

## A Recount Ordered Because of Evidence That Write-In Votes Were Not Counted

*Curtis v. Oliver (James O. Browning, D.N.M. 1:20-cv-748)*

A write-in Libertarian Party primary-election candidate for New Mexico’s court of appeals was only a few votes short of the number needed to advance to the general election. But there were indications of counting errors related to extensive absentee voting because of the social distancing made necessary by a global infectious pandemic. There was sufficient evidence of an undercount in one county for the district judge to order a recount. After the recount, the candidate qualified for the general election.

*Subject:* Recounts. *Topics:* Election errors; primary election; voting technology; recounts; absentee ballots; early voting; matters for state courts; Covid-19; attorney fees.

A write-in candidate for New Mexico’s court of appeals in the Libertarian Party’s June 2, 2020, primary election filed a federal complaint in the District of New Mexico on July 23, 2020, against New Mexico’s secretary of state, including as plaintiffs the Libertarian Party of New Mexico, its chair, and a voter, alleging that election officials failed to tabulate all votes for the first plaintiff, denying him qualification for the general-election ballot.<sup>1</sup> According to the complaint, the candidate plaintiff “was credited with receiving only 204 votes by Defendant, 26 votes short of the number required.”<sup>2</sup> Six days later, the plaintiffs filed a motion for a temporary restraining order and a preliminary injunction requiring recounts in seven counties.<sup>3</sup>

Judge James O. Browning set the case for a videoconference hearing on August 7, noting on the public docket sheet that the passcode would be provided to participants by email.<sup>4</sup> The hearing lasted from 1:29 to 3:47 p.m.<sup>5</sup> “The Court noted that, at the moment, the record indicates that one voter believes her vote was not counted.”<sup>6</sup> There was specific evidence of at least one vote not counted in Bernalillo County.<sup>7</sup>

There were indications of vote-count errors related to extensive voting by mail because of social distancing made necessary by the global Covid-19 infectious pandemic.<sup>8</sup> There also was controversy over whether the candidate

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1. Complaint, *Curtis v. Oliver*, No. 1:20-cv-748 (D.N.M. July 23, 2020), D.E. 1; *Curtis v. Oliver*, 479 F. Supp. 3d 1039, 1059–60 (D.N.M. 2020); see Phaedra Haywood, *Judge Candidate Sues Secretary of State Over Primary*, Santa Fe New Mexican, July 25, 2020, at A1.

2. Complaint, *supra* note 1, at 5.

3. Motion, *Curtis*, No. 1:20-cv-748 (D.N.M. July 29, 2020), D.E. 7; *Curtis*, 479 F. Supp. 3d at 1060.

4. Docket Sheet, *Curtis*, No. 1:20-cv-748 (D.N.M. July 23, 2020) (D.E. 9).

5. Minutes, *id.* (Aug. 7, 2020), D.E. 13.

6. *Curtis*, 479 F. Supp. 3d at 1074.

7. *Id.*

8. *Id.* at 1050–54, 1061–63, 1074, 1081–85.

would have to post a bond of about \$3.5 million for a recount.<sup>9</sup> On Friday, August 14, Judge Browning ordered a recount in Bernalillo County.<sup>10</sup> He issued an agreed final order on Monday recognizing that an accounting of the write-in votes in Bernalillo County established that the candidate plaintiff qualified for the general election.<sup>11</sup>

The last filing in the case was a September 18 extension of time to September 30 for a motion for fees or costs.<sup>12</sup>

In November, the candidate plaintiff did not prevail over the incumbent.<sup>13</sup>

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9. *Id.* at 1056, 1058–59, 1062–65.

10. *Id.* at 1148.

11. Agreed Final Order, *Curtis v. Oliver*, No. 1:20-cv-748 (D.N.M. Aug. 17, 2020), D.E. 29; see *Three Parties on the Ballot for Court of Appeals Seat*, *Santa Fe New Mexican*, Oct. 17, 2020, at A8.

12. Order, *Curtis*, No. 1:20-cv-748 (D.N.M. Sept. 18, 2020), D.E. 32.

13. See Phaedra Haywood, *Democrats Poised to Continue Domination of State Judiciary*, *Santa Fe New Mexican*, Nov. 4, 2020, at A7.