

Electronic At-Home Absentee Voting for Blind Voters

Powell v. Benson (Gershwin A. Drain, E.D. Mich. 2:20-cv-11023), Drenth v. Boockvar (Jennifer P. Wilson, M.D. Pa. 1:20-cv-829), Hernandez v. New York State Board of Elections (Lewis J. Liman, S.D.N.Y. 1:20-cv-4003), Merrill v. Dunlap (John A. Woodcock, Jr., D. Me. 1:20-cv-248), and Rivero v. Galvin (Douglas P. Woodlock, D. Mass. 1:20-cv-11808)

In light of the greater need for absentee voting in 2020 because of the Covid-19 global infectious pandemic, lawsuits in four states resulted in electronic at-home absentee voting for blind voters that protected the secrecy of their ballots.

Subject: Absentee and early voting. *Topics:* Covid-19; absentee ballots; Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA); intervention; class action; primary election.

In light of the greater need for absentee voting in 2020 because of the Covid-19 global infectious pandemic, blind voters and state affiliates of the National Federation of the Blind filed federal actions in Michigan, Pennsylvania, New York, Maine, and Massachusetts seeking at-home electronic voting that would allow blind voters to vote without the assistance of others in order to protect the secrecy of their ballots.¹ The lawsuits resulted in consent decrees in Michigan, New York, and Massachusetts. In Pennsylvania, the judge granted the plaintiffs a remedy proposed by the defendants. The Maine case was resolved by a settlement that the court reserved jurisdiction to enforce.

Michigan

Two blind voters filed a federal class-action complaint in the Eastern District of Michigan on Saturday, April 25, 2020, claiming that mail-in absentee ballots available only in paper form deprived them of an opportunity to vote in private, because blind voters needed the assistance of others to complete ballots of that type.²

For example, Maryland has developed an online ballot marking tool that allows voters to view and mark their absentee ballots on their computers. Maryland created the tool so that it would work with screen access

1. See Christina A. Cassidy, *Blind Fear Privacy Loss with Shift to Mail Voting*, S. Fla. Sun-Sentinel, June 17, 2020, at A12.

2. Complaint, *Powell v. Benson*, No. 2:20-cv-11023 (E.D. Mich. Apr. 25, 2020), D.E. 1 [hereinafter *Powell* Complaint]; see Taylor DesOrmeau, *Blind Voters Sue Michigan as Tuesday Nears, Absentee Ballots Are Not Available*, Jackson Citizen Patriot, Apr. 30, 2020, at A1.

software and has extensively tested the tool's usability for individuals with a variety of disabilities.³

The complaint argued that a remedy was especially needed because the global infectious Covid-19 pandemic made voting by mail essential.⁴ With their complaint, the plaintiffs filed a motion for a preliminary injunction seeking a remedy in time for the May 5 primary election.⁵ Two days later, Judge Gershwin A. Drain set the case for a hearing by videoconference on Friday, May 1.⁶

On April 28, the plaintiffs filed an amended complaint adding the National Federation of the Blind of Michigan as a plaintiff.⁷ On the next day, the plaintiffs filed a motion to convert their motion for a preliminary injunction to a motion for a temporary restraining order.⁸ Judge Drain set the case for a telephonic status conference on April 30.⁹ The conference closed with instructions to the parties to reconvene that afternoon for settlement discussions.¹⁰ Following the conference, Judge Drain appointed a facilitator "to facilitate a resolution of issues in this matter."¹¹

On May 1, the court filed a notice of specifications for the use of Zoom that day for the conference: "Notice of this proceeding is only going to the [seven] attorneys listed above. It is the responsibility of these attorneys to invite other necessary participants."¹²

The May 1 proceeding turned out to be a settlement conference,¹³ and on that day Judge Drain issued a consent order requiring Michigan to use for the May 5 elections the same technology that it used for overseas absentee ballots pursuant to the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA).¹⁴

3. *Powell* Complaint, *supra* note 2, at 6.

On February 10, 2020, District of Maryland Judge Stephanie A. Gallagher denied the National Federation of the Blind a preliminary injunction that would require Maryland election officials to use electronic ballot-marking devices for in-person voting by most voters that would allow blind voters to cast secret votes indistinguishable from sighted voters' votes. *Nat'l Fed'n of the Blind, Inc. v. Lamone*, 438 F. Supp. 3d 510 (D. Md. 2020); *see* Complaint, *Nat'l Fed'n of the Blind, Inc. v. Lamone*, No. 1:19-cv-2228 (D. Md. Aug. 1, 2019), D.E. 1. The case was settled in 2021. Docket Sheet, *Nat'l Fed'n of the Blind, Inc.*, No. 1:19-cv-2228 (D. Md. Aug. 1, 2019) (order, Sept. 24, 2021, D.E. 99).

