

No Order Without a Plaintiff

In re 2016 Primary Election
(Susan J. Dlott, S.D. Ohio 1:16-mc-5)

Early during rush hour on March 15, 2016, the day of Ohio's primary election, a traffic accident involving 12 vehicles, one of which plunged into the Ohio River, resulted in closure for several hours of the eastbound lanes of the Combs-Hehl Bridge from Kentucky to Ohio.¹ The clerk's office in Cincinnati's federal courthouse received an anonymous telephone request to keep polls open beyond the scheduled closing time of 7:30 p.m. to accommodate delayed motorists.² The request was referred to Judge Susan J. Dlott, who was away from the courthouse and who orally instructed the clerk's office to issue an order keeping the polls open until 8:30 p.m. in four southwest Ohio counties: Butler, Clermont, Hamilton (which includes Cincinnati), and Warren.³ News of the order did not reach many election officials until after 7:30.⁴

Boards of elections for Butler and Hamilton Counties moved to intervene on April 4 and 5, respectively, in order to appeal Judge Dlott's order and explain to the courts why such orders should not be issued without giving county boards of elections an opportunity to explain their difficulties in complying with such orders.⁵ On April 8, Judge Dlott transferred the case to the clerk of court for reassignment.⁶ That same day, Judge Timothy S. Black granted the motions to intervene.⁷ Ohio's secretary of state and the two boards filed notices of appeal on April 11 and 12.⁸

The court of appeals appointed pro bono counsel to defend the district court's order.⁹ On September 6, the court of appeals determined, by a vote of

1. *In re 2016 Primary Election*, 836 F.3d 584, 586 (6th Cir. 2016); see Patrick Brennan & Bob Strickley, *Authorities Locate Car That Fell Into the River*, Cincinnati Enquirer, Mar. 16, 2016, at A16; www.cincinnati.com/videos/news/2016/03/16/81892858/ (audio recordings of 911 calls).

2. *In re 2016 Primary Election*, 836 F.3d at 585–86.

3. *Id.* at 586; Order, *In re 2016 Primary Election*, No. 1:16-mc-5 (S.D. Ohio Mar. 15, 2016), D.E. 1; see Dan Horn, *I-275 Incident Mars Otherwise Smooth Vote*, Cincinnati Enquirer, Mar. 16, 2016, at A3.

4. *In re 2016 Primary Election*, 836 F.3d at 587; see Dan Horn, *Judge: Stranded Drivers "Wanted to Vote,"* Cincinnati Enquirer, Mar. 7, 2016, at A6.

5. Intervention Motion, *In re 2016 Primary Election*, No. 1:16-mc-5 (S.D. Ohio Apr. 5, 2016), D.E. 4 (Butler County); Intervention Motion, *id.* (Apr. 4, 2016), D.E. 4 (Hamilton County).

6. Order, *id.* (Apr. 8, 2016), D.E. 5.

7. Order, *id.* (Apr. 8, 2016), D.E. 6, 2016 WL 1392498.

8. Notice of Appeal, *id.* (Apr. 12, 2016), D.E. 9 (Butler County); Notice of Appeal, *id.* (Apr. 11, 2016), D.E. 8 (secretary of state); Notice of Appeal, *id.* (Apr. 11, 2016), D.E. 7 (Hamilton County); *In re 2016 Primary Election*, 836 F.3d at 586.

9. Order, *In re 2016 Primary Election*, No. 16-3350 (6th Cir. May 3, 2016), D.E. 7; Letter, *id.* (May 6, 2016), D.E. 8; *In re 2016 Primary Election*, 836 F.3d at 586.

two to one, that the court did not have power to issue an order based on an anonymous telephone call.¹⁰

The district court judge, we realize, was in a difficult spot. She was out of the office. It was late. She had little time to act. All of this presumably led her to err on the side of protecting people's right to vote. But none of this explains why the clerk's office or the court couldn't answer the phone call with the most natural of questions: "Who is it?" And none of this allowed the court to sidestep the Article III limitations on our power.¹¹

The third judge would have dismissed the appeal as moot.¹²

10. *In re 2016 Primary Election*, 836 F.3d 584; see Dismissal Order, *In re 2016 Primary Election*, No. 1:16-mc-5 (S.D. Ohio Sept. 28, 2016), D.E. 12; see also Jessie Balmert, *Judge Should Not Have Kept Polls Open, Appeals Panel Finds*, Cincinnati Enquirer, Sept. 8, 2016, at A4.

11. *In re 2016 Primary Election*, 836 F.3d at 589 (opinion by Circuit Judge Jeffrey S. Sutton, joined by Circuit Judge Eugene E. Siler, Jr.).

12. *Id.* at 589–91.