

**UNITED STATES DISTRICT COURT
DISTRICT OF VERMONT**

**Tracey Martel,
Robert Frenier,
Brian Smith,
Raoul Beaulieu, and
Mary Beausoleil,**

Plaintiffs,

v.

**James C. Condos,
in his official capacity as the
Secretary of State
of the State of Vermont,**

Defendant.

Civ. No. 5:20-cv-00131-GWC

EXPERT DECLARATION OF SCOTT E. GESSLER

1. I have been asked by Plaintiffs in this matter to provide an opinion on whether Vermont's plan to send a mail ballot to every active registered voter will create an unacceptably large risk of fraud and mistake, which could result in disenfranchisement or vote dilution.

2. In developing this opinion, I have relied upon a review of Vermont's election procedures guide, the July 2020 Directive from the Vermont Secretary of State, conversations with Vermont town clerks, and my experiences as Colorado's Secretary of State, an election attorney, and election law professor.

3. The Plaintiffs have retained me to review documents and provide an opinion. My rate for this matter is \$400 per hour.

Education and Experience

4. My education is as follows: I received a B.A. from Yale University, a J.D. from the University of Michigan Law School, and an M.B.A. from the J.L. Kellogg School of Management at Northwestern University. I also received a certificate for the

Senior Executives in State and Local Government at the Kennedy School of Government at Harvard University.

5. I served as the Colorado Secretary of State from January 2011 until January 2015. In Colorado, the Secretary of State serves as the state's chief election officer. In that capacity my responsibilities included: supervising the conduct of primary, general, congressional vacancy, and statewide ballot issue elections in Colorado; enforcement of the Colorado election code; interpretation of the election code and promulgation of statewide regulations; statewide coordination and compliance with all federal election laws, including the Voting Rights Act ("VRA"), the National Voter Registration Act ("NVRA"), the Help America Vote Act ("HAVA"), and the Uniformed and Overseas Citizens Absentee Voting Act ("UOCAVA"); training, review, and oversight of local countywide election officials and local election practices and procedures; maintenance and modifications to the statewide voter database and state voter registration systems, maintenance of the statewide voter rolls, testing and certification of voting equipment, implementation and enforcement of campaign finance laws, and development of election policies; development of statewide election legal strategy and responses to legal actions; and management of office personnel, policies, and procedures.

6. Most relevant to this matter, as Colorado's chief election officer I oversaw Colorado's transition from in-person voting to a statewide vote-by-mail system. Prior to 2013, Colorado had an in-person voting system. In 2013 Colorado enacted a universal vote-by-mail system, and starting in late 2013 Colorado election officials sent ballots by mail to active voters, all of whom had the opportunity to vote by mail. As Colorado's chief election officer, I implemented the new legislation and oversaw Colorado's transition to an all-mail ballot state.

7. In addition, as Secretary of State I implemented various new programs and initiatives involving the administration of Colorado's elections. These included:

a. Participation in the Election Registration Information Center ("ERIC") program, launched by the Pew Charitable Trusts. As Secretary of State, I evaluated the ERIC program and ensured Colorado was one of the very first states to join. During my time Colorado served as one of the first states to use voter registration and driver's license matching to improve voter registration efforts, as well as improve the accuracy of voter rolls.

b. The expansion and rebuilding of online voter registration in Colorado, which enabled voters not only to register online, but to also maintain their registration records online and remove their names from Colorado's voter rolls. To my knowledge, this system has been the most popular and heavily used system nationwide, from 2012 until the present. For this, Colorado was awarded the 2013 "State Technology Innovator Award" from the National Association of State Chief Information Officers.

c. The review of all election procedures and the implementation of process mapping to improve and refine statewide and local procedures for election administration. This includes voter list maintenance and voter registration procedures and policies.

d. A complete rewriting and streamlining of Colorado's election regulations.