4. *Powell* Complaint, *supra* note 2, at 9.

5. Preliminary-Injunction Motion, *Powell*, No. 2:20-cv-11023 (E.D. Mich. Apr. 25, 2020), D.E. 2.

6. Order, *id.* (Apr. 27, 2020), D.E. 6.

7. Amended Complaint, *id.* (Apr. 28, 2020), D.E. 13.

8. Temporary-Restraining-Order Motion, *id.* (Apr. 29, 2020), D.E. 16.

9. Notice, *id.* (Apr. 30, 2020), D.E. 19.

10. Transcript at 17–21, *id.* (Apr. 30, 2020, filed July 12, 2020), D.E. 42.

11. Order, *id.* (Apr. 30, 2020), D.E. 21.

12. Notice, *id.* (May 1, 2020), D.E. 22.

13. Docket Sheet, *id.* (Apr. 25, 2020) [hereinafter *Powell* Docket Sheet].

14. Consent Order, *id.* (May 1, 2020), D.E. 24; *see* 52 U.S.C. §§ 20301–20311; Robert Timothy Reagan, *Overseas Voting: The Uniformed and Overseas Citizens Absentee Voting Act* (Federal Judicial Center 2016).

Following three additional conferences,¹⁵ Judge Drain issued a consent decree on May 19: “So that it may be used for the August 2020 Election, Defendants shall acquire a remote accessible vote-by-mail system (‘RAVBM’) that shall allow voters with print disabilities to review and mark vote-by-mail ballots electronically”¹⁶

Because Michigan was unable to acquire RAVBM election materials in time for the August 4 primary election, Judge Drain ordered them in place in time for absentee voting for the November 3 general election and ordered that UOCAVA procedures be used again for the August election.¹⁷

On September 2, Judge Drain allowed intervention by a blind voter who alleged that she was not able to vote in the August election without assistance of a family member because of technical deficiencies in Michigan’s voting website.¹⁸ The plaintiffs filed a notice of settlement on September 4.¹⁹

Pennsylvania

On May 21, a voter and the National Federation of the Blind of Pennsylvania filed a federal complaint in the Middle District of Pennsylvania “to vindicate the right of individuals with disabilities to vote privately and independently by absentee or mail-in ballot in the June 2, 2020 primary election and in future elections.”²⁰ The plaintiffs asked for Pennsylvania to ultimately establish “an accessible online ballot tool so that blind voters have equal access to vote independently and privately in all elections through absentee and mail-in voting,” noting that in light of the Covid-19 pandemic, blind voters would have to choose between risking their health by going to the polls and forgoing the secret ballot by voting by mail using a paper ballot.²¹ According to the complaint,

12. When Michigan faced a similar inaccessible ballot problem earlier this month, a federal judge approved the same UOCAVA solution Plaintiffs proposed here. The judge entered a stipulated order approving this interim solution on May 1, 2020—a mere four days before the May 5, 2020 election in that state.

15. Transcript, *Powell*, No. 2:20-cv-11023 (E.D. Mich. May 14, 2020, filed July 13, 2020), D.E. 45; Transcript, *id.* (May 8, 2020, filed July 13, 2020), D.E. 44; Transcript, *id.* (May 4, 2020, filed July 13, 2020), D.E. 43; *Powell* Docket Sheet, *supra* note 13.

16. Consent Decree at 6, *Powell*, No. 2:20-cv-11023 (E.D. Mich. May 19, 2020), D.E. 31.

17. Order, *id.* (July 13, 2020), D.E. 48.

The order followed four proceedings in July. Transcript, *id.* (July 10, 2020, filed July 13, 2020), D.E. 47; Transcript, *id.* (July 8, 2020, filed July 13, 2020), D.E. 46; Transcript, *id.* (July 7, 2020, filed July 31, 2020), D.E. 64; Transcript, *id.* (July 2, 2020, filed July 31, 2020), D.E. 63; *Powell* Docket Sheet, *supra* note 13.

18. Opinion, *Powell*, No. 2:20-cv-11023 (E.D. Mich. Sept. 2, 2020), D.E. 87, 2020 WL 5229104; *see* Intervention Motion, *id.* (Aug. 17, 2020), D.E. 70.

19. Notice, *id.* (Sept. 4, 2020), D.E. 89.

20. Complaint at 3–4, *Drenth v. Boockvar*, No. 1:20-cv-829 (M.D. Pa. May 21, 2020), D.E. 1 [hereinafter *Drenth* Complaint]; *see* Matt Miller, *Blind Voters Sue Pa.*, Harrisburg Patriot News, May 26, 2020, at A3.

