

An Opportunity to Cure Absentee Ballot Signatures That Do Not Match Voter Registration Records

Florida Democratic Party v. Detzner
(Mark E. Walker, N.D. Fla. 4:16-cv-607)

A little over one month before a general election, a political party filed a federal complaint seeking opportunities to cure mismatches between absentee ballot signatures and voter registration signatures, noting an existing opportunity to cure signature omissions. After taking testimony from the local county supervisor of elections, the district judge issued a preliminary injunction requiring an opportunity to cure signature mismatches.

Subject: Absentee and early voting. *Topics:* Signature matching; absentee ballots; equal protection; news media; attorney fees.

On October 3, 2016, a little over one month before the general election, a political party filed a federal complaint in the Northern District of Florida against Florida's secretary of state seeking an opportunity to cure when a voter's signature on a mailed absentee ballot is judged not to match the signature on file.¹ According to the complaint, a mismatched signature caused the ballot to be excluded from the election, but an absent signature triggered an opportunity to cure the defect before the election although "because Florida's system of signature review involves human reviewers, it is necessarily fallible."² With its complaint, the party filed an emergency motion for a preliminary injunction, noting that the "canvassing of returned vote-by-mail ballots is to begin on October 24."³

The party experienced technical difficulties filing the case electronically,⁴ perhaps because the party's attorneys were not registered with the court as electronic filers.⁵ For that reason, there was a delay in Judge Mark E. Walker's learning that he had been assigned the case.⁶ On October 6, Judge Walker set a telephone conference for the following day and ordered the party to immediately serve the secretary's attorneys.⁷

1. Complaint, *Fla. Democratic Party v. Detzner*, No. 4:16-cv-607 (N.D. Fla. Oct. 3, 2016), D.E. 5; see Steve Bousquet, *Florida Sued Over Mail Ballots*, Tampa Bay Times, Oct. 4, 2016, at 5; Steve Bousquet, *Mail Voting Heads to Record*, Tampa Bay Times, Oct. 6, 2016, at 1.

2. Complaint, *supra* note 1, at 14.

3. Motion, *Fla. Democratic Party*, No. 4:16-cv-607 (N.D. Fla. Oct. 3, 2016), D.E. 1.

4. Interview with Hon. Mark E. Walker, Oct. 31, 2016.

Tim Reagan interviewed Judge Walker for this report by telephone.

5. Notice, *Fla. Democratic Party*, No. 4:16-cv-607 (N.D. Fla. Oct. 5, 2016), D.E. 8.

6. Interview with Hon. Mark E. Walker, Oct. 31, 2016 (noting the importance of the clerk's office keeping a judge informed about emergency filings assigned to the judge).

7. Order, *Fla. Democratic Party*, No. 4:16-cv-607 (N.D. Fla. Oct. 6, 2016), D.E. 12.

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Judge Walker has a standard order for use in emergency cases, which he tailors to each case.⁸ The docket sheet includes instructions for telephone participation by news media as well as the parties.⁹ In the future, Judge Walker will include in the participation notice an instruction that he issued orally: participants may not record the proceeding.¹⁰ In the future, Judge Walker will also instruct participants not to tweet or blog about the proceeding while it is occurring.¹¹

At the conference, the secretary asked for a week to develop a factual record in response to the party's filings.¹² Judge Walker set a briefing schedule culminating in a hearing on October 18.¹³

Later, Judge Walker set an additional hearing for October 14 and took testimony then from the local county supervisor of elections.¹⁴ Judge Walker is a fan of Federal Rule of Evidence 614, which provides for the court's calling and examining a witness.¹⁵ Judge Walker described his goals for the witness at the hearing:

As I indicated in the notice, what I want is some background information in terms of the mechanics of how things work. I am not asking this witness what his opinions are, that is what I should or should not do or how things should or should not work. What I'm trying to find out is, as a practical matter, how things do work. And also find out where there's a difference from county to county, because there's going to be some things that vary from county to county, and again so I have a practical understanding of when votes are counted, how they are counted, how we respond to those that don't sign their ballots and so forth, and so that's the purpose of this testimony today.¹⁶

Judge Walker learned from the witness information that he otherwise would not have learned about how the controversy and its possible resolution would likely play out for local election officials.¹⁷

8. Interview with Hon. Mark E. Walker, Oct. 31, 2016.

9. *E.g.*, Docket Sheet, *Fla. Democratic Party*, No. 4:16-cv-607 (N.D. Fla. Oct. 3, 2016) (D.E. 20).

10. Interview with Hon. Mark E. Walker, Oct. 31, 2016.

11. *Id.*

12. Order at 2, *Fla. Democratic Party*, No. 4:16-cv-607 (N.D. Fla. Oct. 15, 2016), D.E. 30 [hereinafter Oct. 15, 2016, Order].