e. Development of a program to remove non-citizens from the voter registration rolls. During my time as Secretary of State, Colorado became the first state to match driver's license and voter roll information to identify potential non-citizens on the voter rolls, and Colorado and Florida were the first two states to obtain access to the Systematic Verification for Entitlements ("SAVE") program for purposes of maintaining voter rolls.

f. In response to new legislation, the development of an online, statewide electronic poll book and real-time access to the statewide voter database, to allow election-day voter registration and voting throughout the state. Colorado developed this complete system overhaul in nine months and at the time was the only state to have such a system.

g. Development of new online training programs for the public and for local election officials. For this program, Colorado won the 2014 "Ideas Award" from the National Association of Secretaries of State.

h. Development and implementation of the "Accountability in Colorado Elections" ("ACE") program, which provides online, interactive maps for election information, including voter registration statistics, registration by districts, voter turnout, election cost statistics, and county election activity and legal compliance information. For this project, Colorado was a finalist for the 2016 "Ideas Award" from the National Association of Secretaries of State.

i. The launch and improvement of a statewide electronic delivery system for ballots to military and overseas civilian voters, which resulted in a substantial increase in military and overseas civilian voter turnout.

8. I have worked as an attorney, primarily in the area of election law, from 2001 until 2011, and again from 2015 until the present. In this capacity I have represented candidates, parties, ballot issue committees, and independent groups in nearly all aspects of election-related activities. Further, I have litigated voting procedures and voter registration issues.

9. In addition, I have taught Election Law for over five years as an adjunct professor at the University of Denver Law School, and I have previously taught Election Law at the University of Colorado Law School.

10. I have attended multiple conferences involving voter registration and list maintenance activities, include conferences conducted by the National Association of Secretaries of State, the Pew Foundation, and the Heritage Foundation, among others.

11. In 2017 I was qualified as an expert and testified in *American Civil Right Union v. Snipes*, Case No. 16-cv-61474 (S.D. Fla., 2018). My testimony addressed the issue of whether the Broward County Supervisor of Election took reasonable steps to maintain the accuracy of the county voter rolls.

12. In 2018, I submitted an expert report in *Jacobson v. Detzner*, Case No. 4:18-cv-00262-MW-CAS (N.D. Fla., 2018). That matter was resolved without requiring live testimony.

Documents and Materials Relied Upon

13. I reviewed and used the following materials and documents in preparing this Report:

- a. Vermont 2018 Election Procedures,¹
- b. Vermont Secretary of State First Statewide Directive,²
- c. The *Complaint*, all exhibits, and all affidavits in this matter.
- d. U.S. Election Assistance Commission Election Administration and Voting Survey (EAVS) 2018 election data,³
- e. U.S. Election Assistance Commission (EAC) 2018 Election Administration and Voting Survey (EAVS).⁴

¹ 2018 Election Procedures, Vermont Secretary of State (March 2018), available at <https://sos.vermont.gov/media/34bputnn/2018-election-procedures.pdf> (accessed September 10, 2020).

² First Statewide Elections Directive, Vermont Secretary of State (July 20, 2020), available at <https://sos.vermont.gov/media/hxgjjdkb/secretary-of-state-s-first-2020-statewide-election-procedures-directive.pdf> (accessed September 10, 2020).

³ Election Administration and Voting Survey (EAVS) 2018 Datasets Version 1.3 (released July 15, 2020), available at: <https://www.eac.gov/research-and-data/datasets-codebooks-and-surveys> (accessed September 11, 2020).

⁴ U.S. Election Assistance Commission (EAC) 2018 Election Administration and Voting Survey (EAVS), https://www.eac.gov/sites/default/files/eac_assets/1/6/2018_EAC_Election_Administrati_on_and_Voting_Survey_Instrument.pdf (accessed September 11, 2020).

