

## Preparing for Voting-Machine Failure

### *NAACP State Conference of Pennsylvania v. Cortés* (*Harvey Bartle III, E.D. Pa. 2:08-cv-5048*)

A federal complaint filed twelve days before a general election challenged a directive allowing the use of paper ballots only when all voting machines fail. A day after a hearing, held five days after the complaint was filed, the district judge issued a preliminary injunction requiring the offering of paper ballots when half or more of the voting machines cease to work.

*Subject:* Voting procedures. *Topics:* Voting technology; case assignment; intervention.

Three voters and two voting-rights organizations filed a federal complaint in the Eastern District of Pennsylvania on October 23, 2008, twelve days before a general election, claiming that “the new rule promulgated by the Pennsylvania Secretary of the Commonwealth directing the use of emergency paper ballots only when *all* of the voting machines in a precinct fail is nothing short of perverse.”<sup>1</sup> With their complaint, the plaintiffs filed a motion for a preliminary injunction and expedited hearing.<sup>2</sup>

The court assigned the case to Senior Judge Bruce W. Kauffman, but on the day after the case was filed the court reassigned the case to Chief Judge Harvey Bartle III.<sup>3</sup>

Another voter and the Republican Party moved on October 24 to intervene on behalf of the plaintiffs.<sup>4</sup> Judge Bartle set the matter for hearing on Tuesday, October 28, at 1:00 p.m.<sup>5</sup> He held pretrial conferences on October 24 and 27.<sup>6</sup> After the first conference, the motion to intervene was withdrawn.<sup>7</sup>

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1. Complaint at 2, *NAACP State Conference of Pa. v. Cortés*, No. 2:08-cv-5048 (E.D. Pa. Oct. 23, 2008), D.E. 1; *NAACP State Conference of Pa. v. Cortés*, 591 F. Supp. 2d 757, 758 (E.D. Pa. 2008); see Tom Barnes, *Elections Officials Face GOP, NAACP Lawsuits*, Pittsburgh Post-Gazette, Oct. 24, 2008, at A8; Bob Driehaus, *Lawsuit Is Filed Over Ballot Rule in Pennsylvania*, N.Y. Times, Oct. 24, 2008, at A19; Cynthia Henry, *Pa. Lawsuit Seeks Paper Backup* Nov. 4, Phila. Inquirer, Oct. 24, 2008, at B11; Jenna Portnoy, *Voters’ Rights Groups Sue State*, Phila. Intelligencer, Oct. 24, 2008, at 1.

2. Motion, *NAACP State Conference of Pa.*, No. 2:08-cv-5048 (E.D. Pa. Oct. 23, 2008), D.E. 2.

3. Order, *id.* (Oct. 24, 2008), D.E. 3.

Judge Kauffman died on November 29, 2021. Federal Judicial Center Biographical Directory of Article III Federal Judges, [www.fjc.gov/history/judges](http://www.fjc.gov/history/judges).

4. Intervention Motion, *NAACP State Conference of Pa.*, No. 2:08-cv-5048 (E.D. Pa. Oct. 24, 2008), D.E. 4.

5. Notice, *id.* (Oct. 27, 2008), D.E. 12; see *NAACP State Conference of Pa.*, 591 F. Supp. 2d at 758–59.

6. Docket Sheet, *NAACP State Conference of Pa.*, No. 2:08-cv-5048 (E.D. Pa. Oct. 23, 2008) (D.E. 15, 16).

7. Order, *id.* (Oct. 28, 2008, filed Oct. 30, 2008), D.E. 22; Letter, *id.* (Oct. 28, 2008, filed Oct. 30, 2008), D.E. 20.

At the October 28 hearing, the plaintiffs called nine witnesses, and the defendants called three; closing arguments began at 8:34 p.m.<sup>8</sup> The hearing ended at 9:00.<sup>9</sup>

On October 29, Judge Bartle issued a preliminary injunction mandating that polling places offer voters paper ballots when half or more of the voting machines become inoperable.<sup>10</sup>

It is undisputed that there are a total of 9,329 polling places in the 67 counties of Pennsylvania. . . . [O]ver 90% of Philadelphia's divisions or precincts are equipped with two machines or less and over 99% have three machines or less.

. . .

Based on the record before us, we find that there is a real danger that a significant number of machines will malfunction throughout the Commonwealth, and this occurrence is likely to cause unacceptably long lines on November 4 . . . .<sup>11</sup>

Judge Bartle made the injunction permanent on January 28, 2009.<sup>12</sup>

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8. Transcript, *id.* (Oct. 28, 2008, filed Dec. 4, 2008), D.E. 27.

Because of their election duties, two witnesses were allowed to testify out of order. *Id.*

9. See Cynthia Henry, *U.S. Judge Hears Pa. Ballot Lawsuit*, Phila. Inquirer, Oct. 29, 2008, at B1.

10. *NAACP State Conference of Pa.*, 591 F. Supp. 2d at 767; see Cynthia Henry, *Judge Says Pa. Must Provide Paper Ballots*, Phila. Inquirer, Oct. 30, 2008, at B1; Bob Warner, *Paper's Ready If Machines Fail Voters*, Phila. Daily News, Oct. 30, 2008, at 11.

11. *NAACP State Conference of Pa.*, 591 F. Supp. 2d at 760, 765; see Justin Levitt, *Long Lines at the Courthouse: Pre-Election Litigation of Election Day Burdens*, 9 Election L.J. 19, 22 (2010).

12. Order, *NAACP State Conference of Pa.*, No. 2:08-cv-5048 (E.D. Pa. Jan. 29, 2009), D.E. 34.