

No Constitutional Right to Greater Publicization of Early Voting for a Special Congressional Election

McMurray v. Mohr
(*Lawrence J. Vilardo, W.D.N.Y. 1:20-cv-689*)

A district judge denied immediate relief to plaintiffs who sought an injunction requiring county election officials to publicize more widely early-voting opportunities for a special congressional election.

Subject: Absentee and early voting. *Topics:* Early voting; Covid-19; interlocutory appeal.

To date, less than a week before early voting is scheduled to start, the Erie County Board of Elections, and its Commissioners, have not even listed the dates, times and places of early voting on the Board's website, much less engaged in other methods of informing the voters of how to exercise their rights, an exercise made all the more difficult this year by the Coronavirus pandemic.¹

So alleged a major-party nominee for a special congressional election and two other voters in a federal complaint filed on June 9, 2020, in the Western District of New York against election officials of Erie County, the county that includes Buffalo.² The complaint sought a temporary restraining order, a preliminary injunction, and expedited hearings,³ which the plaintiffs also sought by separate motion.⁴

Judge Lawrence J. Vilardo set the case for a remote hearing on the day that it was filed.⁵ The public docket sheet included instructions for public access.⁶ At the hearing, Judge Vilardo instructed everyone on the line to not broadcast or record the hearing.⁷ He also ordered briefing completed by 12:01 p.m. on June 11.⁸

The plaintiffs' motion brief was more than four hours late, and their reply brief was filed an hour after their two-and-a-half-hour extension.⁹ Judge

1. Complaint at 2, *McMurray v. Mohr*, No. 1:20-cv-689 (W.D.N.Y. June 9, 2020), D.E. 1 (referring to the global infectious pandemic of Covid-19, the coronavirus disease that began in late 2019); see Opinion at 3, *id.* (June 11, 2020), D.E. 15 ("Early voting is scheduled to begin on Saturday, June 13, 2020.").

2. Complaint, *supra* note 1; see Amended Complaint, *McMurray*, No. 1:20-cv-689 (W.D.N.Y. June 11, 2020), D.E. 12.

3. Complaint, *supra* note 1, at 9.

4. Motion, *McMurray*, No. 1:20-cv-689 (W.D.N.Y. June 9, 2020), D.E. 3.

5. Docket Sheet, *id.* (June 9, 2020); see *id.* (D.E. 9).

6. *Id.*

Tim Reagan interviewed Judge Vilardo for this report by telephone on October 28, 2020.

7. Interview with Hon. Lawrence J. Vilardo, Oct. 28, 2020.

8. Docket Sheet, *supra* note 5 (D.E. 7).

9. Opinion, *supra* note 1, at 1–2.

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Vilardo declined to consider a legal theory raised for the first time in the reply brief.¹⁰

Judge Vilardo ruled on Thursday, June 11, allowing the plaintiffs an additional day during the week to file an appeal.¹¹ He denied the plaintiffs immediate relief.¹²

. . . [E]arly voting is an *expansion* of the right to vote; there is no constitutional right to vote prior to the election. Therefore, the plaintiffs are unlikely to prove that in failing to further publicize early voting, the defendants have burdened—let alone unduly burdened—their right to participate in the June 23rd elections.¹³

The county election officials, moreover, had added information about early voting to their website after the complaint was filed.¹⁴

The plaintiff candidate was defeated in the special election, and he would be on the ballot again in November’s general election.¹⁵

The court of appeals dismissed an interlocutory appeal as moot on October 6.¹⁶ The parties stipulated dismissal of the district-court case on November 13.¹⁷

10. *Id.* at 2.

11. Interview with Hon. Lawrence J. Vilardo, Oct. 28, 2020; see Notice of Interlocutory Appeal, *McMurray*, No. 1:20-cv-689 (W.D.N.Y. June 12, 2020), D.E. 17.

12. Opinion, *supra* note 1.

13. *Id.* at 9 (citation and quotation marks omitted).

14. *Id.* at 9–10.

15. See Jerry Zemski, *Jacobs to Be Sworn In as Newest Congressman Today*, Buffalo News, July 21, 2020, at B15.

16. Order, *McMurray v. Mohr*, No. 20-1818 (2d Cir. Oct. 6, 2020), D.E. 49.

17. Stipulation, *McMurray v. Mohr*, No. 1:20-cv-689 (W.D.N.Y. Nov. 13, 2020), D.E. 33; Docket Sheet, *supra* note 5 (dismissal order, D.E. 34).