21. *Drenth* Complaint, *supra* note 20, at 2–3.

13. As a more permanent fix, Michigan has agreed to purchase a remote accessible vote-by-mail system in time for its August 2020 elections, and to continue to use this system in future elections.²²

With their complaint, the plaintiffs filed a motion for a temporary restraining order or a preliminary injunction.²³ Judge Jennifer P. Wilson set the case for a telephonic status conference on Friday, May 22, at 3:00 p.m.²⁴ The order stated, “Given the expedited nature of this order and the current circumstances caused by the COVID-19 pandemic, Plaintiffs are permitted to effect service upon Defendants via email.”²⁵ Judge Wilson’s goal for the conference was to determine what information she would need to rule.²⁶

Following the conference call, Judge Wilson set the case for a telephonic hearing on May 27, should the parties not come to an agreement before then.²⁷ She heard testimony from three witnesses at the hearing.²⁸

“At the outset of the hearing, the court stated that the motion for temporary restraining order and/or preliminary injunction would be granted and the hearing would focus on the adequacy and feasibility of the proposed remedies.”²⁹ Following the evidentiary hearing, Judge Wilson issued a preliminary injunction with a remedy proposed by the defendants, who nevertheless denied liability: an accessible write-in ballot.³⁰ She wanted to rule quickly so that her ruling would not be an exercise in futility.³¹

Judge Wilson observed that a judge often comes to election litigation knowing about as much as a voter about the complexities of election management, and understanding the complexities is very important when presiding over an election case.³² Fortunately, the attorneys in this case were very good, and that was very helpful.³³

22. *Id.* at 4.

23. Motion, *Drenth*, No. 1:20-cv-829 (M.D. Pa. May 21, 2020), D.E. 4.

24. Order, *id.* (May 21, 2020), D.E. 3 [hereinafter May 21, 2020, *Drenth* Order].

Tim Reagan interviewed Judge Wilson for this report by telephone on September 4, 2020.

25. May 21, 2020, *Drenth* Order, *supra* note 24, at 1.

26. Interview with Judge Jennifer P. Wilson, Sept. 4, 2020.

27. Order, *Drenth*, No. 1:20-cv-829 (M.D. Pa. May 22, 2020), D.E. 16.

28. Transcript, *id.* (May 27, 2020, filed June 25, 2020), D.E. 42 [hereinafter *Drenth* Transcript].

“The hearing is limited to two hours because of previously scheduled matters. Each side has forty-five minutes to present testimony and fifteen minutes to present argument.” *Id.* at 6.

29. Opinion at 6–7, *id.* (May 27, 2020), D.E. 31 [hereinafter May 27, 2020, *Drenth* Opinion], 2020 WL 2745729; *see Drenth* Transcript, *supra* note 28, at 6.

30. May 27, 2020, *Drenth* Opinion, *supra* note 29, at 1, 16; *see* Matt Miller, *Ballot Change Ordered to Aid Blind Voters*, Harrisburg Patriot News, May 31, 2020, at A12; *see also* Accessible Remote Ballot Marking Solution for Mail Voting, www.vote.pa.gov/voting-in-PA/Pages/Accessible-Remote-Ballot-Marking-Solution-for-Mail-Voting.aspx.

31. Interview with Judge Jennifer P. Wilson, Sept. 4, 2020.

32. *Id.* (recommending that other judges try to study the complexities of election management as soon as possible in election litigation).

33. *Id.*

On August 12, Pennsylvania finalized a contract for internet voting:

An eligible voter who applies for an accessible ballot will be able to access the ballot through a web link. The voter will then be able to vote on the accessible ballot by marking his choices and will be able to use a variety of assistive technologies while doing so.³⁴

Because Pennsylvania had established a way for blind voters to vote privately and independently, Judge Wilson determined on August 18 that the case was moot, and she awarded summary judgment to the defendants.³⁵

Maine

Four blind voters and Disability Rights Maine filed a federal complaint in the District of Maine against state and local election officials on July 15 to vindicate their voting rights in the November 3 and subsequent elections.³⁶ With their complaint, the voters filed a motion for a temporary restraining order or a preliminary injunction.³⁷

Five days later, Judge John A. Woodcock, Jr., set the case for a telephonic conference on July 23.³⁸ At the conference, “counsel for the Secretary [of State] reported that the Secretary was already developing a plan to implement accessible absentee voting for the November 2020 general election and anticipated being able to outline more details of that plan to the other parties by August 7, 2020.”³⁹ So Judge Woodcock stayed the case until August 10.⁴⁰

On August 14, following an August 10 status conference, the parties reported that new accessible voting systems were expected by September 19.⁴¹

Following a September 30 amended complaint,⁴² the plaintiffs withdrew their injunction motion in February 2021.⁴³ On June 24, 2021, Judge Woodcock approved a settlement agreement specifying that the court would retain enforcement jurisdiction.⁴⁴

34. Opinion at 9, *Drenth*, No. 1:20-cv-829 (M.D. Pa. Aug. 18, 2020), D.E. 80, 2020 WL 4805621.

35. *Id.* at 2, 13–21.

