SPEECH: ELECTION LITIGATION IS NOT EASY. LET'S REMEMBER THAT WHEN CRITIQUING LAWYERS AND JUDGES?

HON. CHAD A. READLER

Danny, thank you for those kind remarks.[1] Danny will be clerking for me in the coming years, so admittedly it was in his best interest to offer a generous introduction, but I appreciate it nonetheless. It's also nice to see some past law clerks in the audience, as well as many friends.

I was honored to be asked by the *Harvard Journal of Law and Public Policy* to present today's keynote address. In fact, it has long been a goal of mine to speak to the Journal. After all, I learned about the Journal even before I went to law school. During my senior year of college at the University of Michigan, and over the ensuing summer, I worked for Spence Abraham, then a candidate for the United States Senate. He would later go on to win that election and serve a term as a Senator, followed by an appointment as the Energy Secretary in President Bush's first term. During my time on the campaign, I became quite familiar with Spence's bio. His pedigree was impeccable, from Harvard Law School to Deputy Chief of Staff for the Vice President. But there were two lines on his resume that, at least as a senior in college, did not resonate with me. One was an indication that he was the co-founder of something called The Federalist Society. The other was that he was the founder of a publication titled the *Harvard Journal of Law and Public Policy*. So, thirty years later, it is a privilege, and something of a homecoming, given

1. Danny Bushacra, a 3L at Harvard Law School, introduced me before my address. Danny will be my law clerk in 2026-2027.

my ties to Spence, to be here as your keynote speaker, an occasion I would not have anticipated during my stint as an upstart campaign staffer in the mid-1990s.

In light of that modest beginning, you might expect that, now that I am here with all of you, I would approach this talk with a good dose of humility. Not exactly. Much of my talk, in fact, will be about myself. Rest assured, I will do so only to reflect on my personal experiences with election law, the theme of this symposium. I will contrast my opportunities as an election law litigator, a pursuit shared by many here today, with those from my time on the bench, a privilege I hope you all hold as well during your careers. Because those experiences are quite different. As a jurist, I have gained even more admiration for the work of election lawyers. At the same time, I have a greater appreciation for the difficulties judges face in resolving the thorny issues that arise in the election law context. And in both scenarios, I feel the media, and to some extent the public, has been too critical of those engaged in these challenging endeavors.

To that end, it is no exaggeration to say that election law litigation is not for the faint of heart. The cases typically move quickly, with an election or other important deadline pending. The issues can be novel and often difficult. And the stakes can be high, with a case's resolution potentially affecting the outcome of an election or the success of a ballot measure.

Election law perhaps first captured national attention during the 2000 presidential campaign. That year, the electoral results in Florida, and in turn the nation, turned on the counting of votes in a handful of Florida counties that had used punch card ballots.[2] The manual recount process for those ballots helped coin terms like hanging chads, dimpled chads, and even pregnant chads,[3] phrases

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2. *See, e.g.*, Don Van Natta Jr., *Fatigue in Florida: Bush's Slim Lead Holds as Rules Change and Challenges Pile Up*, N.Y. TIMES, Nov. 20, 2000, at A1.

3. *See, e.g.*, *id.*; Ford Fessenden, *After Cards Are Poked, the Confetti Can Come*, N.Y. TIMES, Nov. 12, 2000, at 32.

that I, as a fellow Chad, have heard in jest many times since. The recount process in Florida displayed for the nation and the world the role that lawyers can play in a close election. Hundreds of attorneys, including John Roberts, Brett Kavanaugh, and Amy Coney Barrett,[4] descended upon the Sunshine State to take on tasks ranging from crafting legal strategies for ensuing Supreme Court litigation to watching recount workers in dusty rooms pore over thousands of paper ballots in painstaking detail. Some would argue that the strategies deployed by Republican lawyers in 2000 had as much to do in paving the way for George Bush's ascension to the presidency as did any political strategies utilized during the campaign.

The 2020 campaign brought election law back to the public fore. But, it seems, in a rather dim light. Although the pandemic led to evolving voting practices that year,[5] efforts to address those measures via litigation were often panned by critics. In particular, President Trump's initiatives to contest aspects of the election were met with sharp criticisms by the press and sectors of the public.[6] True, some cases pursued by Trump's associates seemed frivolous

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Julian Borger, *The Chad Debate – Are Dimples Gore's Best Hope?*, THE GUARDIAN (Nov. 21, 2000, 9:27 PM), https://www.theguardian.com/world/2000/nov/22/uselections2000.usa [https://perma.cc/5PL4-YDAW].

4. *See* Joan Biskupic, *Supreme Court Is About to Have 3* Bush v. Gore *Alumni Sitting on the Bench*, CNN (Oct. 17, 2020, 8:07 AM), https://www.cnn.com/2020/10/17/politics/bush-v-gore-barrett-kavanaugh-roberts-supreme-court/index.html [https://perma.cc/5HDL-HFN9].