Summary of Opinion

14. As a former Secretary of State from 2011 to 2015, I know and like Secretary Jim Condos personally, and I have a great deal of professional respect for him. Nonetheless, it is my opinion that Vermont is not ready for an all-mail ballot system. The state's plan to send a mail ballot to every single active voter creates an unacceptable risk of vote dilution and disenfranchisement.

Opinion

15. An all-mail ballot system, like any voting system, requires certain things. First, it must contain anti-fraud safeguards. These are particularly important for mail ballots, because local election officials cannot oversee every aspect of voting and in fact usually do not even see the voter in person. Second, the system must be able to respond to voter error. Again, this is important because election officials cannot provide instructions or immediately correct errors like they can at a polling place. And third, the system relies almost exclusively on the U.S. Postal Service for delivery and return of ballots, and election officials must therefore frequently verify and ensure the accuracy of mailing addresses.

16. Vermont's legal framework and administrative procedures contain serious deficiencies in all three areas.

a. Vermont does not verify voter signatures on returned ballots.

17. Under Vermont law, absentee voters receive an envelope with a ballot, an outer envelope to return the ballot, and an inner envelope (certificate envelope) that has printed on it a voter certification. A voter must complete the certification affidavit, sign it, and insert his or her ballot into the certificate envelope before placing the certificate envelope (with the ballot) into the mailing envelope.⁵

18. Ballots do not contain personally identifying marks, and a ballot will be considered defective (and not counted) if a voter places an identifying mark on his or her ballot.⁶

19. Town clerks or other local election officials who receive the returned absentee ballot remove the certificate envelope from the mailing envelope and check to make sure that the voter properly completed and signed the affidavit.⁷

⁵ Election Procedures, p. 16.

⁶ Election Procedures, Appendix K.

⁷ Election Procedures, pp. 17-18.

20. Election officials do not verify that the signature is, in fact, the voter's signature. They do not compare the affidavit signature to a sample signature on file.

21. Verifying the authenticity of a signature on an absentee ballot is far and away the number one protection to ensure the integrity of a mail ballot election. It prevents voter fraud and serves as a powerful deterrent. I am surprised that Vermont would consider a statewide mail ballot system without signature verification.

22. The dangers of unverified ballot signatures substantially increase when ballots are sent out to voters who have not requested them. In Vermont, a voter may request an absentee ballot, and this request is valid for one year only.⁸ Requiring a voter to request an absentee ballot on a yearly basis contains certain safeguards. First, the voter is expecting a ballot, and can contact the local election official if there is a problem. Second, the voter must submit a current mailing address. For these reasons, it is less likely that ballots will be delivered to addresses without voters and less likely that intercepted ballots will go unnoticed. Although this does not compensate for the lack of signature verification, requiring that voter request and absentee ballot poses fewer dangers than sending mail-in ballots to voters who do not request them.

23. Sending ballots to voters who do not request them poses several dangers. First, voter rolls often contain addresses of people who have moved, or they contain inaccurate mailing addresses. As discussed below, Vermont is no exception.

24. Because Vermont does not conduct signature verification, nothing prevents a person from illegally voting a ballot that has been delivered to an incorrect address or delivered to an address where the voter no longer lives.

25. To be sure, a person who fraudulently votes a ballot can face criminal charges. But that does not happen until after a fraudulent vote has been cast. For this reason, signature verification is important to prevent a fraudulent vote.

26. Unfortunately, it is often impossible to prosecute people who have illegally filled out the voter affidavit, because the affidavit is unlikely to contain any clues as to the perpetrator.

27. Signature verification also has a deterrent effect, because people will be less tempted to forge a signature if they know that local election officials verify every single signature.

28. Finally, signature verification gives voters and citizens a sense of confidence that an all-mail ballot system is safe and secure, and that the system contains adequate protections against fraud and mistake.

⁸ Election Procedures, Appendix A.

