

## Seeking Voter Records to Challenge Crossover Voting

*True the Vote v. Hosemann (Michael P. Mills, N.D. Miss. 3:14-cv-144) and True the Vote v. Hosemann (Henry T. Wingate and Nancy F. Atlas, S.D. Miss. 3:14-cv-532)*

A federal complaint sought voter information to investigate the possibility of voting in a runoff senatorial primary election for one party after voting in another party's earlier primary election. The judge assigned the case determined that it should have been brought in the other district, which includes the capital. A second suit there was transferred to a district in another state within the circuit because of the federal bench's close ties with the incumbent senator, a candidate in the runoff primary election. The transferee judge dismissed claims under the National Voter Registration Act for failure to comply with the act's notice requirements. By the time of decision, the defendants had disclosed to the plaintiffs all of the information required by the act anyway.

*Subject:* Voting irregularities. *Topics:* National Voter Registration Act; primary election; recusal; case assignment; attorney fees; matters for state courts.

“After learning of reports of irregularities in Mississippi’s June 2014 Republican Primary Run-Off Election, True the Vote requested access to Mississippi’s voter rolls. The purpose of its request was to investigate claims that voters illegally double-voted in both the democratic and republican primary races.”<sup>1</sup> The organization and 13 voters filed a federal complaint in the Northern District of Mississippi on July 1, 2014, against Mississippi’s secretary of state and the Republican Party to enforce the organization’s requests and to seek remedies for alleged improper participation in the Republican primary election.<sup>2</sup>

On June 24, 2014, the Republican Party held its run-off election [for United States Senate]. [Incumbent] Thad Cochran won with a majority of the vote. Some attribute Thad Cochran’s win to his campaign’s outreach to African American voters and to other Democratic voters. The Chris McDaniel campaign [a Tea Party campaign that came in first on June 3] has “cried foul” over this alleged approach, and has contended that traditionally Democratic voters illegally voted in the Republican primary run-off election.

Mississippi has an “open primary” system, meaning that voters are not required to register with a particular party, and anyone can vote in either the Republican or the Democratic primaries. Voters however, cannot vote in

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1. Complaint at 2, *True the Vote v. Hosemann*, No. 3:14-cv-144 (N.D. Miss. July 1, 2014), D.E. 1 [hereinafter N.D. Miss. Complaint]; *True the Vote v. Hosemann*, 43 F. Supp. 3d 693, 705 n.49 (S.D. Miss. 2014).

*True the Vote* is an election advocacy organization headquartered in Houston, Texas. N.D. Miss. Complaint, *supra* note 1, at 2.

2. N.D. Miss. Complaint, *supra* note 1.

both the Republican and Democratic primaries, nor can an individual who voted in one party's primary decide to vote in another party's primary run-off.<sup>3</sup>

"Plaintiffs did not seek a TRO or other emergency relief, and this court has had no contact from plaintiffs' counsel requesting any sort of emergency hearing (as is typically the case when parties seek expedited relief)."<sup>4</sup> On his own motion, Judge Michael P. Mills issued an order on July 7 to show cause why the case should not be transferred to the Southern District, which includes the capital, Jackson.<sup>5</sup>

On July 8, the organization dismissed its Northern District case.<sup>6</sup> On July 9, the plaintiffs in the first suit and an additional nine voters filed a complaint in the Southern District against Mississippi's secretary of state, the Republican Party, and nine county election commissions.<sup>7</sup> With their complaint, the plaintiffs filed a motion for a temporary restraining order "not to redact or otherwise destroy voter records" as the plaintiffs litigate disclosure of voter records pursuant to the National Voter Registration Act (NVRA).<sup>8</sup> On July 10, Judge Henry T. Wingate set the case for hearing on the following day.<sup>9</sup>

At the Friday hearing, Judge Wingate announced that he would recuse himself.<sup>10</sup> He issued a recusal order on Monday, explaining that Senator Cochran had recommended to President Reagan Judge Wingate's nomination to the bench, and "Thad Cochran is, and has been, a personal friend of the undersigned for over thirty years."<sup>11</sup> That day, Chief Judge Louis Guirola, Jr., referred the case to Chief Circuit Judge Carl E. Stewart for assignment to a

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3. Recusal Order at 2, *True the Vote v. Hosemann*, No. 3:14-cv-532 (S.D. Miss. July 14, 2014), D.E. 16 (citations omitted); see *True the Vote*, 43 F. Supp. 3d at 702 ("The Republican Party officially certified Cochran as the primary winner on July 7, 2014.").

"With an unusual assist from African-American voters and other Democrats who feared his opponent, Senator Thad Cochran on Tuesday beat back a spirited challenge from State Senator Chris McDaniel, triumphing in a Republican runoff and defeating the Tea Party in the state where the movement's hopes were bright." Jonathan Weisman, *Cochran Holds Off Tea Party Challenger in Mississippi*, N.Y. Times, June 25, 2014, at A1.