5. *See, e.g.*, Zach Montellaro, *The Pandemic Changed How We Vote. These States Are Making the Changes Permanent.*, POLITICO (June 22, 2021, 4:30 AM), https://www.politico.com/news/2021/06/22/pandemic-voting-changes-495411 [https://perma.cc/8G2X-CHYR].

6. *See, e.g.*, Elie Honig, Opinion, *The Reason Trump's Election Lawsuits Are Tanking*, CNN (Nov. 16, 2020, 4:00 PM), https://www.cnn.com/2020/11/16/opinions/trump-2020-election-lawsuits-tanking-honig/index.html [https://perma.cc/M3UC-E476]; Madeline MacMillan, Letter to the Editor, N.Y. TIMES (Nov. 10, 2020), https://www.nytimes.com/2020/11/10/opinion/letters/trump-election-lawsuits.html [https://perma.cc/AA33-ZRDM].

from the start, and were swiftly dismissed.[7] Yet even where cases had some potential merit, lawyers were criticized for pursuing them, even to the point of being a target of the cancel culture movement.[8]

Having been confirmed to the Sixth Circuit in 2019, I did not litigate any election cases in 2020, nor did I have any meaningful role as a judge in cases pursued in the aftermath of that election. But four years earlier, in 2016, I served as a lead litigator for the Trump campaign, working under the direction of legal chair Don McGahn. That year, candidate Trump prevailed in virtually all of the significant election litigation matters that arose in the days leading up to the election, and in the weeks that followed. And just like in 2020, some of the election cases filed in 2016 also lacked merit, in that instance, primarily cases filed by Trump's opponents. In truth, this happens every election season. And it is understandable, given the stakes. In view of these realties, save for extreme instances, we should not shame ambitious candidates and their lawyers for pursuing election litigation, as we witnessed in 2020. So perhaps it is time to step back and reflect on the proper light by which we view election litigation. Let me do so in the context of the 2016 election, where I participated in many of the memorable cases from that season.

The cases that perhaps drew the most attention pre-election were filed roughly a week before election day. In a batch of filings, the Democratic Party sued the Trump campaign and a host of state Republican parties to prevent defendants from "engaging in voter intimidation activity" from the time of filing until the end of election

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7. *See, e.g.*, Alan Feuer & Zach Montague, *Over 30 Trump Campaign Lawsuits Have Failed. Some Rulings Are Scathing*, N.Y. TIMES (Dec. 10, 2020), https://www.nytimes.com/2020/11/25/us/elections/trump-campaign-lawsuits.html [https://perma.cc/3HD8-MQ8N].

8. *See, e.g.*, Brent Kendall & Alexa Corse, *Trump 2020 Election Lawsuits Lead to Requests to Discipline Lawyers*, WALL ST. J. (May 9, 2021, 10:00 AM), https://www.wsj.com/articles/trump-2020-election-lawsuits-lead-to-requests-to-discipline-lawyers-11620568801.

day.[9] In effect, the Democratic Party wanted an injunction barring the Republican Party from participating in electioneering activity at the polls, despite decades of precedent to the contrary. Why? Because, according to their complaints, the Democratic Party was worried about Trump supporters coming to the polls to do things as outrageous as wearing red hats while loudly supporting their candidate and monitoring for election irregularities.[10] If you think these cases might sound like their origins were more in politics than law, let me help further those suspicions. One, although plaintiff's primary cause of action was asserted under 42 U.S.C. § 1985, a long-standing and well-understood statute addressing conspiracies to violate one's civil rights, the Democratic Party referred to the law ubiquitously by its much more dated moniker, the Ku Klux Klan

9. *E.g.*, Ohio Democratic Party v. Ohio Republican Party, No. 16-2645, 2016 WL 6542486, at *2 (N.D. Ohio Nov. 4, 2016).

10. *See, e.g.*, Voter Intimidation Complaint Pursuant to the Voting Rights Act of 1965 and the Ku Klux Klan Act of 1871 ¶ 9, *Ohio Democratic Party*, No. 16-2645, ECF No. 1.

Act.[11] Two, these cases were filed only in the following states: Arizona,[12] Michigan,[13] Nevada,[14] North Carolina,[15] Ohio,[16] and Pennsylvania.[17] It is likely not lost on you that these were the expected swing states in 2016.[18]

Most of the cases were rejected outright, or after a brief round of litigation. For example, the case in Pennsylvania was dismissed after the district court chastised the plaintiff for unnecessarily delaying its lawsuit and creating a "judicial fire drill" without "reasonable explanation."[19] The case in North Carolina was similarly dismissed after the district court found "only a handful of hearsay reports that purported supporters of the defendants' presidential nominee may have threatened or intimidated voters."[20]

Only one case gained any traction. In Ohio, a district court enjoined the Ohio Republican Party and the Trump campaign from

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11. *See, e.g.*, *id.* ¶ 75.