29. On a practical level, an all-mail system requires advance planning, particularly to ensure that all signatures are verified. For example, election officials must obtain signature samples, which are available from a variety of reliable sources. This includes the driver's license database, the signature a voter uses to request an absentee ballot, a signature from a prior absentee ballot, or a voter affirmation return card.

30. Colorado provides an example of a robust signature verification system. That state became an all-mail ballot state in 2013, but prior to that date it had heavy usage of absentee ballots. Local election officials have always verified the signature of every single mail-in ballot. Election officials usually have multiple sample signatures to compare against a returned ballot signature. In most counties, the election judges who review signatures receive training from handwriting experts. And in larger counties, signatures first go through an automated review process, which usually accepts about 70% of all signatures. The remaining 30% of submitted ballots are reviewed by election judges.

b. Vermont does not allow voters the opportunity to cure ballots that contain a mistake on the affidavit.

31. Under Vermont law, a ballot is deficient if;

- a. The affidavit on the certificate envelope is not completed,
- b. The certificate is not signed,
- c. The voted ballot is not in the certificate envelope, or
- d. The voter identifies themselves on the ballot.⁹

If a town clerk receives a deficient ballot, that ballot is set aside and not counted.

32. As in every human endeavor, people make mistakes. And this includes voters. Voters may not complete the certificate, or fail to sign it, or erroneously send the ballot without first putting the certificate in the voter sleeve. Voters who do not request an absentee ballot, and who therefore are less focused on the details of voting, are even more likely to make these mistakes.

33. In Vermont, once an election official receives a mail-in ballot, the voter can no longer touch or modify the ballot. This also applies to the voter certificate or the placement of the ballot in the envelope.¹⁰ As a result, if a voter makes an error, then he or she can never cure that error, and as a result that voter's vote will not count.

34. The lack of opportunity to cure stems from Vermont's laws, not its election procedures. As with lack of signature verification, these requirements

⁹ Election Procedures, p. 16 and Appendix J.

¹⁰ Election Procedures, p. 16

demonstrate that the legal framework adopted by Vermont does not contemplate – and is ill-suited for – an all-mail ballot election.

35. In 2018, Vermont received 25,936 absentee ballots. Of these, 722 were rejected (a rejection rate of 2.7%), for the following reasons:

- a. Ballots not received on time: 426
- b. Certificates not signed: 51
- c. Ballots not placed in envelope: 245.¹¹

36. The rejection rate of 2.7% represents voters who affirmatively sought out absentee ballots and therefore were more aware of absentee ballots than an average voter. One can expect the likelihood of mistakes to be higher among voters who do not request, but nonetheless receive, absentee ballots. Accordingly, one can expect the rejection rate to increase.

37. Of particular concern should be the fact that over 300 voters (approximately one percent) had their votes cancelled due to simple errors that could have easily been corrected, if the voter had been given the chance.

38. Before implementing a statewide absentee ballot system, Vermont should first change its laws to accept votes even if a voter does not place his or her ballot inside the certificate envelope. To be sure, voter anonymity is important. But it should not be used to cancel out a vote entirely.

39. Further, Vermont law should be changed to give voters a chance to cure an unsigned certificate. In Colorado, a voter can provide a curative affidavit in person, or by mail (or hand deliver) if it is accompanied with a copy of a photo identification (such as a driver's license).

40. Without these procedures, Vermont will likely disenfranchise at least one percent of its absentee voters, due solely to minor voter errors, or errors that can easily be corrected.

c. The Vermont voter checklist has not been maintained to ensure accurate mailing addresses.

41. In order to properly conduct an all-mail ballot election, it is absolutely necessary to have accurate mailing addresses for all voters who will receive a ballot. In Vermont, the Secretary of State will send ballots to all active voters.¹² Active voters are

¹¹ EAVS dataset; EAVS, pp. 22-25.

¹² Directive, p. 4.

all registered voters, less voters who have been challenged by their respective Boards of Civil Authority (and not satisfactorily responded to the challenge).¹³

42. Because it runs an in-person voting system, in the past Vermont has not had a need to ensure that every voter record contained an accurate mailing address.

