

## No Relief from Reductions in Polling Locations in Kentucky During a Pandemic

*Nemes v. Bensinger*

(*Charles R. Simpson III, W.D. Ky. 3:20-cv-407*)

Because of the global Covid-19 infectious pandemic, some populous counties in Kentucky planned to operate only one polling place each for a primary election in which voting by mail would be encouraged. A federal judge denied a requested injunction to require more polling places.

*Subject:* Voting procedures. *Topics:* Poll locations; Covid-19; intervention; case assignment; recusal; primary election; class action.

Fifteen days before a June 23, 2020, primary election in Kentucky, a state legislator and six other voters filed a federal class-action complaint in the Western District of Kentucky challenging the number of planned voting locations—which would be reduced because of heavy voting by mail and concerns about exposing poll workers to infection during the global Covid-19 infectious pandemic—as burdensome and dangerous for voters.<sup>1</sup>

The court initially assigned the case to Judge Claria Horn Boom,<sup>2</sup> but then it reassigned the case to Judge Justin R. Walker.<sup>3</sup> Then, on the case’s third day, the plaintiffs filed a motion for a temporary restraining order or a preliminary injunction.<sup>4</sup> Judge Boom’s recusal was issued on the same day as the motion.<sup>5</sup> On the next day, Judge Walker recused himself,<sup>6</sup> and the case was reassigned to Judge Rebecca Grady Jennings.<sup>7</sup> She recused herself, and the case was reassigned to Judge Charles R. Simpson III on June 11.<sup>8</sup> Judge Simpson set the case for a videoconference at 11:00 on the following morning.<sup>9</sup>

At the conference, Judge Simpson disclosed that he had voted absentee by mail because of the Covid-19 pandemic and his age; he gave the attorneys enough time to bring the facts to the attention of their clients and set 4:00 that

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1. Complaint, *Nemes v. Bensinger*, No. 3:20-cv-407 (W.D. Ky. June 8, 2020), D.E. 1; *Nemes v. Bensinger*, 467 F. Supp. 3d 509, 519, 524 (W.D. Ky. 2020); *Nemes v. Bensinger*, 336 F.R.D. 132, 135 (W.D. Ky. 2020).

2. Notice, *Nemes*, No. 3:20-cv-407 (W.D. Ky. June 8, 2020), D.E. 2.

3. Notice, *id.* (June 9, 2020), D.E. 15.

4. Motion, *id.* (June 10, 2020), D.E. 4.

5. Recusal, *id.* (June 10, 2020, filed June 11, 2020), D.E. 9.

6. Judge Walker was elevated to a seat on the Court of Appeals for the District of Columbia Circuit on September 2, 2020. Federal Judicial Center Biographical Directory of Article III Federal Judges, [www.fjc.gov/history/judges](http://www.fjc.gov/history/judges) (noting that his elevation was confirmed by the Senate on June 18, 2020).

7. Docket Sheet, *Nemes*, No. 3:20-cv-407 (W.D. Ky. June 8, 2020) (D.E. 10).

8. Recusal, *id.* (June 11, 2020), D.E. 13.

Tim Reagan interviewed Judge Simpson for this report by telephone on September 24, 2020.

9. Order, *Nemes*, No. 3:20-cv-407 (W.D. Ky. June 11, 2020), D.E. 17.

afternoon as the deadline for a recusal request.<sup>10</sup> No party asked for his recusal.<sup>11</sup>

Two motions to intervene were filed on June 12:<sup>12</sup> one before the conference by the candidate who would win a major party's primary election for the U.S. Senate<sup>13</sup> and one after the conference by a member of an urban council who promised to assist with possible remedies.<sup>14</sup> The second motion was unopposed, and Judge Simpson granted it.<sup>15</sup> Judge Simpson denied the first motion because of time constraints and the plaintiffs' adequately representing the proposed intervenor's interests.<sup>16</sup>

At the conference, Judge Simpson set the case for an evidentiary hearing on June 17.<sup>17</sup> He and the parties agreed that he would address claims with respect to counties in both of Kentucky's districts.<sup>18</sup> An order filed on June 16 gave the public instructions for how to request audio access to the hearing,<sup>19</sup> but the parties and the judge agreed that he could decide the injunction issue without a hearing, so the hearing was canceled.<sup>20</sup>

Judge Simpson denied the plaintiffs immediate relief on June 18.<sup>21</sup> "While it may seem intuitive that, when it comes to polling places, more is better, that is not a call for this Court to make, *unless* we first find a constitutional or statutory violation."<sup>22</sup>

Comprehensive plans were put in place which included making absentee ballots available for all voters, providing early in-person voting options for 15 days leading up to Election Day, and establishing a polling place for Election Day in-person voting. This Triple Crown of voting options wins against the pandemic's risk of disenfranchising the Kentucky voter.<sup>23</sup>

A month later, the plaintiffs voluntarily dismissed their complaint without prejudice "based on public representations by the Kentucky Secretary of State

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10. Postconference Order, *Nemes*, No. 3:20-cv-407 (W.D. Ky. June 13, 2020), D.E. 22 [hereinafter *Nemes* Postconference Order]; Interview with Hon. Charles R. Simpson III, Sept. 24, 2020.

11. *Nemes* Postconference Order, *supra* note 10.

12. *See id.*; *see also* Ben Tobin, *McGrath Campaign Joins Suit on Voting*, *Louisville Courier-J.*, June 13, 2020, at A6.

13. Intervention Motion, *Nemes*, No. 3:20-cv-407 (W.D. Ky. June 12, 2020), D.E. 18; *Nemes v. Bensinger*, 336 F.R.D. 132, 135 (W.D. Ky. 2020).

14. Intervention Motion, *Nemes*, No. 3:20-cv-407 (W.D. Ky. June 12, 2020), D.E. 19.

15. Order, *id.* (June 16, 2020), D.E. 34; *see* Intervenor Complaint, *id.* (June 16, 2020), D.E. 35.

16. *Nemes*, 336 F.R.D. 132.

17. *Nemes* Postconference Order, *supra* note 10.

18. *Id.* at 3.

19. Order, *Nemes*, No. 3:20-cv-407 (W.D. Ky. June 16, 2020), D.E. 39.

20. Order, *id.* (June 17, 2020), D.E. 48.

21. *Nemes v. Bensinger*, 467 F. Supp. 3d 509 (W.D. Ky. 2020); *see* Ben Tobin, *Jefferson, Fayette Counties Will Not Have to Add More Polling Locations*, *Louisville Courier-J.*, June 20, 2020, at A6.

22. *Nemes*, 467 F. Supp. 3d at 524.

23. *Id.* at 526.

that he will not permit single polling locations in Kentucky's largest counties in the November general election."<sup>24</sup>

As luck would have it, Judge Simpson had been assigned at random an earlier case seeking modifications to election procedures for the November 3 general election in light of the pandemic.<sup>25</sup> The plaintiffs in that action also dismissed their complaint when they became satisfied with the commonwealth's general election plan.<sup>26</sup>

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24. Notice, *Nemes*, No. 3:20-cv-407 (W.D. Ky. July 17, 2020), D.E. 52.

25. Notice, *Collins v. Adams*, No. 3:20-cv-375 (W.D. Ky. May 27, 2020), D.E. 2; Complaint, *id.* (May 27, 2020), D.E. 1; *see* Amended Complaint, *id.* (Aug. 19, 2020), D.E. 56.

26. Stipulated Dismissal, *id.* (Sept. 1, 2020), D.E. 59; Interview with Hon. Charles R. Simpson III, Sept. 24, 2020.