12. *See* Voter Intimidation Complaint Pursuant to the Voting Rights Act of 1965 and the Ku Klux Klan Act of 1871, Ariz. Democratic Party v. Ariz. Republican Party, No. 16-3752 (D. Ariz. Nov. 4, 2016), 2016 WL 6439952, ECF No. 1.

13. *See* Voter Intimidation Complaint Pursuant to the Voting Rights Act of 1965 and the Ku Klux Klan Act of 1871 for Declaratory and Injunctive Relief, Mich. Democratic Party v. Mich. Republican Party, No. 16-13924 (E.D. Mich. Nov. 4, 2016), ECF No. 1.

14. *See* Voter Intimidation Complaint Pursuant to the Voting Rights Act of 1965 and the Ku Klux Klan Act of 1871, Nev. State Democratic Party v. Nev. Republican Party, No. 15-2514 (D. Nev. Oct. 30, 2016), ECF No. 1.

15. *See* Voter Intimidation Complaint Pursuant to the Voting Rights Act of 1965 and the Ku Klux Klan Act of 1871, N.C. Democratic Party v. N.C. Republican Party, No. 16-1288 (M.D.N.C. Nov. 7, 2016), ECF No. 1.

16. *See* Voter Intimidation Complaint, *supra* note 10.

17. *See* Voter Intimidation Complaint Pursuant to the Voting Rights Act of 1965 and the Ku Klux Klan Act of 1871, Pa. Democratic Party v. Republican Party of Pa., No. 16-5664 (E.D. Pa. Nov. 7, 2016), 2016 WL 6439950, ECF No. 1.

18. Darren Samuelsohn & Josh Gerstein, *Dems Losing Voting Challenges but Winning on Optics*, POLITICO (Nov. 7, 2016, 5:01 AM), https://www.politico.com/story/2016/11/voter-intimidation-democrats-clinton-230857 [https://perma.cc/X3DH-V9G2].

19. Pa. Democratic Party v. Republican Party of Pa., No. 16-5664, 2016 WL 6582659, at *4 (E.D. Pa. Nov. 7, 2016).

20. N.C. Democratic Party v. N.C. Republican Party, No. 16-1288, slip op. at 2 (M.D.N.C. Nov. 7, 2016) (order).

any election day activity.[21] The court justified its decision, issued four days before election day, on then-candidate Trump's "comments encouraging rally attendees to monitor 'certain areas,' as well as promises from Mr. Trump's supporters to aggressively patrol polling places."[22] In a footnote, the court clarified that those "promises" derived from one *Boston Globe* article which quoted a 61-year-old Ohioan as stating that he would make select voters "a little bit nervous" at the polls, but would do nothing illegal.[23] For good measure, the court also enjoined "Clinton for Presidency" in the same respects,[24] despite the facts that (1) the Clinton campaign was not a party to the case; (2) the plaintiff, again the Democratic Party, did not request such relief;[25] and (3) the campaign's actual name was "Hillary for America," not "Clinton for Presidency."[26]

Facing a wholesale ban on election day activity, the Trump campaign had little choice but to seek immediate relief. So we did, filing an emergency submission with perhaps America's most esteemed judicial institution, the Sixth Circuit Court of Appeals.[27] In our motion, we highlighted the perceived flaws in the district court's analysis, culminating the point this way: "Finally, Plaintiff imputes unlawful connotations to the prospect that many voters and observers may wear red-colored clothing to the polling place. But Plaintiff

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21. Ohio Democratic Party v. Ohio Republican Party, No. 16-2645, 2016 WL 6542486, at *2 (N.D. Ohio Nov. 4, 2016).

22. *Id.* at *1.

23. *Id.* at *1 n.6; *see also* Matt Viser & Tracy Jan, *Warnings of Conspiracy Stoke Anger Among Trump Faithful*, BOS. GLOBE (Oct. 15, 2016, 7:07 AM), https://www.bostonglobe.com/news/politics/2016/10/15/donald-trump-warnings-conspiracy-rig-election-are-stoking-anger-among-his-followers/LcCY6e0QOcfH8VdeK9UdsM/story.html [https://perma.cc/5HTF-BVKT].

24. *Ohio Democratic Party*, 2016 WL 6542486, at *2.

25. *See* Voter Intimidation Complaint, *supra* note 10, at 27–29 (seeking relief against only the Ohio Republican Party, the Trump campaign, Roger Stone, and Stop the Steal, Inc.).

26. *See, e.g.*, FEC, *Hillary for America Statement of Organization* at 1 (Apr. 13, 2015), https://docquery.fec.gov/pdf/528/15031411528/15031411528.pdf [https://perma.cc/9Y53-VB7R].