43. Vermont faces unique challenges, because many voters do not – or cannot – receive mail at their physical addresses. Merely having a physical address, therefore, does not ensure mail delivery.

44. To its credit, in June of this year the Secretary of State began the process of cleaning up its voter checklist by sending a mail piece to every voter. Mail that could not be delivered to a voter was instead returned to the local town clerk.¹⁴

45. This initial attempt contained errors that limited its effectiveness. Most importantly, the Secretary of State only sent ballots to a voter’s physical address, and often that address differed from the voter’s mailing address. This caused two problems. First, a large number of ballots were returned undeliverable, even if the voter had a correct mailing address. Second, a large number of mailing addresses on the voter rolls were not verified, because the mail went to physical, not mailing addresses.

46. The fact that this initial effort contained mistakes is unsurprising. Transitioning from an in-person voting system to a mail ballot system is difficult, and the Vermont Secretary of State’s office does not have experience with an all-mail ballot system. Transitioning to an all-mail ballot system requires multiple mailings to get accurate mailing addresses, and it requires a careful understanding of the underlying mailing-address data. And it takes time to clean up the data.

47. Even under the best of circumstances, one mailing to voters is not enough. Election officials occasionally make errors, as does the U.S. Postal Service. Local election officials should constantly be updating and checking the mailing addresses of voters.

48. Unfortunately, town clerks have little experience in maintaining mailing addresses, in large part because Vermont has traditionally conducted in-person voting. Local election officials do not necessarily maintain accurate mailing addresses, because absolute accuracy is not necessary.

49. One of the most important tools for maintaining up-to-date mailing addresses is the National Change of Address database, commonly referred to as NCOA. Maintained by the U.S. Postal Service, this database contains all mailing address changes, and an “NCOA check” is a very common and frequently used tool for updating postal

¹³ *Id.*

¹⁴ *See Directive, p. 5.*

addresses. Many Vermont Clerks do not know what this is. To me, that indicates that few towns have an ongoing program to ensure mailing address accuracy.

50. Inaccurate mailing addresses exacerbate the problems with a universal mail ballot system. Ballots will be delivered to residents who have since moved, but perhaps still receive mail at their old addresses. Common examples are students or young adults who have moved, yet their relatives continue to receive mail at their old addresses.

51. Because many Vermont voters have only physical addresses that do not receive mail delivery, some ballots will not be delivered.

52. Unfortunately, without a baseline of mailings or NCOA checks, it is exceedingly difficult to project an error rate or to fully understand the scope of the problem. This presents another problem with Vermont's sudden implementation of an all-mail ballot system.

53. Ballots that cannot be delivered are supposed to be returned to the town clerks, in the expectation that the town clerks will attempt to find a correct mailing address or otherwise contact the voter to pick up his or her ballot. (Vermont law only allows hand delivery of ballots if a voter is ill or disabled).¹⁵

54. Town clerks already have their hands full, since they must still have polling places for in-person voting. Accordingly, requiring officials to process returned ballots places an added burden and stress on town clerks during the busiest time of the year, increasing the likelihood of mistakes and overlooked tasks.

55. Vermont has experienced a large increase in the number of absentee ballot requests. This will ameliorate some of the problems described above, such as inaccurate mailing addresses. But it does not eliminate the problems, especially the lack of signature verification and the lack of cure procedures.

Conclusion

56. Vermont is not ready for an all-mail ballot system. It does not have signature verification to ensure election integrity, nor does it have cure procedures that would prevent inadvertent disenfranchisement resulting from voter mistakes. And Vermont does not have accurate mailing addresses for many voters. Because of these problems, the state should not implement an all-mail voting system for the 2020 general election.



Scott E. Gessler

¹⁵ Election Procedures, p. 15.