-signature ballots during the review (and cure) process.<sup>23</sup>

It is illogical, irrational, and patently bizarre for the State of Florida to withhold the opportunity to cure from mismatched-signature voters while providing that same opportunity to no-signature voters. And in doing so, the State of Florida has categorically disenfranchised thousands of voters arguably for no reason other than they have poor handwriting or their handwriting has changed over time. Thus, Florida's statutory scheme does not even survive rational basis review.<sup>24</sup>

Judge Walker ordered the party to post a \$500 preliminary injunction security bond.<sup>25</sup>

On Monday, October 17, the secretary directed county supervisors of elections "to allow mismatched-signature ballots to be cured in precisely the same fashion as currently provided for non-signature ballots."<sup>26</sup>

In response to Judge Walker's October 25 order directing the parties to file a notice by October 28 whether any further action by the court was required, the parties filed notices that the plaintiffs would seek a permanent injunction and would consent to an extension until November 30 for the secretary to answer the complaint.<sup>27</sup> A status conference is set for December 12.<sup>28</sup>

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23. *Id.* at 8–9.

24. *Id.* at 22–23; *see id.* at 28 ("In our democracy, those who vote decide everything; those who count the vote decide nothing.").

25. *Id.* at 26, 29–30; *see* Docket Sheet, *supra* note 9 (D.E. 35, noting receipt of security bond).

26. Letter, *attached to* Notice, Fla. Democratic Party v. Detzner, No. 4:16-cv-607 (N.D. Fla. Oct. 17, 2016), D.E. 37; *see* Steve Bousquet, *Judge Orders Fix for Faulty Mail Ballot Signatures*, Miami Herald, Oct. 18, 2016, at 1A.

27. Notice, Fla. Democratic Party, No. 4:16-cv-607 (N.D. Fla. Oct. 28, 2016), D.E. 41; Joint Notice, *id.* (Oct. 28, 2016), D.E. 40.

28. Docket Sheet, *supra* note 9 (D.E. 45).