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Why *Gunaji v. Macias* Matters to Candidates and Voters: Its Impact on New Mexico Election Law

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WHY *GUNAJI V. MACIAS* MATTERS TO CANDIDATES AND VOTERS: ITS IMPACT ON NEW MEXICO ELECTION LAW OCEAN MUNDS-DRY*

I. INTRODUCTION

In *Gunaji v. Macias*,¹ the New Mexico Supreme Court interpreted Article Two, Section Eight, of the New Mexico Constitution for the first time in an election contest.² The court held that while the election was not “free and open,” the proper remedy was not to hold a new election, as the Contestants requested, but to reject the votes in the precinct where the improper votes were cast. In order to reach this decision, the court first addressed three preliminary issues: mootness, standing, and source of remedy. The court held that although the case was moot, it was an issue of substantial public interest and capable of repetition. The court also found that the candidates had standing to assert the constitutional claim on behalf of voters. And finally, because the court did not find a provision in the Election Code³ that addressed the circumstances in this case, it held that it could fashion a remedy outside of the statute.⁴

This note will examine the court’s findings on mootness and standing, the court’s interpretation and holding of the “free and open” elections clause of the New Mexico Constitution, the court’s analysis of the power to fashion a remedy beyond a statute and chosen remedy, the court’s rationale, and the implications of this decision on future New Mexico election contest cases.

II. STATEMENT OF THE CASE

In the 1996 elections, the race for State Senate District No. 38 was between Fernando R. Macias, Democrat, and Narendra N. Gunaji, Republican.⁵ The candidates for Doña Ana County Commission District No. 5 were Gilbert T. Apodaca, Democrat, and Maria S. Sutton, Republican.

On Election Day, November 5, 1996, machine 4719 in Precinct 31 had two errors on the ballot face. The early voters who used machine 4719 chose from Mary Jane Garcia or Thomas Bulger for State Senate and Rita Torres (unopposed) for Doña Ana County Clerk.⁶

Sixty-six voters cast their votes using the incorrect ballot face on machine 4719 before the error was discovered. The sixty-sixth voter, after casting his vote, pointed out the problem to precinct officials.⁷ Election officials then placed the correct ballot

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1. 2001-NMSC-028, 31 P.3d 1008.

2. *Id.* ¶ 27, 31 P.3d at 1015.

3. N.M. STAT. ANN. § 1-14-1 (Michie 2002). A statute addressing the specific facts of the case has been enacted since *Gunaji*, but at the time of the case, that statute was not yet law. *See infra* part III.B.

4. *Gunaji*, 2001-NMSC-028, 31 P.3d 1008.

5. Unless otherwise indicated, all factual statements are from *Gunaji*.

6. The Appellant’s Docketing Statement lists the candidate as James Parks, but the court’s opinion lists the name of Thomas Bulger. Appellant’s Docketing Statement at 3, *Gunaji* (No. 25,896). The incorrect ballot face was from a previous election. *Id.*

7. The sixty-sixth voter was a relative of candidate Gunaji. *Id.*

face on the machine. However, election officials kept the machine in use and the flawed ballots were mixed with the valid ballots that were cast with the correct ballot face.

If one of the sixty-six voters who used the incorrect ballot voted for Mary Jane Garcia for state senate, the vote was credited to Macias. If one voted for Thomas Bulger, the vote was credited to Gunaji. The votes were likely credited this way due to the similar positions on the ballot face in the previous election based on political party. The final total in Precinct 31 for the senate race was 205 to 159 in favor of Gunaji. The final results in District 38 were 5297 votes for Macias and 5286 votes for Gunaji. This meant the state senate race was decided by only eleven votes.