36. Complaint, *Merrill v. Dunlap*, No. 1:20-cv-248 (D. Me. July 15, 2020), D.E. 1.

37. Motion, *id.* (July 15, 2020), D.E. 3.

38. Docket Sheet, *id.* (July 15, 2020) [hereinafter *Merrill Docket Sheet*] (D.E. 9); *see id.* (minutes, D.E. 11).

39. Joint Status Report at 1–2, *id.* (Aug. 10, 2020), D.E. 17.

40. *Merrill Docket Sheet*, *supra* note 38 (order, July 24, 2020, D.E. 12).

41. Joint Status Report, *Merrill*, No. 1:20-cv-248 (D. Me. Aug. 14, 2020), D.E. 20; *Merrill Docket Sheet*, *supra* note 38 (minutes, Aug. 10, 2020, D.E. 18); *see* Megan Gray, *Maine Agrees to Improve Absentee Ballot Access for Visually Impaired*, Waterville Morning Sentinel, Aug. 18, 2020, at 2B.

42. Amended Complaint, *Merrill*, No. 1:20-cv-248 (D. Me. Sept. 30, 2020), D.E. 42; *see* Scott Thistle, *Maine Launching New System That Lets Disabled Vote Online*, Portland Press Herald, Oct. 2, 2020, at B2.

43. *Merrill Docket Sheet*, *supra* note 38 (text order granting withdrawal motion, D.E. 57); Withdrawal Motion, *Merrill*, No. 1:20-cv-248 (D. Me. Feb. 17, 2021), D.E. 56.

44. Settlement Agreement, *Merrill*, No. 1:20-cv-248 (D. Me. June 24, 2021), D.E. 77.

New York

An action in the Southern District of New York took longer to resolve. The National Federation of the Blind of New York State, three other organizations, and four voters filed a federal complaint on May 22, 2020, seeking accessible absentee ballots in New York and suggesting that New York accomplish that by modifying the electronic ballots it already provided for overseas voters.⁴⁵ With their complaint, the plaintiffs filed a motion for a temporary restraining order and a preliminary injunction⁴⁶ and a proposed order to show cause why immediate relief should not be granted.⁴⁷ Judge Lewis J. Liman scheduled a telephonic conference for 4:30 that afternoon, posting in the public record contact information for the conference.⁴⁸ Throughout this case, Judge Liman was keen to move quickly.⁴⁹

At the conference, Judge Liman asked the parties about the evidence that he would have to consider to rule.⁵⁰ He also asked the plaintiffs to order a copy of the conference transcript for the court's benefit.⁵¹

Judge Liman set the case for a telephonic oral argument on the morning of May 29, again posting contact information in the public record.⁵² He preferred affidavits over live testimony, because the case did not involve much in the way of factual disputes, and witness credibility was not an issue.⁵³ Evidence by affidavit would make it easier for him to rule quickly.⁵⁴ He conducted the proceedings by telephone rather than by video for ease of the parties, the public, and the court, and because seeing speakers was not necessary for this case.⁵⁵

Following oral argument, Judge Liman ordered the parties to submit by 5:00 p.m. on June 3 either a consent decree or a statement that they were unable to agree to one.⁵⁶ On June 2, he issued a consent decree: "Defendants agree to instruct county boards of elections to provide by email an accessible fillable PDF absentee ballot ('accessible absentee ballot') to voters who have a

45. Complaint, *Hernandez v. N.Y. State Bd. of Elections*, No. 1:20-cv-4003 (S.D.N.Y. May 22, 2020), D.E. 1; *Hernandez v. N.Y. State Bd. of Elections*, 479 F. Supp. 3d 1, 5 (S.D.N.Y. 2020).

46. Motion, *Hernandez*, No. 1:20-cv-4003 (S.D.N.Y. May 22, 2020), D.E. 8; *Hernandez*, 479 F. Supp. 3d at 5.

47. Proposed Order, *Hernandez*, No. 1:20-cv-4003 (S.D.N.Y. May 22, 2020), D.E. 3.

48. Order, *id.* (May 22, 2020), D.E. 9.

Tim Reagan interviewed Judge Liman for this report by telephone on September 8, 2020.

