

Casting Provisional Ballots in the Wrong Precinct in Michigan

*Bay County Democratic Party v. Land (1:04-cv-10257)
and Michigan State Conference of NAACP Branches v. Land
(1:04-cv-10267) (David M. Lawson, E.D. Mich.)*

Local branches of the Democratic Party filed a federal complaint to challenge a state directive that provisional ballots would only be counted if cast in the correct precinct. Three days later, three organizations filed a similar action in the same district, and the court consolidated the two cases. The district court denied a motion by voters to intervene as defendants, but the court permitted their participation as amici curiae. The court denied the Justice Department’s motion for a short delay so that it could file an amicus brief. Three weeks after the first case was filed, the court determined that provisional ballots must be counted so long as they are cast in the correct city, village, or township. One week later, the court of appeals reversed that decision in light of a contrary holding in another case issued on the same day.

Topics: Provisional ballots; Help America Vote Act (HAVA); 42 U.S.C. § 1983; intervention; case assignment.

Local branches of the Democratic Party filed a federal complaint on September 28, 2004, in the Eastern District of Michigan’s Bay City courthouse, alleging that a directive issued by Michigan’s director of elections violated the Help America Vote Act (HAVA).¹ The directive stated that provisional ballots would only be counted if they were cast in the correct precinct.² With their complaint, the plaintiffs filed a motion for a preliminary injunction.³

The court assigned the case to Judge David M. Lawson, who was the court’s only judge in Bay City.⁴ He set a hearing on the injunction motion for fifteen days later.⁵ Judge Lawson declined to use the plaintiffs’ proposed order to show cause—“a relic of the past and unnecessary, except, perhaps, in

1. Complaint, *Bay Cty. Democratic Party v. Land*, No. 1:04-cv-10257 (E.D. Mich. Sept. 28, 2004), D.E. 1 [hereinafter *Bay Cty. Democratic Party Complaint*]; *Bay Cty. Democratic Party v. Land*, 347 F. Supp. 2d 404, 417 (E.D. Mich. 2004); see Pub. L. No. 107-252, 116 Stat. 1666 (2002), as amended, 52 U.S.C. §§ 20901–21145; see also Amy F. Bailey, *Democrats Sue Over Polling Place Issue*, Grand Rapids Press, Sept. 29, 2004, at C6. See generally Marie Leary & Robert Timothy Reagan, *The Help America Vote Act* (Federal Judicial Center 2012); Symposium, *HAVA @ 10*, 12 Election L.J. 111 (2013).

2. Ex. 2, *Bay Cty. Democratic Party Complaint*, *supra* note 1.

3. Preliminary-Injunction Motion, *Bay Cty. Democratic Party*, No. 1:04-cv-10257 (E.D. Mich. Sept. 28, 2004), D.E. 4.

4. Docket Sheet, *id.* (Sept. 28, 2004).

Tim Reagan interviewed Judge Lawson for this report by telephone on October 3, 2012.

5. Order, *Bay Cty. Democratic Party*, No. 1:04-cv-10257 (E.D. Mich. Sept. 28, 2004), D.E. 3.

contempt proceedings”—because it improperly suggested that the defendants had the burden of persuasion.⁶

On October 1, three organizations filed a similar action in the same district.⁷ Judge Lawson consolidated the two cases on October 5.⁸ That same day, the second set of plaintiffs filed a motion for a preliminary injunction.⁹ On the next day, five voters, four of whom were also county or municipal clerks, moved to intervene as defendants.¹⁰ On the day before the hearing, Michigan moved to join the U.S. Department of Justice as either a party or an *amicus curiae*.¹¹

On the day of the hearing, Judge Lawson denied Michigan’s October 5 motion to transfer the case to the Western District, which includes the state’s capital.¹² In cases of this type, Judge Lawson was always prepared for threshold issues: venue, standing, ripeness, mootness, and other jurisdictional issues.¹³

Judge Lawson determined that an evidentiary hearing was necessary to address factual allegations.¹⁴ He often found live testimony more efficient than affidavits and counteraffidavits in resolving factual issues.¹⁵

Two days after the Wednesday hearing, the Justice Department asked Judge Lawson to delay ruling on the injunction motions until after he could review the department’s *amicus curiae* brief, which the department would file on Monday.¹⁶

The Court is always interested in the position of the United States on matters of national interest, such as is presented in this case. However, if the Court permits the *amicus* filing, in fairness it ought to allow the parties to the case an opportunity to respond. Given the need for a prompt decision,

6. *Id.* at 1–2.