Votes for Rita Torres were credited to Gilbert Apodaca. In the county commissioner race in Precinct 31, Apodaca had the most votes: 185 to 160. In total, Apodaca had 4507 votes to Sutton's 4409 votes in District 5, a difference of 98 votes. Thus, the court stated that the sixty-six votes could have made a difference in either election.⁸

Contestants Gunaji and Sutton brought this action on three counts.⁹ Count I was an election contest, Count II was a request for declaratory judgment as to whether the elections were valid, and Count III was a civil rights violation against the Doña Ana County Clerk. The county clerk had the action removed to federal court, where the court dismissed Count III and remanded Counts I and II back to state district court.¹⁰

The state district court found that while the precinct board did not comply with the Election Code, there was no fraud or intentional wrongdoing and no way to determine who the sixty-six voters would have voted for.¹¹ Because the Contestants could not obtain the relief they sought and discarding the votes from Precinct 31 would not change the election, the trial court granted the Contestees' Motion for Summary Judgment on Count I.¹² The trial court granted Contestees' Motion to Dismiss on Count II, holding that the "Contestants are not entitled to the equitable relief sought in the context of an election contest as a matter of law."¹³

The Contestants appealed to the New Mexico Court of Appeals. The New Mexico Court of Appeals found that jurisdiction was proper in the New Mexico Supreme Court and transferred the appeal on its own motion.¹⁴

8. *Gunaji*, 2001-NMSC-028, ¶ 4, 31 P.3d at 1010.

9. The Contestees were Fernando Macias, Gilbert Apodaca, and Rita Torres.

10. *Gunaji*, 2001-NMSC-028, ¶ 7, 31 P.3d at 1011. *See* 28 U.S.C. § 1441 (1991) ("[A]ny civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.").

11. The names of the sixty-six voters had been entered into evidence, but since their ballots had been commingled, there was no way to show how their votes had been cast. *Id.* ¶ 3, 31 P.3d at 1010. In addition, the trial court held that N.M. R. EVID. 11-507 provides that to overcome the privilege against a voter disclosing how they voted, the contestant has to show that the voter cast the vote illegally. Minute Order on Defendant's Motion for Summary Judgment or, in the Alternative, Motion to Dismiss at 7, *Gunaji* (No. 25,896).

12. *Gunaji*, 2001-NMSC-028, ¶ 7, 31 P.3d at 1011.

13. *Id.* (internal quote omitted).

14. Order of Transfer, *Gunaji v. Macias* (No. 19,775). *See* N.M. STAT. ANN. § 1-14-5 (Michie 2002) ("Contest of election; appeal. An appeal shall lie from any judgment or decree entered in the contest proceeding to the supreme court of New Mexico within the time and in the manner provided by law for civil appeals from the district court.").

III. BACKGROUND

A. Election Code

Article Seven, Section One, of the New Mexico Constitution provides that “the legislature shall enact such laws as will secure the secrecy of the ballot, purity of elections and guard against the abuse of the elective franchise.”¹⁵ The New Mexico Legislature adopted the essence of the current Election Code in 1969.¹⁶ The purpose of the Election Code is to “secure the secrecy of the ballot, [ensure] the purity of elections,” and prevent abuse of the election system in an efficient manner.¹⁷ Nearly all elections are covered by the Code, including primary and general elections.¹⁸ The county clerk is designated to care for, and keep custody of, all voting systems, which includes preparing and supplying the ballots used in elections.¹⁹ The precinct board member who is attending the voting machine is responsible for inspecting the face of the machine after each vote to ensure that the ballot is in its proper place.²⁰

The statute allows an unsuccessful candidate to contest an election.²¹ The contestant may file a complaint in the district court of the county where either party resides.²² The complaint must be filed within thirty days from the issuance of certification of the election.²³ The district court will render judgment in favor of the party for whom a majority of legal votes has been found to be cast.²⁴ The losing party may appeal the judgment of the district court to the New Mexico Supreme Court within the time and manner provided by law for civil appeals from the district court.²⁵

In an election contest, the contestant must make a *prima facie* showing that the precinct board did not comply with the Election Code.²⁶ Once a *prima facie* showing has been made, the “candidates of the political party having majority representation on the precinct board”²⁷ have the burden of proving there was no “fraud, intimidation, coercion or undue influence”²⁸ by the precinct board and showing the secrecy

15. N.M. CONST. art. 7, § 1.

16. N.M. STAT. ANN. § 1-1-1 (Michie 2002).

17. *Id.* § 1-1-1.1.

18. *Id.* § 1-1-19.

19. *Id.* §§ 1-9-12, 1-10-2.