49. Interview with Judge Lewis J. Liman, Sept. 8, 2020.

50. Transcript at 7–8, *Hernandez*, No. 1:20-cv-4003 (S.D.N.Y. May 22, 2020, filed May 28, 2020), D.E. 32.

51. *Id.* at 15.

52. Order, *id.* (May 26, 2020), D.E. 24; Docket Sheet, *id.* (May 22, 2020).

53. Interview with Judge Lewis J. Liman, Sept. 8, 2020 (noting that the judge used video-conference technology in other cases during the pandemic).

54. *Id.*

55. *Id.*

56. Order, *Hernandez*, No. 1:20-cv-4003 (S.D.N.Y. May 29, 2020), D.E. 36.

disability that prevents them from privately and independently using a paper absentee ballot.”⁵⁷

On August 14, Judge Liman denied a second motion for a preliminary injunction to govern the November general election.⁵⁸ Declaring the call close, he concluded that the plaintiffs had not shown that their preferred method of accommodating disabled voters would be superior to methods adopted by the defendants.⁵⁹ But he did order state election officials to provide county election officials with some specific guidance on how to accommodate disabled absentee voters.⁶⁰

Following nine endorsed status reports from January 2021 to March 2022,⁶¹ Judge Liman approved a settlement agreement on April 5, 2022.⁶² On July 21, however, he concluded that New York’s election authorities were in breach of the agreement.⁶³ According to an October 14 status report, “Defendants have completed the procurement and implementation of the RAVBM system and County Boards of Election are now providing General Election ballots to eligible voters via the RAVBM system.”⁶⁴ Two days after the general election, Judge Liman relieved the defendants of an obligation to submit weekly status reports.⁶⁵ He approved an attorney-fee settlement on March 8, 2023, for \$110,000 to cover the enforcement motion.⁶⁶

Massachusetts

A suit filed in the District of Massachusetts was filed last and resolved most quickly. Four voters and two organizations filed the federal complaint against the secretary of the commonwealth on October 2, 2020, seeking an order permitting blind voters to submit their ballots by email.⁶⁷ With their complaint, the plaintiffs filed a motion for a preliminary injunction.⁶⁸

Judge Douglas P. Woodlock set the case for a videoconference hearing on October 16.⁶⁹ The court provided a link in the docket sheet for public-attendance registration.⁷⁰

57. Consent Decree, *id.* (June 2, 2020), D.E. 38; *see* *Hernandez v. N.Y. State Bd. of Elections*, 479 F. Supp. 3d 1, 5–6 (S.D.N.Y. 2020).

58. *Hernandez*, 479 F. Supp. 3d 1; *see* Second Preliminary-Injunction Motion, *Hernandez*, No. 1:20-cv-4003 (S.D.N.Y. July 28, 2020), D.E. 55.

59. *Hernandez*, 479 F. Supp. 3d 1.

60. Order, *Hernandez*, No. 1:20-cv-4003 (S.D.N.Y. Aug. 19, 2020), D.E. 110, 2020 WL 4883889.

61. Endorsements, *id.* (Jan. 22, 2021, to Mar. 1, 2022), D.E. 119, 124, 126, 128, 130, 134, 136, 138, 140.

62. Stipulated Dismissal, *id.* (Apr. 5, 2022), D.E. 143; Settlement Agreement, *id.* (Apr. 5, 2022), D.E. 142.

63. Order, *id.* (July 21, 2022), D.E. 159; Transcript at 129, *id.* (July 21, 2022, filed Aug. 18, 2022), D.E. 164.

64. Letter, *id.* (Oct. 14, 2022), D.E. 180.

65. Order, *id.* (Nov. 10, 2022), D.E. 185; *see* Letter, *id.* (Nov. 10, 2022), D.E. 184.

66. Settlement Order, *id.* (Mar. 8, 2023), D.E. 193.

67. Complaint, *Rivero v. Galvin*, No. 1:20-cv-11808 (D. Mass. Oct. 2, 2020), D.E. 1.

68. Preliminary-Injunction Motion, *id.* (Oct. 2, 2020), D.E. 2.

69. Docket Sheet, *id.* (Oct. 2, 2020) (D.E. 8).

On October 9, the parties submitted a motion to approve a consent judgment.⁷¹ Judge Woodlock approved the settlement providing for email voting on October 13.⁷²

70. *Id.* (D.E. 9).

71. Motion, *id.* (Oct. 9, 2020), D.E. 12.

72. Judgment, *id.* (Oct. 13, 2020), D.E. 14.