27. *See* Emergency Motion for Stay on Behalf of Defendant-Appellant Donald J. Trump for President, Inc., Ohio Democratic Party v. Donald J. Trump for President, Inc., No. 16-2645 (6th Cir. Nov. 6, 2016), ECF No. 6.

conveniently omits the fact that supporters of its nominee for President are planning to wear coordinated clothing on election day" themselves, and here we cited a *Wall Street Journal* article titled "Hillary Clinton Supports Plan to Sport Pantsuits at the Polls."[28] "Neither pantsuits nor red Buckeye jerseys," we explained, "put voting rights at risk."[29]

The Sixth Circuit unanimously agreed that the district court abused its discretion in issuing the injunction, and accordingly granted an emergency stay of the temporary restraining order.[30]

The following day, now the day before election day, the Supreme Court denied review of plaintiff's request to lift the Sixth Circuit's emergency stay.[31] No Justice issued an opinion accompanying the cert denial, other than Justice Ginsburg.[32] She wrote a two-sentence concurring opinion, which simply reminded readers that "Ohio Law proscribes voter intimidation."[33] Some speculated at the time that she did so not to highlight Ohio's run-of-the mill prohibition on voter coercion, but rather to make plain that she would not be recusing herself from matters involving Donald Trump, whom she criticized in the press earlier in the year.[34]

The eventual dismissal of these thin complaints was perhaps predictable. But the election results were not. In what amounted to a surprise to most election followers, Donald Trump defeated Hillary

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28. *Id.* at 20 (citing Natalie Andrews, *Hillary Clinton Supporters Plan to Sport Pantsuits at the Polls*, WALL ST. J. (Nov. 4, 2016), https://www.wsj.com/articles/hillary-clinton-supporters-plan-to-sport-pansuits-at-the-polls-1478208739).

29. *Id.*

30. Ohio Democratic Party v. Donald J. Trump for President, Inc., 2016 WL 6608962 (6th Cir. Nov. 6, 2016).

31. Ohio Democratic Party v. Donald J. Trump for President, 580 U.S. 978, 978 (2016).

32. *Id.* (Ginsburg, J., statement respecting the denial of the application to vacate stay).

33. *Id.* (citing OHIO REV. CODE ANN. § 3501.90(A)(1) (2006)).

34. Lyle Denniston, *Supreme Court Refuses Plea on Ohio Voting*, NAT'L CONST. CTR. (Nov. 7, 2016), https://constitutioncenter.org/blog/supreme-court-refuses-plea-on-ohio-voting [https://perma.cc/2VWG-E4GK]; *see also* Adam Liptak, *Ruth Bader Ginsburg, No Fan of Donald Trump, Critiques Latest Term*, N.Y. TIMES (July 10, 2016), https://www.nytimes.com/2016/07/11/us/politics/ruth-bader-ginsburg-no-fan-of-donald-trump-critiques-latest-term.html?smid=url-share [https://perma.cc/XUM5-QYAX].

Clinton.[35] What ensued was more unsuccessful election litigation inspired by Trump's opponents.

First up were recounts efforts in Michigan, Pennsylvania, and Wisconsin. In Wisconsin, Green Party candidate and fourth-place finisher Jill Stein requested a recount of that state's election results three weeks after election day, and just hours before the deadline for doing so.[36] The Clinton campaign soon joined the call for a recount.[37] Litigation seeking to block the recount proved unsuccessful. So too, however, did the recount itself, from the Clinton/Stein perspective. Trump netted over 100 additional votes, and was again declared the winner of the Badger State's 10 electoral votes.[38]

Michigan proved to be a far more interesting case, from a legal perspective. There, Stein received approximately one percent of the 4.8 million votes cast in the state's presidential election, again registering a fourth-place finish.[39] Nonetheless, she petitioned for a recount, alleging, as Michigan law required her to do, that she was "aggrieved on account of fraud or mistake."[40] You might be asking yourself, how could a fourth-place finisher, one over 2.2 million votes short of the winner's total, be "aggrieved" by the election results, let alone by "fraud or mistake"? We were asking ourselves the same question. Yet over our objections, state administrators ordered a recount to commence a few days later.[41] Selection of that

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35. *See, e.g.*, Matt Flegenheimer & Michael Barbaro, *Donald Trump Is Elected President in Stunning Repudiation of the Establishment*, N.Y. TIMES (Nov. 9, 2016), https://www.nytimes.com/2016/11/09/us/politics/hillary-clinton-donald-trump-president.html?smid=url-share [https://perma.cc/V8DT-JHQD].

36. *Green Party's Stein files recount request in Wisconsin*, ASSOCIATED PRESS (Nov. 25, 2016), https://www.mprnews.org/story/2016/11/25/jill-stein-wisconsin-michigan-pennsylvania-recount [https://perma.cc/W4PU-ADN7].

37. Eugene Scott, *Clinton to join recount that Trump calls 'scam'*, CNN (Nov. 28, 2016), https://www.cnn.com/2016/11/26/politics/clinton-campaign-recount/index.html [https://perma.cc/3NB3-A6WC].

38. Jason Stein, *Recount confirms Trump's victory in Wisconsin*, MILWAUKEE JOURNAL-SENTINEL (Dec. 12, 2016), https://www.jsonline.com/story/news/politics/elections/2016/12/12/recount-drawing-close-wisconsin/95328294/ [https://perma.cc/H3KC-3ARW].