20. *Id.* § 1-12-24. In *Gunaji*, the court noted that there was a gap in the statutory scheme because the Election Code did not specifically address the issue in the case. 2001-NMSC-028, ¶ 15, 31 P.3d at 1012. While section 1-12-24 requires the precinct board member to make sure the ballot is placed correctly, nothing in the Code spoke directly to the duty of the precinct board or procedure to follow if an incorrect ballot is discovered. *Id.* The New Mexico Legislature, in the 2002 session, passed a statutory provision that outlines a procedure and remedy for the use of incorrect ballots. See *infra* part III.B.

21. N.M. STAT. ANN. § 1-14-1.

22. *Id.* § 1-14-3.

23. *Id.*

24. *Id.* § 1-14-4.

25. *Id.* § 1-14-5.

26. *Id.* § 1-14-13. Note that later revisions to the Code, in response to *Gunaji*, do not change these particular provisions. Cf. *infra* part III.B.

27. N.M. STAT. ANN. § 1-14-1.

28. *Id.*

and purity of the election was preserved.²⁹ If this burden is not met, the district court should reject the votes of the entire precinct.³⁰ Thus, at the time this case was decided, the only form of relief available through the Code was to determine a winner based on the legal votes cast in the contested election. If it were not possible to determine all the legal votes, the court would reject all of the votes from the contested precinct.

B. Legislative Response to *Gunaji v. Macias*

After this decision, the New Mexico State Legislature addressed the gap identified by the New Mexico Supreme Court. The legislature adopted a new provision of the Code that provides a procedure to follow when an incorrect ballot is used in an election.³¹ The statutory provision defines an incorrect ballot as a ballot that fails to list the correct candidate for office.³² The statute provides that if eligible voters have already voted using the incorrect ballot, the precinct board shall immediately lock and seal the voting machine, preserve a record of who voted on the machine, and notify the county clerk and the secretary of state by one hour after the polls close.³³ If a candidate contests the election and the incorrect votes are great enough to affect the outcome of the election, the court may order new ballots sent to those voters who voted on the incorrect ballot.³⁴

While the legislature addressed the specific facts of *Gunaji*, the opinion remains relevant as an indication of how the court may treat future disputes that are not covered by statute. As Justice Maes stated, "Courts must often fill in gaps in statutory schemes in order to achieve just results."³⁵ Further, whereas elected officials may address foreseeable circumstances prospectively through legislation, the courts are more often faced with unforeseen situations that must be reactively addressed. Therefore, courts must often employ the common law to fill in the statutory gaps. The court's decision in *Gunaji* demonstrates a willingness to respond to legislative gaps and, moreover, may have opened the door to bringing a new constitutional cause of action.

C. New Mexico Election Contests

New Mexico courts have taken great strides to ensure that the will of the majority of the electorate will determine the winner of an elective office.³⁶ New Mexico case law requires that all possible effort should be made to avoid disenfranchising unchallenged voters.³⁷ This includes giving any reasonable construction to a statute

29. *Id.* § 1-14-13. In *Gunaji*, the Contestant was a member of the same political party as the party having majority representation on the precinct board. *Gunaji*, 2001-NMSC-028, ¶ 2, 31 P.3d at 1010. Thus, the party would have been in the untenable position of rebutting their own candidate's prima facie case.

30. N.M. STAT. ANN. § 1-14-13 (Michie 2002).

31. *Id.* § 1-12-37.

32. *Id.* § 1-12-37.1(A).

33. *Id.* § 1-12-37.1(B)-(C).

34. *Id.* § 1-12-37.1(E).

35. *Gunaji*, 2001-NMSC-028, ¶ 21, 31 P.3d at 1014.

36. See *Kiehne v. Atwood*, 93 N.M. 657, 664, 604 P.2d 123, 130 (N.M. 1979); *Klumker v. Allred*, 112 N.M. 42, 47, 811 P.2d 75, 82 (N.M. 1991).

