

## **No Immediate Relief from Expanded Absentee-Voting Opportunities During an Infectious Pandemic Because of a Delay in Bringing the Case**

*Curtin v. Virginia State Board of Elections*  
(*Rossie D. Alston, Jr., E.D. Va. 1:20-cv-546*)

Because of the Covid-19 global infectious pandemic, Virginia voters were permitted to vote absentee on account of disability. A suit challenging broad absentee-voting rights as diluting plaintiffs' voting rights did not result in immediate relief, because the suit was brought about two months after the guidelines became public. After the preliminary-injunction decision, plaintiffs voluntarily dismissed the case.

*Subject:* Absentee and early voting. *Topics:* Absentee ballots; Covid-19; laches; primary election; case assignment; recusal; early voting.

Six voters filed a federal complaint in the Eastern District of Virginia on May 13, 2020, challenging Virginia's election officials' decision to regard the health risks arising from the global infectious Covid-19 pandemic as providing voters with a disability justifying absentee voting in a June 23 primary election (postponed because of the pandemic from June 9).<sup>1</sup> With their complaint, the voters filed a motion for a preliminary injunction to curtail absentee voting,<sup>2</sup> a motion to expedite consideration of the motion (proposing a hearing on May 22 and resolution by the court on May 26),<sup>3</sup> and a motion to consolidate consideration of the injunction motion with resolution of the case.<sup>4</sup> Two days later, the voters filed notice of a May 22 hearing.<sup>5</sup>

A day after the case was filed, it was reassigned from Judge Leonie M. Brinkema to Judge T.S. Ellis III, and then to Judge Rossie D. Alston, Jr.<sup>6</sup>

Four days before the noticed hearing date, Judge Alston ordered briefing concluded by May 22 at 5:00 p.m. and notice to the court by 5:00 p.m. on the day of his order whether the parties intended to proceed with a hearing by teleconference or videoconference.<sup>7</sup> On May 21, he set the case for a video

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1. Complaint, *Curtin v. Va. State Bd. of Elections*, No. 1:20-cv-546 (E.D. Va. May 13, 2020), D.E. 1; *Curtin v. Va. State Bd. of Elections*, 463 F. Supp. 3d 653, 656–60 (E.D. Va. 2020); see Justin Mattingly & Andrew Cain, *Virginia Officials Prepare for Surge in Mail-In Voting After Municipal Elections*, Richmond Times-Dispatch, May 24, 2020, at 2A.

2. Preliminary-Injunction Motion, *Curtin*, No. 1:20-cv-546 (E.D. Va. May 13, 2020), D.E. 3.

3. Motion to Expedite, *id.* (May 13, 2020), D.E. 5.

4. Consolidation Motion, *id.* (May 13, 2020), D.E. 6.

5. Notice, *id.* (May 15, 2020), D.E. 15.

6. Docket Sheet, *id.* (May 13, 2020).

Tim Reagan interviewed Judge Alston for this report by telephone on October 20, 2020.

7. Order, *Curtin*, No. 1:20-cv-546 (E.D. Va. May 17, 2020), D.E. 17; see *Curtin v. Va. State Bd. of Elections*, 463 F. Supp. 3d 653, 657 (E.D. Va. 2020).

hearing on May 27.<sup>8</sup> Some attorneys were present in the courtroom.<sup>9</sup> They and the judge wore face coverings, except when speaking.<sup>10</sup>

Judge Alston's strategies for handling the emergent case included promptly finding out who the lawyers were and where they were to plan for getting them together.<sup>11</sup> Judge Alston's judicial assistant did a technical rehearsal with participants on the day before the videoconference.<sup>12</sup> Guidelines were presented in advance regarding who would speak and when, and participants were instructed to mute their microphones when not speaking.<sup>13</sup> Members of the public could dial in, and they were instructed to mute their microphones and refrain from recording the proceeding.<sup>14</sup> The lawyers were zealous and professional, and because they respected the process the proceeding was a success.<sup>15</sup> Among the keys to success were preparation, cooperation, and professionalism.<sup>16</sup>

Judge Alston denied immediate relief because of the voters' delay in filing the case.<sup>17</sup>

The limited record here supports the conclusion that Plaintiffs had an incentive to file suit as soon as [the alleged vote-dilution] injuries became apparent in order to rectify the perceived wrong prior to the actual commencement of the absentee ballot period. The disputed COVID-19 Guidance was issued to local registrars on March 16, 2020, and to the public on March 17, 2020, and the absentee ballot period began May 8 or 9, 2020, yet Plaintiffs did not file suit until May 13, 2020. Ultimately, the Court finds that Plaintiffs failed to demonstrate the requisite diligence.<sup>18</sup>

On June 18, Judge Alston approved the voters' voluntary dismissal of their case.<sup>19</sup>

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8. Order, *Curtin*, No. 1:20-cv-546 (E.D. Va. May 21, 2020), D.E. 27; see *Curtin*, 463 F. Supp. 3d at 655, 675; Minutes, *Curtin*, No. 1:20-cv-546 (E.D. Va. May 27, 2020), D.E. 44.

9. Transcript at 1–2, *Curtin*, No. 1:20-cv-546 (E.D. Va. May 27, 2020, filed June 2, 2020), D.E. 51.

10. *Id.* at 1.

11. Interview with Hon. Rossie D. Alston, Jr., Oct. 20, 2020.

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*; see Transcript, *supra* note 9, at 43 (“THE COURT: . . . I also appreciate the professionalism that we have seen.”).

17. *Curtin v. Va. State Bd. of Elections*, 463 F. Supp. 3d 653 (E.D. Va. 2020).

18. *Id.* at 659.

19. Order, *Curtin v. Va. State Bd. of Elections*, No. 1:20-cv-546 (E.D. Va. June 18, 2020), D.E. 57.