39. Att'y Gen. v. Bd. of State Canvassers, 896 N.W.2d 485, 487 (Mich. Ct. App. 2016).

40. MICH. COMP. LAWS § 168.862 (2005).

41. *Board of State Canvassers*, 896 N.W.2d at 487.

date was consistent with Michigan law, which allowed a short interim period for elections officials to organize recount efforts before the recount was to begin.[42] At the same time, a proceeding challenging the administrative recount order was pending before the Michigan Court of Appeals. By all accounts, the State was timely and carefully handling Stein's request for a recount under state law: Executive officers had granted her request, and judicial officers were deciding whether that decision complied with state law.

But before the state process had a chance to unfold, Stein filed suit in federal court, seeking an injunction requiring Michigan to begin its recount immediately.[43] And, to our surprise, the district court agreed to the request, ordering the recount to commence at once. According to the district court, Michigan's two-day-recount waiting period likely violated some aspect of the First and Fourteenth Amendments.[44]

In the course of that decision, the district court seemed to proceed on the assumption that the presidential election was not conducted in a fair manner. "Without elections that are conducted fairly," the district court wrote, "public confidence in our political institutions will swiftly erode."[45] Evidence of irregularities in the election, however, was all but absent. Yet with that, state election procedures were washed away by a largely undefined due process wave.

Happily, regular order would soon be restored. The Michigan Court of Appeals held that Stein, as a fourth-place finisher who never claimed she would be made the winner of the election following a recount, had not been "aggrieved" under state law, and thus had no right to seek a recount.[46] The state court accordingly issued a writ of mandamus ordering state officials to reject Stein's recount petition.[47] And when the Michigan Supreme Court left the

42. Stein v. Thomas, 222 F.Supp.3d 539, 542 (E.D. Mich. 2016).
43. *Id.* at 539.
44. *Id.* at 542.
45. *Id.* at 544.
46. *Board of State Canvassers*, 896 N.W.2d at 491.
47. *Id.*

appellate court's decision in place, the recount was halted.[48] So too, then, was the federal court litigation. Following these state court rulings, the district court dissolved its injunction.

As an aside, it is not clear that a full recount could have been completed in the Wolverine State. As reported in the media, voting machines in several precincts in Detroit tabulated more votes than voters in the precinct.[49] As a legal matter, state law barred a recount in places where the number of votes and voters did not match.[50] And even were a recount to occur, what could explain the bloated voting totals at certain polls in the Motor City? One answer floated at the time attributed the voting irregularities to malfunctions in the City's ballot scanners.[51] When voters inserted their ballots in the scanners, the theory went, the machines sometimes jammed, causing them to count more votes than voters.[52] Given the location of those troubled precincts, the overvotes likely benefitted Clinton. So had Clinton narrowly won the state, a recount undoubtedly would have ensued, possibly making Florida's 2000 recount look like a well-oiled machine by comparison.

That leaves Pennsylvania. And there, things were perhaps even more unusual. According to papers filed by Stein, cyber security experts had concluded that there was possible fraud in the election.[53] Russian operatives, Stein suggested, may have hacked the voting machines in Michigan and Pennsylvania by infecting them

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48. Att'y Gen. v. Bd. of State Canvassers, 887 N.W.2d 782 (Mich. 2016).

49. *See* John Wisely & JC Reindl, *Detroit's Election Woes: 782 More Votes Than Voters*, DETROIT FREE PRESS (Dec. 18, 2016, 10:28 PM), https://www.freep.com/story/news/local/michigan/detroit/2016/12/18/detroit-ballots-vote-recount-election-stein/95570866/.

50. *See* Mich. Comp. Laws Ann. § 168.871(1)(b); Sam Thielman, *US Elections: Broken Machines Could Throw Michigan Recount into Chaos*, THE GUARDIAN (Dec. 6, 2016, 2:38 PM), https://www.theguardian.com/us-news/2016/dec/05/us-election-recount-michigan-donald-trump-hillary-clinton [https://perma.cc/255W-QAZR].

51. *Detroit Voting Machine Failures Were Widespread on Election Day*, TIME (Dec. 13, 2016), https://time.com/4599886/detroit-voting-machine-failures-were-widespread-on-election-day/ [https://perma.cc/F5AE-UCEU].

52. *Id.*

53. *See* Pls.' Mem. of Law in Support of Mot. for a Prelim. Inj. at 4–10, Stein v. Cortés, 223 F. Supp. 3d 423 (E.D. Pa. 2016) (No.16-6287).

with malware.[54] In ensuing state court recount litigation, Stein unsuccessfully sought a forensic examination of the state's voting machines.[55] Pennsylvania law, the court explained, does not allow for such an examination, nor would the court "impose requirements the Legislature has not seen fit to establish," especially when there was "absolutely no evidence of any voting irregularities."[56]

Having failed in her state-level recount efforts, Stein again turned to federal court, alleging that the Commonwealth violated her First and Fourteenth Amendment rights.[57] She asked the court to order Pennsylvania to conduct a recount on the grounds that the Commonwealth's voting machines might have been hacked. The district court denied her request, both on standing grounds and because Stein's "suspicion of a 'hacked' Pennsylvania election borders on the irrational."[58] And with that, the election recount litigation came to an end.