37. *Martinez v. Harris*, 102 N.M. 2, 690 P.2d 445 (N.M. 1984).

so that a lawful vote may stand.³⁸ In *Orchard v. Board of Commissioners of Sierra County*,³⁹ the court held that “[e]ven if the acts of [election] officers are fraudulent the votes of the electors should not be invalidated if it is possible to prevent it.”⁴⁰ In *Valdez v. Herrera*,⁴¹ the court noted that “[w]e will examine most carefully, and rather unsympathetically, any challenge to the right...of voters to participate in an election before denying that right, absent bad faith, [or] fraud....”⁴² The *Valdez* court went on to say, “the voter shall not be deprived of his rights as an elector either by fraud or the mistake of elections officers if it is possible to prevent it.”⁴³ A court may even consider circumstantial evidence to determine how a voter voted.⁴⁴

The district court in this case was heavily influenced by *Darr v. Village of Tularosa*,⁴⁵ a New Mexico Court of Appeals decision issued while the *Gunaji* trial was in progress. In *Darr*, the appellate court reversed the district court’s order of a new election and upheld the official results of the village council election.⁴⁶ Pursuant to the Municipal Election Code,⁴⁷ the district court rejected the votes due to voting irregularities caused in part by the municipal clerk’s breach of statutory duty, which amounted to a failure to safeguard the purity of the ballot.⁴⁸ The appellate court held that precinct votes may only be rejected if the contestant proves that, due to statutory violations, it is impossible to determine a lawful winner.⁴⁹ The appellate court interpreted the Municipal Election Code to read that a court must first attempt to determine a legal winner before considering rejecting the votes.⁵⁰ This initial burden first falls on the contestant to prove that there is no possible way to determine lawful votes.⁵¹ In dicta, the appellate court stated that the district court may not necessarily have the authority to order a new election, but the court declined to decide that issue, basing its decision on other grounds.⁵²

38. *Reese v. Dempsey*, 48 N.M. 485, 490, 153 P.2d 127, 132 (N.M. 1944).

39. 42 N.M. 172, 76 P.2d 41 (N.M. 1938).

40. *Id.* at 188, 76 P.2d at 51 (quoting 9 R.C.L. *Elections* § 102).

41. 48 N.M. 45, 145 P.2d 864 (N.M. 1944).

42. *Id.* at 49, 145 P.2d at 868.

43. *Id.* at 51, 145 P.2d at 870.

44. See *Montoya v. Ortiz*, 24 N.M. 616, 619, 175 P. 335, 338 (N.M. 1918).

45. 1998-NMCA-104, 962 P.2d 640.

46. *Id.* ¶ 21, 962 P.2d at 646.

47. N.M. STAT. ANN. § 3-8-67 (Michie 2002).

48. *Darr*, 1998-NMCA-104, ¶ 6, 962 P.2d at 642. Section 3-8-67 of the Municipal Election Code is substantially identical to section 1-14-13 of the State Election Code except that the provision includes the municipal clerk in addition to the precinct board in its language. N.M. STAT. ANN. §§ 1-14-13, 3-8-67.

49. *Darr*, 1998-NMCA-104, ¶ 8, 962 P.2d at 643.

50. *Id.*

51. *Id.* ¶ 20, 962 P.2d at 646. Examples cited by the court included voters who could not be served with subpoenas or refused to testify how they voted and a contestant’s inability to find circumstantial evidence to show how the voters in question voted. *Id.*

52. *Id.* ¶ 11, 962 P.2d at 643.

D. Mootness

Gunaji was moot by the time it was decided by the New Mexico Supreme Court because the terms of office had expired.⁵³ As a general rule, the courts do not have jurisdiction or the authority to issue judgment when no actual controversy exists.⁵⁴ However, there are exceptions to this rule when the issues are of "substantial public interest" and capable of repetition.⁵⁵

Beginning with the first election contest in New Mexico in 1859, New Mexico's highest court has liberally granted certiorari in moot election contests. The Supreme Court of the Territory of New Mexico decided to review *Arellano v. Chacon*,⁵⁶ despite the fact that the term of office had already expired, in order to provide instruction and guidance in case the issue should rise again in the future. In *Mowrer v. Rusk*,⁵⁷ the court accepted the case even though legislation had been passed by the state legislature that resolved the issue at controversy in the case, thus making it moot. The court held that because the issue involved an inherent issue of separation of powers, it presented "a recurring problem of great public interest."⁵⁸

However, in *State v. Vogel*,⁵⁹ the court dismissed without prejudice because, due to the expiration of office, there was no relief available to be granted. The court was not persuaded by the contestant's argument that, although he could not be granted the relief of returning to office, his reputation would be prejudiced if the decision were to stand.⁶⁰