7. Complaint, *Mich. State Conference of NAACP Branches v. Land*, No. 1:04-cv-10267 (E.D. Mich. Oct. 1, 2004), D.E. 1; *Bay Cty. Democratic Party v. Land*, 347 F. Supp. 2d 404, 417 (E.D. Mich. 2004).

8. Order, *Mich. State Conference of NAACP Branches*, No. 1:04-cv-10267 (E.D. Mich. Oct. 5, 2004), D.E. 2; Order, *Bay Cty. Democratic Party*, No. 1:04-cv-10257 (E.D. Mich. Oct. 5, 2004), D.E. 11; *Bay Cty. Democratic Party*, 347 F. Supp. 2d at 417.

9. Preliminary-Injunction Motion, *Mich. State Conference of NAACP Branches*, No. 1:04-cv-10267 (E.D. Mich. Oct. 5, 2004), D.E. 9.

10. Intervention Motion, *Bay Cty. Democratic Party*, No. 1:04-cv-10257 (E.D. Mich. Oct. 6, 2004), D.E. 12; *Bay Cty. Democratic Party*, 347 F. Supp. 2d at 417–18; *see also* Intervention Motion, *Bay Cty. Democratic Party*, No. 1:04-cv-10257 (E.D. Mich. Oct. 8, 2004), D.E. 20.

11. Joinder Motion, *Bay Cty. Democratic Party*, No. 1:04-cv-10257 (E.D. Mich. Oct. 12, 2004), D.E. 31.

12. *Bay Cty. Democratic Party v. Land*, 340 F. Supp. 2d 802 (E.D. Mich. 2004); *see Bay Cty. Democratic Party*, 347 F. Supp. 2d at 417; Transfer Motion, *Bay Cty. Democratic Party*, No. 1:04-cv-10257 (E.D. Mich. Oct. 5, 2004), D.E. 8.

13. Interview with Hon. David M. Lawson, Oct. 3, 2012.

14. *Id.*

15. *Id.*

16. Amicus Order, *Bay Cty. Democratic Party*, No. 1:04-cv-10257 (E.D. Mich. Oct. 19, 2004), D.E. 50 [hereinafter *Bay Cty. Democratic Party Amicus Order*]; *see* Amicus Motion, *id.* (Oct. 18, 2004), D.E. 47.

the Court finds that the request of the United States is not timely. Moreover, the Court has reviewed the filing and determines that it adds nothing to the arguments already advanced by the defendants and the other *amici*.¹⁷

Judge Lawson resolved the injunction motions on Tuesday, October 19.¹⁸ First, he denied the five voters intervention, but he permitted their participation as *amici curiae*.¹⁹ He found that voters could enforce HAVA rights through 42 U.S.C. § 1983.²⁰ He determined that HAVA guarantees that provisional ballots cast for federal offices be counted so long as they are cast in the correct city, village, or township.²¹

On October 26, the court of appeals reversed the injunction in light of its holding that same day in an Ohio case that HAVA does not give voters the right to cast ballots in the wrong precinct.²²

17. *Bay Cty. Democratic Party Amicus Order*, *supra* note 16, at 2.

18. *Bay Cty. Democratic Party v. Land*, 347 F. Supp. 2d 404; *see State, Opponents Debate Provisional Ballot Plan*, Grand Rapids Press, Oct. 14, 2004, at B6 (reporting that the hearing lasted five hours and that the state had requested a ruling by Wednesday so it would have time to train election officials if necessary).

19. *Bay Cty. Democratic Party*, 347 F. Supp. 2d at 438.

20. *Id.* at 411, 424–27, 438.

21. *Id.* at 434, 438; *see Provisional Ballots Must Be Counted, Federal Judge Rules*, Grand Rapids Press, Oct. 20, 2004, at C2 (reporting also that the Justice Department had opposed the injunction).

22. *Order, Mich. State Conference of NAACP Branches v. Land*, Nos. 04-2307 and 04-2318 (6th Cir. Oct. 26, 2004), *filed as Order, Bay Cty. Democratic Party v. Land*, No. 1:04-cv-10257 (E.D. Mich. Nov. 15, 2004), D.E. 68; *see Sandusky Cty. Democratic Party v. Blackwell*, 387 F.3d 565 (6th Cir. 2004); *see also Court Reverses Ruling on Ballots*, Detroit News, Oct. 27, 2004, at 2; David Eggert, *Appeals Court Reverses Provisional Ballot Ruling*, Grand Rapids Press, Oct. 27, 2004, at C5.