Objectors to 2016's election results, however, had one last salvo. In the lead up to the December 19 vote of the members of the Electoral College, Democrat electors in a handful of states won by Clinton led a movement to attempt to convince electors in states won by Trump to band together and reject the will of the voters.[59] Their plan, it was reported, was either to have Trump electors vote for Clinton, not Trump, or for a compromise candidate along the lines of Colin Powell or John Kasich.[60] The electors believed it was their duty to oppose Trump's ascension to the presidency because, in

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54. *Id.*; *see* Pls.' Mem. of Law In Support of Mot. for TRO & Prelim. Inj. at 7–8, Stein v. Thomas, 222 F. Supp. 3d 539 (E.D. Mich. 2016) (No. 16-14233).

55. Daniel Strauss, *Court denies Jill Stein request to examine voting machines*, POLITICO (Dec. 7, 2016), https://www.politico.com/story/2016/12/jill-stein-voting-machine-examination-denied-232328 [https://perma.cc/4C9R-PYS4].

56. Stein v. Phila. Cty. Bd. of Elections, No. 161103335, at *4 (Pa. C.P. Ct. Phila. Cty. Dec. 7, 2016).

57. Stein v. Cortés, 223 F.Supp.3d 423, 429 (E.D. Pa. 2016).

58. *Id.* at 442.

59. Lilly O'Donnell, *Meet the 'Hamilton Electors' Hoping for an Electoral College Revolt*, THE ATLANTIC (Nov. 21, 2016), https://www.theatlantic.com/politics/archive/2016/11/meet-the-hamilton-electors-hoping-for-an-electoral-college-revolt/508433/ [https://perma.cc/7P5T-T5QJ].

60. *Id.*

their words, "he is a demagogue,"[61] "would be a danger as President,"[62] and is "under foreign influence,"[63] justifying the electors' decision to "break the [g]lass and activate our function as the last line of defense."[64]

Setting aside the two centuries of history that weighed against efforts by electors to override the will of the voters,[65] the Electoral College members faced another problem: most states barred them from voting for someone other than the election's winner,[66] such as by imposing penalties on the electors or allowing for their removal to ensure against so called rogue or "faithless electors."[67] Through cases filed in federal court, electors in three states challenged the respective state laws binding their votes.[68] Those suits, in which we intervened on behalf of the Trump campaign, all proved to be unsuccessful in district court.[69] Each judge recognized the difficulty in upsetting a 200-year-old tradition via litigation filed just days before the meeting of the Electoral College.[70] That tradition likewise cast doubt on the electors' claims that the First Amendment entitled them to act as "free agents," to the point of setting aside the vote of

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61. /u/HamiltonElectors, REDDIT, /r/IamA (Dec. 16, 2016, 2:41 PM), https://www.reddit.com/r/IAmA/comments/5ip3cj/we_are_republican_elector_chris_suprun_and/dba1m1e/.

62. *Id.*

63. Christopher Suprun, *Why I Will Not Cast My Electoral College Vote for Donald Trump*, N.Y. TIMES (Dec. 5, 2016), https://www.nytimes.com/2016/12/05/opinion/why-i-will-not-cast-my-electoral-vote-for-donald-trump.html [https://perma.cc/XKC4-GZN4].

64. /u/HamiltonElectors, REDDIT, /r/IamA (Dec. 16, 2016, 12:45 PM), https://www.reddit.com/r/IAmA/comments/5ip3cj/we_are_republican_elector_chris_suprun_and/db9vwy0/.

65. *See* Chiafalo v. Washington, 140 S. Ct. 2316, 2326–27 (2020).

66. *Id.* at 2328.

67. *See, e.g.*, VA. CODE ANN. § 163-212.

68. *See* Koller v. Brown, 224 F. Supp. 3d 871, 873 (N.D. Cal. 2016); Baca v. Hickenlooper, No. 16-2986, 2016 WL 7384286, at *1 (D. Colo. Dec. 21, 2016) (order); Chiafalo v. Inslee, 224 F. Supp. 3d 1140, 1142 (W.D. Wash. 2016).

69. *See Koller*, 224 F. Supp. 3d at 874, 881; *Baca*, 2016 WL 7384286, at *1, *6; *Chiafalo*, 224 F. Supp. 3d at 1142, 1149.