E. Standing

The issue of standing is derived from the New Mexico Constitution⁶¹ and the Declaratory Judgment Act.⁶² While the New Mexico Supreme Court is not restrained by Article III of the U.S. Constitution, the court has frequently followed federal law analysis of standing.⁶³ To assert third-party standing, the rule is generally that a third

53. *Gunaji*, 2001-NMSC-028, ¶ 9, 31 P.3d at 1011. See N.M. CONST. art. IV, § 4; art. X, § 2. The state senate seat and the county commission seat were four-year terms of office.

54. *Mowrer v. Rusk*, 95 N.M. 48, 51, 618 P.2d 886, 889 (N.M. 1980) (citing the Declaratory Judgment Act, N.M. STAT. ANN. § 44-6-2 (1978), which requires an "actual controversy"). As previously noted, Contestant's Count II sought a declaratory judgment.

55. *Id.*

56. 1859 WL 3122 (N.M. Terr. 1859).

57. 95 N.M. 48, 50, 618 P.2d 886, 888 (N.M. 1980).

58. *Id.* at 52, 618 P.2d at 890. See also *Klumker v. Allred*, 112 N.M. 42, 811 P.2d 75 (N.M. 1991) (holding that the election contest was not moot even though the terms of office had expired because it involved a "recurring question of public importance"); *State v. Lujan*, 85 N.M. 378, 512 P.2d 951 (N.M. 1973) ("[W]e decide the question involved for two reasons: (1) it seems to possess sufficient public importance to warrant a decision and (2) it is likely to recur.").

59. 39 N.M. 122, 123, 41 P.2d 1107, 1108 (N.M. 1935).

60. The contestant in *Vogel* was claiming a private interest that did not fit within the "great public interest" exception.

61. N.M. CONST. art. VI, § 1 ("[T]he judicial power of the state shall be vested in... a supreme court, a court of appeals, district courts...."); N.M. CONST. art. VI, § 13 ("The district court shall have original jurisdiction in all matters and causes not excepted in the constitution.").

62. N.M. STAT. ANN. § 44-6-2 (Michie 2002) ("In cases of actual controversy, district courts within their respective jurisdictions shall have power to declare rights, status and other legal relations...."). Cf. U.S. CONST. art. III, § 2 (limiting judicial power to "cases" and "controversies").

63. *N.M. Right to Choose/NARAL v. Johnson*, 1999-NMSC-005, ¶¶ 12-13, 975 P.2d 841, 847 (looking to *Sierra Club v. Morton*, 405 U.S. 727 (1972); *United States v. Students Challenging Regulatory Agency Procedures*,

party must show a direct injury, the extent of which may be slight.⁶⁴ In addition, New Mexico courts look to prudential considerations to further determine if parties may assert the rights of others, such as whether the party has a close relation to the third party and whether it would be difficult for the third party to assert its rights on its own.⁶⁵ When an organization seeks to assert the rights of its members, the interests the group is seeking to protect must be germane to the organization's purposes.⁶⁶ State legislators have been denied standing to sue because the court found that they showed only an "abstract right owed to the people of the state as a whole,"⁶⁷ which was not sufficient to claim a direct injury.

Further, the court did not grant standing under the "great public importance doctrine"⁶⁸ because the case did not involve "[i]ssues of such constitutional moment."⁶⁹ A protection and advocacy group was also denied third-party standing to keep a man on life support because there was a governing statute that did not authorize the group to bring a suit.⁷⁰

The New Mexico Court of Appeals granted third-party standing to news organizations that sought disclosure of depositions that were under protective order.⁷¹ The court found that the plaintiffs had shown a direct injury, a causal relationship between the injury and the challenged conduct, and a likelihood that the injury would be redressed by a favorable decision.⁷² Other prudential considerations also favored granting standing: the case did not meddle in the affairs of the political branches, the news media interest in challenging the order suggested a public interest in the contents of the order, the media sought to vindicate the public welfare, and the media would challenge the protective order with the necessary "adversarial vigor" to sharpen the presentation of issues.⁷³

