

## Challenging a Governor's Oversight of Elections When He Is a Candidate for Another Office

*League of Women Voters of Florida v. Scott*  
(*Mark E. Walker, N.D. Fla. 4:18-cv-525*)

A federal complaint filed a few days after a general election challenged the governor's authority over vote-counting matters because he was a candidate for the U.S. Senate in a close election. The federal judge decided that the governor had come close to but not crossed a line of propriety.

*Subject:* Voting procedures. *Topics:* Recounts.

Two organizations and a voter filed a federal complaint in the Northern District of Florida against Florida's governor on November 12, 2018, six days after a general election, alleging that the governor, who was an apparently prevailing candidate for the United States Senate, "has already misused his authority to influence and frustrate the high stakes vote-counting process, and the powers of his office give him opportunity to misuse his authority."<sup>1</sup> With their complaint, the plaintiffs filed a motion for a temporary restraining order and a preliminary injunction.<sup>2</sup> Judge Mark E. Walker set the case for a telephonic status conference on November 14.<sup>3</sup>

At the status conference, Judge Walker set the case for an evidentiary hearing on November 15.<sup>4</sup> On the day of the hearing, the governor moved to quash a subpoena commanding him to appear personally, arguing that "absent extraordinary circumstances, high-ranking officials may not be subjected to depositions or called to testify regarding their official actions."<sup>5</sup> Judge Walker quashed the subpoena.<sup>6</sup> "This Court will revisit the issue if at today's hearing, Plaintiffs make the unlikely showing that Governor Scott has information that

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1. Complaint at 2, *League of Women Voters of Fla. v. Scott*, No. 4:18-cv-525 (N.D. Fla. Nov. 12, 2018), D.E. 1; see Daniel Chang, Elizabeth Koh & Nicholas Nehmas, *Legal Sparring Continues; Recounts Get Uneven Start*, Miami Herald, Nov. 13, 2018, at 1A; Jeffrey Schweers, *Seven Lawsuits and Counting: Tallahassee Is Ground Zero*, Tallahassee Democrat, Nov. 14, 2018, at A6; David Smiley, Kyra Gurney, Steve Bousquet & Emily L. Mahoney, *It's "Prayer Mode" as Legal Decisions and Deadlines Loom*, Miami Herald, Nov. 15, 2018, at 1A; Kenneth P. Vogel & Patricia Mazzei, *Legal Pugilist for Democrats at Center of Recount Fight in Florida*, N.Y. Times, Nov. 15, 2018, at A12.

2. Motion, *League of Women Voters of Fla.*, No. 4:18-cv-525 (N.D. Fla. Nov. 12, 2018), D.E. 4.

3. Order, *id.* (Nov. 12, 2018), D.E. 8.

A docket entry gave parties and the public dial-in information. Docket Sheet, *id.* Nov. 12, 2018) (D.E. 9).

4. Minutes, *id.* (Nov. 14, 2018), D.E. 16; see Minutes, *id.* (Nov. 15, 2018), D.E. 28; see also Schweers, *supra* note 1.

5. Motion, *League of Women Voters of Fla.*, No. 4:18-cv-525 (N.D. Fla. Nov. 15, 2018), D.E. 22.

6. Order, *id.* (Nov. 15, 2018), D.E. 23.

cannot be gleaned from any other source. What this Court will not do, however, is permit the Governor to be called for the sole purpose of grandstanding.”<sup>7</sup>

After the hearing, Judge Walker denied the plaintiffs immediate relief.<sup>8</sup> Judge Walker noted that two days after the election, the governor alleged at a press conference that there was rampant election fraud in two counties, “despite the presence of election monitors from the Florida Department of State who had not reported any criminal activity.”<sup>9</sup> But Judge Walker concluded that the governor had not impermissibly crossed a line:

This is a case about the precariousness of public trust. . . .

. . .

The crux of this case is whether [Governor] Scott’s post-Election Day words and actions require extraordinary court-ordered recusal under the U.S. Constitution because of alleged due process deprivations. . . . While campaign-trail rhetoric is increasingly bombastic, imprudent, and not necessarily rooted in objective facts, there is a critical line between campaign rhetoric and that rhetoric transforming into state action that requires judicially imposed recusal.

. . .

Here, Scott has toed the line between imprudent campaign-trail rhetoric and problematic state action. But he has not crossed the line.

. . .

. . . Scott has not yet moved to indicate an objective risk of bias. He has not suspended any election official. He has not ordered any investigation. He has not interfered with the recount so far.<sup>10</sup>

The plaintiffs voluntarily dismissed the case on November 27.<sup>11</sup>

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7. *Id.*

8. Opinion, *id.* (Nov. 15, 2018), D.E. 27, 2018 WL 6025856; see Audra D.S. Burch & Glenn Thrush, *Florida Recounts Senate Votes Again, and Democrat’s Chances Dwindle*, N.Y. Times, Nov. 17, 2018, at A20; Manuel Roig-Franzia & Amy Gardner, *Nelson’s Chances in Senate Race Dim as Key Fla. Counties Complete Recount*, Wash. Post, Nov. 17, 2018, at A4.

9. Opinion, *supra* note 8, at 3.

10. *Id.* at 1, 6–7, 11.

11. Dismissal Notice, *League of Women Voters of Fla.*, No. 4:18-cv-525 (N.D. Fla. Nov. 27, 2018), D.E. 30.