70. *See Koller*, 224 F. Supp. 3d at 878; *Baca*, 2016 WL 7384286, at *6; *Chiafalo*, 224 F. Supp. 3d at 1144–45.

the people based upon the elector's singular preferences.[71] By another name, these efforts might have been deemed an attempted non-violent insurrection. But as the cases uniformly failed, the Electoral College vote proceeded as it had historically.

As you likely know, there is more to this story. In the years that followed, a split evolved over the viability of state restrictions governing electors in future elections.[72] The Supreme Court resolved the matter in advance of the 2020 election in *Chiafalo v. Washington*.[73] Writing for a near-unanimous Court, Justice Kagan concluded that the Constitution grants States broad power over electors, including to enforce pledge laws as well as sanctions for violating those laws.[74]

Why did I run through this lengthy recounting of litigation from the 2016 election? In part, to remind you that each election comes with its own set of legal issues, some foreseeable, some not. And to remind you that in every election season, we see litigation of all types, from meritorious to merely colorable (but not meritorious) to outright frivolous. The public outcry over election litigation in 2020 was enormous. In 2016, not so much. To my knowledge, none of the lawyers in the cases I've mentioned were attacked by the press, decried in public corners, or sanctioned by the courts. Going forward, my hope is that, as was the case before 2020, lawyers are afforded some grace as they weave through the labyrinth of state and federal rules governing elections. The difficulties inherent in these cases bear repeating. Start with the legal framework, which varies from state to state. Then consider fact development. Cases often are pursued with the benefit of only a modest record, given time constraints and uncertainties inherent in the election process. And then consider the unpredictable nature of election cases. Lawyers must react to developments that can be difficult to forecast,

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71. *See Koller*, 224 F. Supp. 3d at 879 n.7; *Baca*, 2016 WL 7384286, at *4; *Chiafalo*, 224 F. Supp. 3d at 1145–46.

72. *Compare* In re Guerra, 441 P.3d 807, 817 (Wash. 2019), *with* Baca v. Colo. Dep't of State, 935 F.3d 887, 955–56 (10th Cir. 2019).

73. 140 S. Ct. 2316 (2020).

74. *Id.* at 2328.

and they develop legal theories in real time to respond to new or changing circumstances. And they often do so under immense pressure, given the stakes. So it should not be much to ask that we show decency and respect to the players on the field, even where, in the end, a case has little to recommend it. That includes calls for shaming, sanctioning, and even prosecuting lawyers. In a small number of cases, those serious measures may be appropriate. But from my experience, that is unlikely to be true in the vast majority of election law disputes.

Let me close with some reflections on election law from a judicial perspective. For those of us on the federal bench, the Supreme Court eased our burden in the redistricting context through its 2019 decision in *Rucho v. Common Cause*,[75] returning many of those matters to state court. Yet plenty of cases remain, on topics ranging from election mechanics to ballot access to campaign finance to state processes for voter initiatives and referendums. Despite my history with election law, these are not my favorite cases to draw. I do not mind the challenge of a conceptually difficult case, which describes a number of the election law cases we see. Rather, my hesitation is more over whether judges are viewed as impartial actors in these sensitive cases.

I fear we have reached an age where judges, when deciding cases with political ramifications, are viewed more as partisan actors than neutral arbiters. There are many reasons why this perception has developed, and I will not belabor them now. But I do think the criticism is often unfair. Indeed, litigation in the aftermath of the 2020 election should help counter the point. As mentioned, a flurry of cases ensued after election day. Those cases came in a variety of shapes and sizes, but nearly all were filed by associates or supporters of President Trump.[76] And nearly all failed.[77] Judges of all stripes, including Republican appointees, heard and rejected those claims. According to the Washington Post, over three dozen judges

75. 588 U.S. 684 (2019).

76. *See, e.g.*, Feuer & Montague, *supra* note 7.

77. *Id.*

appointed by Republican Presidents ruled against the Trump campaign at different points, and in different cases.[78]

I continue to believe that, as judges, we do our best to be guided by law, not politics. I have two examples from my own tenure to help prove the point. If I've done nothing else today, I've likely established my bona fides in a prior life as a Republican lawyer. But in high profile election cases in my court, I've ruled against the Republican lawyers before me. The reason was simple: the law called for a different result.

Take, for example, a case involving a voter-approved constitutional amendment governing the redistricting process in Michigan. In 2018, Michigan voters opted to jettison the state's traditional means of redistricting, which for many years had been overseen by the Republican-controlled state legislature, in favor of an Independent Citizens Redistricting Commission.[79] The voter-backed amendment conferred the Commission with "exclusive authority to adopt district boundaries" for the state and federal legislatures.[80]

Of note, the Commission's membership consists of thirteen individuals more or less selected at random from the pool of applicants, with most state residents eligible to apply.[81] To me, this manner of choosing the members of a redistricting commission was reminiscent of an observation in Justice Scalia's concurring opinion in *Cruzan* that a divisive issue of the day was just as well decided by "nine

78. Ann E. Marimow & Matt Kiefer, *Judges Nominated by President Trump Play Key Role in Upholding Voting Limits Ahead of Election Day*, WASH. POST (Oct. 31, 2020) https://www.washingtonpost.com/politics/2020/10/31/trump-judges-voting-rights/ [https://perma.cc/S66Z-8HJJ].

