CHAPTER 12:

SPECIAL CONSIDERATIONS

I. INTRODUCTION

Because election lawsuits are pressured by impending elections or the need to determine a winner so that the office can be filled, courts hearing election cases are frequently faced with considerations not present in other types of civil litigation. The following are among the unique differences in election litigation that may require special judicial consideration:

- Immunity for Election Officials
- Voting Rights Act preclearance
- Pre-argument remedies
- Precedence considerations
- Redistricting / reapportionment plans

II. IMMUNITY

Electoral boards or election officials who are defendants may have immunity from damage awards for alleged constitutional violations. For example, state boards of elections, acting in their official capacity have Eleventh Amendment sovereign immunity.[1] Absolute immunity may protect members of local boards of elections operating under a statutory grant of authority and exercising quasi-judicial powers in trial-like settings, such as when they consider and rule on nominating petitions.[2] Absolute immunity's applicability depends on the nature of the official's responsibilities, not his rank or job title.[3] The availability of absolute immunity insulates board members' decision making from harassment and intimidation and ensures board members are not influenced by a fear of litigation or personal financial liability.[4] An

[1] Tobin for Governor v. Ill. State Bd. of Elections, 268 F.3d 517, 521 (7th Cir. 2001).
[2] *Id.* at 521 (granting absolute immunity to individual members of the state elections board who denied the gubernatorial candidacy nominating petition of a Libertarian Party member because of an insufficient number of qualifying signatures).
[3] *Id.*
[4] *Id.* at 522.

official who asserts a right to absolute immunity must prove the challenged conduct qualifies for protection.[5]

III. VOTING RIGHTS ACT PRECLEARANCE ISSUES

In states subject to the preclearance requirements of the *Voting Rights Act* (VRA),[6] courts should be aware that the remedies they provide might themselves need to be precleared before they can be implemented.[7]

IV. PRE-ARGUMENT REMEDIES

Although pre-election challenges are strongly favored over post-election contests, the shortened time frame in which they can be brought may deprive a court of the ability to offer a meaningful remedy to a prevailing plaintiff. In these circumstances, the plaintiff is successful in name only.

In an acknowledgment of this potential, when the challenger appears to have a likelihood of prevailing, the court may opt to issue a pre-argument injunction that preserves a meaningful remedy should a challenger ultimately prevail. For example, as the Supreme Court prepared to hear *Williams v. Rhodes,*[8] the Chief Justice took the unusual step of issuing a pre-argument injunction that required the challenger's name to be added to a set of ballots to ensure a meaningful remedy was available should the challenger prevail.[9]

V. PRECEDENCE-RELATED CONSIDERATIONS

In *Bush v. Gore,*[10] one of the highest-profile modern elections case, the Supreme Court expressly limited its holding by denying it precedential value.[11]

Other courts have also limited their holdings in election cases.[12] In addition, extraordinary writs issued during an election case generally carry no precedential value.[13]

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[5] *Id*.
[6] 42 U.S.C. § 1973(c).
[7] *In re* McMillin, 642 So.2d 1336, 1339 (Miss. 1994) (en banc) (issuing a writ of prohibition against a lower court that had enjoined judicial primary elections, and noting that the chancery court's injunctions themselves were a change requiring VRA pre-clearance before they could be issued).
[8] Williams v. Rhodes, 393 U.S. 23 (1968).
[9] Ely v. Klahr, 403 U.S. 108, 121 n.5 (1971) (Douglas, J., concurring) (noting that this just-in-case remedy, combined with an expedited oral argument schedule, were the only reasons the appellant's later victory was not hollow as without this action no time remained after the decision and before the election for any corrective action to occur).
[10] Bush v. Gore, 531 U.S. 98 (2000).
[11] *Id.* at 108.
[12] *See* Nolan v. Cook County Officers Electoral Bd., 768 N.E.2d 216, 221 (Ill.App. 2002); Maschari v. Tone, 816 N.E.2d 579 (Ohio 2004) (per curiam); Callaway v. Samson, 193 F. Supp. 2d 783 (D.N.J. 2002).

Some courts, on the other hand, expressly seek to establish precedent and issue written opinions intended to provide guidance in future elections and their affiliated challenges.[14] When courts establish precedent in a pre-election lawsuit, the written opinion might nevertheless be issued only after the election because the shortened time frame before the election makes it difficult to construct an effective opinion.

VI. REDISTRICTING PLANS

Although the larger issues of redistricting are beyond the scope of this manual, state courts may hear election challenges relating to delayed or obsolete state or local redistricting schemes. If a redistricting plan is unconstitutional and the state legislature cannot create a constitutional plan before the election, courts are often asked to decide among the following courses of action:

- proceed with the election under the invalid districting scheme,
- postpone the election until the redistricting is complete, or
- impose a court-created redistricting plan and then proceed with the election.

The Supreme Court has upheld a federal district court's decision to allow an election to proceed under an existing apportionment plan that became unconstitutional by the operation of time.[15] A significant factor in the outcome was the Court's assumption that a constitutional plan would be in place before the next election.[16]

When evaluating a constitutional challenge to an apportionment plan, a court must consider the following factors:

- whether the legislative body has sufficient time to draw a new plan before the next election,
- whether an election will be delayed while the new plan is being designed or implemented,
- whether an interim at-large election is feasible,
- how many legislative seats are involved in the upcoming election, and
- the reason the plan is unconstitutional.[17]

After considering those criteria, the court evaluates its options under a "lesser evils" approach.[18] The court may also reserve the right to substitute its own reapportionment plan if the legislative body fails to make progress on a constitutional plan by a court-imposed deadline.[19]

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[13] Baker v. Carr, 369 U.S. 186, 236-37 (1962).

[14] *See* McKinney v. Super. Court, 21 Cal. Rptr. 3d 773, 776 n.5 (Ct. App. 2004) (noting the uncertainty surrounding the litigation justified the court's explanation for its decision rather than issuing a summary denial).

[15] Ely v. Klahr, 403 U.S. 108, 112 (1971) (finding no error in court's decision to allow election to proceed under an existing court-ordered plan that population shifts had rendered obsolete when legislature's proposed plan was unconstitutional and the only other option was to postpone the election until a new court-ordered plan could be devised).

[16] *Id.* at 113.

[17] *Id.* at 112.

[18] *Id.* at 113.

[19] *Id.*