4. *True the Vote v. Hosemann*, 29 F. Supp. 3d 870, 875 (N.D. Miss. 2014); *True the Vote*, 43 F. Supp. 3d at 705 n.49.

5. *True the Vote*, 29 F. Supp. 3d at 876. "[I]t appears that the decision to file suit in Oxford may have been based upon political calculations, the exact nature of which are unclear to this court." *Id.* at 875.

6. Notice, *True the Vote*, No. 3:14-cv-144 (N.D. Miss. July 8, 2014), D.E. 10; *True the Vote*, 43 F. Supp. 3d at 705 n.49.

7. Complaint, *True the Vote*, No. 3:14-cv-532 (S.D. Miss. July 9, 2014), D.E. 1; *True the Vote*, 43 F. Supp. 3d at 705 & n.49; see Amended Complaint, *True the Vote*, No. 3:14-cv-532 (S.D. Miss. July 30, 2014), D.E. 58.

8. Temporary Restraining Order Motion at 11, *True the Vote*, No. 3:14-cv-532 (S.D. Miss. July 9, 2014), D.E. 8; see *True the Vote*, 43 F. Supp. 3d at 706; see also Pub. L. No. 103-31, 107 Stat. 77 (1993), as amended, 52 U.S.C. §§ 20501-20511 (2015). See generally Robert Timothy Reagan, *Motor Voter: The National Voter Registration Act* (Federal Judicial Center 2014).

9. Docket Sheet, *True the Vote*, No. 3:14-cv-532 (S.D. Miss. July 9, 2014).

10. *Id.*

11. Recusal Order, *supra* note 3, at 4.

judge outside of Mississippi.<sup>12</sup> Judge Stewart assigned the case to Southern District of Texas Judge Nancy F. Atlas.<sup>13</sup> Judge Atlas held a telephone conference on July 15 and set the case for an evidentiary hearing in Jackson on July 24.<sup>14</sup> “The defense representatives committed to [Judge Atlas] on the telephone conference, which was on the record, that no disruption or alteration would occur. And so the immediacy of the TRO, the temporary restraining order, was alleviated.”<sup>15</sup> Judge Atlas, therefore, regarded the July 24 hearing as a preliminary injunction hearing.<sup>16</sup> Following the hearing, Judge Atlas invited the parties to move for summary judgment.<sup>17</sup>

On August 29, Judge Atlas awarded the defendants summary judgment on their NVRA claims.<sup>18</sup> The majority of the plaintiffs’ claims were barred by the plaintiffs’ failure to provide the defendants with pre-suit notice and an opportunity to cure, as required by the NVRA.<sup>19</sup> By the time of decision, the defendants had disclosed to the plaintiffs all information that the NVRA required them to disclose.<sup>20</sup>

On October 17, Judge Atlas denied the Republican Party’s motion for attorney fees.<sup>21</sup> Judge Atlas concluded that the plaintiffs’ claims were legally incorrect but not unreasonable.<sup>22</sup>

On October 24, Mississippi’s supreme court affirmed dismissal of an August 4 state court challenge by McDaniel as filed more than 20 days after the election.<sup>23</sup> Senator Cochran won reelection on November 4.<sup>24</sup>

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12. Order, *True the Vote*, No. 3:14-cv-532 (S.D. Miss. July 14, 2014), D.E. 17.

13. Order, *id.* (July 14, 2014), D.E. 19.

14. Minutes, *id.* (July 15, 2014), D.E. 40; *True the Vote v. Hosemann*, 43 F. Supp. 3d 693, 701, 706 (S.D. Miss. 2014); see Jimmie E. Gates, *Fed Hearing Set for Runoff*, Jackson Clarion-Ledger, July 23, 2014, at A3; Jimmie E. Gates, *Motive Questioned in Voter-Info Suit*, July 25, 2014, at A3.

15. Transcript at 9–10, *True the Vote*, No. 3:14-cv-532 (S.D. Miss. July 24, 2014, filed July 29, 2014), D.E. 50 [hereinafter S.D. Miss. Transcript]; see *True the Vote*, 43 F. Supp. 3d at 706.

16. *True the Vote*, 43 F. Supp. 3d at 700–01 n.5; *id.* at 706 (“Plaintiffs’ requests for unredacted voter records is the focus of the pending motions.”); S.D. Miss. Transcript, *supra* note 15, at 10.

17. Order, *True the Vote*, No. 3:14-cv-532 (S.D. Miss. July 25, 2014), D.E. 46.

18. *True the Vote*, 43 F. Supp. 3d 693.

19. *Id.* at 717, 745.

20. *Id.* at 723–40, 745.

21. Opinion, *True the Vote*, No. 3:14-cv-532 (S.D. Miss. Oct. 17, 2014), D.E. 168.

22. *Id.* at 10.

23. *McDaniel v. Cochran*, 158 So. 3d 992 (Miss. 2014).

24. See Geoff Pender, *Cochran Sails to 7th Senate Term*, Jackson Clarion-Ledger, Nov. 5, 2014, at A1.