79. Paul Egan, *Michigan's Anti-Gerrymandering Proposal Is Approved. Now What?*, DETROIT FREE PRESS (Nov. 7, 2018, 6:36 AM), https://www.freep.com/story/news/politics/elections/2018/11/07/proposal-2-anti-gerrymandering-michigan/1847402002/.

80. MICH. BD. OF STATE CANVASSERS, *Proposal 18-2* (Aug. 30, 2018), https://crcmich.org/wp-content/uploads/Official_Ballot_Wording_Prop_18-2_632052_7.pdf [https://perma.cc/3UBT-NV7B].

81. MICH. CONST. art. IV, §§ 6(1)–(2).

people picked at random from the Kansas City telephone directory" than it was "the nine Justices" of the Supreme Court.[82] But whatever one thought about the wisdom of drawing district lines in this fashion, I disagreed with the Michigan Republican Party's assertion in a case before me, *Daunt v. Benson*,[83] that the Commission's structure and conflict-of-interest rules ran afoul of the First Amendment. The majority opinion in the case opted to deploy a balancing test loosely modeled after the *Anderson-Burdick* line of Supreme Court decisions,[84] one I have criticized in two separate opinions.[85] That test, especially as modified by our Circuit, confers unelected federal judges with too much discretion in resolving election-related matters.

Looking instead to history and tradition, and in deference to Michigan's strong interest in self-governance, I voted to uphold the Commission's framework, albeit on grounds different from those invoked by the majority opinion.[86]

The second case worth mentioning is *Weiser v. Benson*.[87] The dispute there centered on a pandemic-era recall effort targeting Michigan Governor Gretchen Whitmer.[88] State campaign finance law allowed recall campaigns as well as their targets, in this case, Governor Whitmer, to accept contributions in uncapped amounts, unlike contributions to election campaigns, which are capped at approximately $7,000.[89] Any unused recall funds could be transferred by the candidate to her party.[90] And that is exactly what happened.

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82. Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 293 (1990) (Scalia, J., concurring).

83. 956 F.3d 396 (6th Cir. 2020) (*Daunt I*); 999 F.3d 299 (6th Cir. 2021) (*Daunt II*).

84. *Daunt I*, 956 F.3d at 406–09; *Daunt II*, 999 F.3d at 310–16; *see also* Anderson v. Celebrezze, 460 U.S. 780 (1983); Burdick v. Takushi, 504 U.S. 428 (1992).

85. *See Daunt I*, 956 F.3d at 422–26 (Readler, J., concurring in the judgment); *Daunt II*, 999 F.3d at 323–31 (Readler, J., concurring in the judgment).

86. *Daunt I*, 956 F.3d at 426–31 (Readler, J., concurring in the judgment); *Daunt II*, 999 F.3d at 331–33 (Readler, J., concurring in the judgment).

87. 48 F.4th 617 (6th Cir. 2022).

88. *Id.* at 620.

89. *Id.* at 619; *see also* Mich. Comp. Laws § 169.252(1)(a).

90. *Weiser*, 48 F.4th at 620.

While the recall effort fizzled out due to problems with the petitioning process, Governor Whitmer collected over $4 million in recall-related donations, which she then transferred to the state Democratic party.[91] The Michigan Republican Party challenged this seeming loophole in Michigan campaign finance law as violative of the Party's First and Fourteenth Amendment rights.[92] I agreed with my two colleagues that, due to the way the Republican Party framed its injury in the case, it lacked standing to challenge the governing regulations, even though, as I noted in a separate writing, the recall exception "magnif[ies] the advantages of incumbency to the point where [it] put[s] challengers to a significant disadvantage."[93]

I hope these examples give you some assurance that I, like other judges, treat all sides equally. If you need more evidence of that in my own case, consider that I teach law at both Ohio State University and the University of Michigan. But as to case law examples, you've heard more than your fair share for one keynote address.

Let me leave you with this. Most judges I know are doing their best to follow the law, even in complex and politically charged cases. In 2020, a host of Republican appointed judges proved just that. Unfortunately, media narratives and social media threads all too often suggest otherwise, with little grounding, in my opinion. But I remain optimistic that better days are ahead. As we gear up for another season of election litigation, it is my hope that more grace will be afforded to attorneys litigating those disputes, just as it hopefully will be to the jurists tasked with resolving them.

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91. *Id.* at 621.

92. Complaint ¶ 1, Weiser v. Benson, No. 21-816 (W.D. Mich. Jan. 4, 2022), ECF No. 1.

93. *Weiser*, 48 F.4th at 629 (Readler, J., concurring in part and concurring in the judgment) (quoting Randall v. Sorrell, 548 U.S. 230, 248 (2006) (plurality opinion)).