

Releasing Names of Provisional Voters

Mah v. Board of County Commissioners
(*J. Thomas Marten, D. Kan. 5:12-cv-4148*)

Three days after the November 2012 general election, an incumbent candidate for a state house of representatives filed a petition in state court seeking an order that a county provide the candidate with the names and addresses of all persons who cast provisional ballots in the county. The defendant board of commissioners removed the action to federal court after a state judge granted the candidate the order she requested. The state’s secretary of state sought a federal restraining order against the state-court order. The board, however, complied with the state-court order by its deadline. The federal judge ordered the candidate not to distribute the list or contact the voters pending further ruling. Subsequently, the judge ruled that the Help America Vote Act “protects ‘access to information about an individual provisional ballot.’ It does not protect information ‘about the individual casting the ballot.’”

Subject: Provisional ballots. *Topics:* Provisional ballots; Help America Vote Act (HAVA); removal.

Three days after the November 6, 2012, general election, an incumbent candidate for Kansas’s house of representatives filed a petition in state court seeking an order that Shawnee County—the county that includes Topeka—provide the candidate with the names and addresses of all persons who cast provisional ballots in the county.¹ After the state judge granted the candidate the order she requested,² the defendant board of commissioners removed the action to federal court.³ Kansas’s secretary of state filed a motion for a temporary restraining order against the state-court order.⁴ The board complied with the state-court order by the November 9, 6:00 p.m., deadline.⁵

On November 13, Judge J. Thomas Marten held a teleconference with the parties and scheduled a hearing for the following day.⁶ Judge Marten ordered

1. Petition, *Mah v. Bd. of Cty. Comm’rs*, No. 12-c-1214 (Kan. Dist. Ct. Shawnee Cty. Nov. 9, 2012), *filed as Ex. A*, Notice of Removal, *Mah v. Bd. of Cty. Comm’rs*, No. 5:12-cv-4148 (D. Kan. Nov. 9, 2012), D.E. 1; *see Kansas: Judge Allows Candidates to Contact Voters*, N.Y. Times, Nov. 15, 2012, at A24 [hereinafter *Judge Allows*] (reporting that the incumbent “trails by 44 votes. She hoped to pick up votes by helping voters correct potential problems with their provisional ballots before officials certify election results . . .”).

2. Order, *Mah*, No. 12-c-1214 (Kan. Dist. Ct. Shawnee Cty. Nov. 9, 2012), *filed as Ex. B*, Notice of Removal, *supra* note 1.

3. Notice of Removal, *supra* note 1.

4. Motion, *Mah*, No. 5:12-cv-4148 (D. Kan. Nov. 9, 2012), D.E. 2.

5. Injunction Denial Opinion at 2, *id.* (Nov. 15, 2012), D.E. 14, 2012 WL 5584613.

6. Docket Sheet, *id.* (Nov. 9, 2012) (D.E. 7, 8).

Judge Marten retired on May 1, 2021. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

the candidate not to distribute the list further or contact the voters until after the hearing.⁷

At the conclusion of the hearing, Judge Marten announced that he was denying the motion for a temporary restraining order and lifting his restrictions on use of provisional-ballot information already disclosed.⁸

Section 302(a)(5)(B) of the Help America Vote Act provides, “Access to information about an individual provisional ballot shall be restricted to the individual who cast the ballot.”⁹ Judge Marten explained on November 15, “The plain language of the statute protects ‘access to information about an individual provisional ballot.’ It does not protect information ‘about the individual casting the ballot.’”¹⁰

After the provisional ballots were counted, the incumbent emerged defeated by a margin of twenty-one votes out of over ten thousand cast.¹¹

In 2013, Kansas amended its election-crimes statute to expressly prohibit the disclosure of “the contents of any ballot, whether cast in a regular or provisional manner, or the name of any voter who cast such ballot, except as ordered by a court of competent jurisdiction in an election contest.”¹² In addition, the statute came to provide, “The name of any voter who has cast a ballot shall not be disclosed from the time the ballot is cast until the final canvass of the election by the county board of canvassers.”¹³ On August 1, 2013, Judge Marten granted a motion by Kansas’s secretary of state to dismiss the case as moot in light of the statutory amendment.¹⁴

7. Injunction Denial Opinion, *supra* note 5, at 2–3.

8. Transcript at 39–43, *Mah*, No. 5:12-cv-4148 (D. Kan. Nov. 14, 2012, filed Nov. 20, 2012), D.E. 15; *see Judge Allows*, *supra* note 1.

9. Pub. L. No. 107-252, 116 Stat. 1666, 1707 (2002), 52 U.S.C. § 21082(a)(5)(B). *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).

10. Injunction Denial Opinion, *supra* note 5, at 6; *see* Daniel P. Tokaji, *HAVA in Court: A Summary and Analysis of Litigation*, 12 Election L.J. 203, 208 (2013).

11. *See Judge Dismisses Lawsuit from House Race*, Newton Kansan, Aug. 3, 2013, at 6 [hereinafter *Judge Dismisses Lawsuit*]; Tim Hrenchir, *Meet Larry Mah*, Topeka Capital-J., Dec. 24, 2012, at A.

12. Dismissal Opinion at 2, *Mah*, No. 5:12-cv-4148 (D. Kan. Aug. 1, 2013), D.E. 37; *see* Kan. Stat. § 25-2422(a)(1) (2013); 2013 Kan. Sess. Laws ch. 101, p.504 (effective July 1, 2013); *see also* Andy Marso, *Bill Shrouding Provisional Ballots Heads to Governor*, Topeka Capital-J., Apr. 8, 2013, at A.

13. Dismissal Opinion, *supra* note 12, at 2; *see* Kan. Stat. § 25-2422(b) (2013); 2013 Kan. Sess. Laws ch. 101, p.504 (effective July 1, 2013).

14. Dismissal Opinion, *supra* note 12; *see Judge Dismisses Lawsuit*, *supra* note 11.