13. Minutes, *id.* (Oct. 7, 2016), D.E. 21.

14. Minutes, *id.* (Oct. 14, 2016), D.E. 27; Opinion at 7, *id.* (Oct. 16, 2016), D.E. 34, 2016 WL 6090943; Docket Sheet, *supra* note 9 (D.E. 24); *see* Steve Bousquet, *Federal Judge Could Reshape Vote in Florida*, Tampa Bay Times, Oct. 12, 2016, at 1.

15. Interview with Hon. Mark E. Walker, Oct. 31, 2016; *see* Docket Sheet, *supra* note 9 (D.E. 24); Transcript at 4, *Fla. Democratic Party*, No. 4:16-cv-607 (N.D. Fla. Oct. 14, 2016, filed Oct. 16, 2016), D.E. 32.

16. Transcript, *supra* note 15, at 11–12.

17. Interview with Hon. Mark E. Walker, Oct. 31, 2016.

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Reviewing the secretary's October 14 opposition papers,¹⁸ Judge Walker observed that they contained only legal arguments that the secretary customarily asserts in voting rights cases, including a pleaded defense of sovereign immunity.¹⁹

Moreover, . . . the Florida Secretary of State has not responded to this case on the merits and thus has not contested a single fact presented by the Plaintiff.

. . .

. . . If one were skeptical, it would appear that the Florida Secretary of State requested as much time as he felt he could possibly justify so that he could use every second available to run out the clock.²⁰

On Saturday, October 15, Judge Walker decided, therefore, that he would rule without additional hearing.²¹

On Sunday, October 16, Judge Walker issued a 33-page opinion granting the party a preliminary injunction.²²

Judge Walker noted that the "county canvassing boards [that review absentee ballot signatures] are staffed by laypersons that are not required to undergo—and many do not participate in—formal handwriting-analysis education or training."²³ Judge Walker concluded that "there is no reason why mismatched-signature ballots cannot be treated the same as no-signature ballots during the review (and cure) process."²⁴

It is illogical, irrational, and patently bizarre for the State of Florida to withhold the opportunity to cure from mismatched-signature voters while providing that same opportunity to no-signature voters. And in doing so, the State of Florida has categorically disenfranchised thousands of voters arguably for no reason other than they have poor handwriting or their handwriting has changed over time. Thus, Florida's statutory scheme does not even survive rational basis review.²⁵

Judge Walker ordered the party to post a \$500 preliminary injunction security bond.²⁶

18. Motion to Dismiss, *Fla. Democratic Party*, No. 4:16-cv-607 (N.D. Fla. Oct. 14, 2016), D.E. 29; Opposition Brief, *id.* (Oct. 14, 2016), D.E. 28.

19. Oct. 15, 2016, Order, *supra* note 12, at 2–3.

20. *Id.* at 5; see Arek Sarkissian, *Judge Critical of Detzner*, Orlando Sentinel, Oct. 17, 2016, at B2.

21. Oct. 15, 2016, Order, *supra* note 12, at 6 (noting that the party's reply brief was due by Sunday evening, October 16, instead of Monday morning, October 17); see Mike Schneider, *Judge Issues Sharp Rebuke in Ballot Suit*, Orlando Sentinel, Oct. 16, 2016, at B1.

22. Opinion, *supra* note 14; see Democratic Exec. Comm. of Fla. v. Lee, ___ F.3d ___, ___, 2019 WL 638722 (11th Cir. 2019) (p.5 of opinion filed at 11th Cir. No. 18-14758); Gray Rohrer, *Judge: Let Voters Fix Signatures on Ballots*, Orlando Sentinel, Oct. 18, 2016, at A1.

23. Opinion, *supra* note 14, at 5.

24. *Id.* at 8–9.

25. *Id.* at 22–23; see *id.* at 28 ("In our democracy, those who vote decide everything; those who count the vote decide nothing.").

26. *Id.* at 26, 29–30; see Docket Sheet, *supra* note 9 (D.E. 35, noting receipt of security bond).

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On Monday, October 17, the secretary directed county supervisors of elections “to allow mismatched-signature ballots to be cured in precisely the same fashion as currently provided for non-signature ballots.”²⁷

In 2017, the parties reached a settlement on attorney fees.²⁸

27. Letter, *attached to Notice*, Fla. Democratic Party v. Detzner, No. 4:16-cv-607 (N.D. Fla. Oct. 17, 2016), D.E. 37; see Steve Bousquet, *Judge Orders Fix for Faulty Mail Ballot Signatures*, Miami Herald, Oct. 18, 2016, at 1A.

28. Order, *Fla. Democratic Party*, No. 4:16-cv-607 (N.D. Fla. Aug. 18, 2017), D.E. 69; Status Reports, *id.* (N.D. Fla. July 25 and Aug. 17, 2017), D.E. 66, 68.