The New Mexico Supreme Court has granted third-party standing to plaintiffs including individual doctors and non-profit organizations that provide abortion services, counseling, and advocacy.⁷⁴ The court found that a New Mexico Department of Health rule prohibiting state funding for medically necessary abortions violated the Equal Rights Amendment of the New Mexico Constitution.⁷⁵

412 U.S. 669 (1973)); *John Does I through III v. Roman Catholic Church of the Archdiocese of Santa Fe, Inc.*, 1996-NMCA-094, ¶ 17, 924 P.2d 273, 278 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992)); *De Vargas Sav. & Loan Ass'n of Santa Fe v. Campbell*, 87 N.M. 469, 471, 535 P.2d 1320, 1322 (N.M. 1975) (citing *Data Processing Serv. v. Camp*, 397 U.S. 150 (1970)).

64. *N.M. Right to Choose/NARAL*, 1999-NMSC-005, ¶ 12, 975 P.2d at 847.

65. *Id.* ¶ 13, 975 P.2d at 847 (citing *John Does I through III*, 1996-NMCA-094, ¶ 25, 924 P.2d at 279).

66. *Forest Guardians v. Powell*, 2001-NMCA-028, ¶ 21, 24 P.3d 803, 811 (citing *Hunt v. Wash. Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977)) (noting that an organization can bring suit on behalf of members when (1) the members could sue in their own right, (2) the interests it seeks to protect are germane to purpose, and (3) the claim or relief requires the participation of the members).

67. *State ex rel. Coll v. Johnson*, 1999-NMSC-036, ¶ 17, 990 P.2d 1277, 1282.

68. *Id.* ¶ 22, 990 P.2d at 1284.

69. *Id.*

70. *Prot. & Advocacy Sys., Inc. v. Presbyterian Healthcare Servs.*, 1999-NMCA-122, ¶ 26, 989 P.2d 890, 896.

71. *John Does I through III v. Roman Catholic Church of the Archdiocese of Santa Fe, Inc.*, 1996-NMCA-094, ¶ 38, 924 P.2d 273, 282.

72. *Id.* ¶ 28, 924 P.2d at 280.

73. *Id.* ¶¶ 35-37, 924 P.2d at 281.

74. *N.M. Right to Choose/NARAL v. Johnson*, 1999-NMSC-005, ¶ 2, 975 P.2d 841, 845.

75. *Id.*

The court found that all the plaintiffs had a direct injury (financial interest) and a sufficiently close and direct relationship to the third party (Medicaid eligible women), and that privacy concerns and time constraints imposed a considerable restraint on the women's ability to independently protect their own interests.⁷⁶

F. Fashioning a Remedy Outside of the Statute

The right to contest an election has traditionally been statutory.⁷⁷ Courts, until *Gunaji*, generally restricted themselves to the procedural framework, as directed by the legislature.⁷⁸ Because election contests were considered statutory proceedings, New Mexico courts have strictly followed election contest statutes.⁷⁹

Both state and federal courts in other jurisdictions have provided several remedial options in election contests, including overturning the results of the election and installing a new winner, voiding the entire election and holding a new election, filling the position by appointment, and imposing criminal or civil liability on election officers.⁸⁰ Generally, because of the effect on the rights of voters, courts do not want to install a new winner unless the contestant can prove he or she received the majority of votes in an election.⁸¹

G. "Free and Open" Clause

Article Two, Section Eight, of the New Mexico Constitution states that "[a]ll elections shall be free and open." In addition to the statutory election contest action in *Gunaji*, the Contestants claimed a constitutional violation of Article Two, Section Eight. Until *Gunaji*, the New Mexico appellate courts had not interpreted this section of the constitution.⁸²

The court found four other states with the same constitutional provision but found no helpful interpretations in those states' case law.⁸³ The court found a similar clause of "free and equal" in thirteen other states' constitutions with useful case law speaking to those clauses.⁸⁴ Of the thirteen states, the court stated that Kentucky had the most developed case law interpreting the constitutional provision.⁸⁵

The Kentucky courts have found many instances where there was a violation of the "free and equal" clause. In one case, the ballot was incorrectly printed in three of five precincts.⁸⁶ Another case involved a ballot that listed the wrong candidates.⁸⁷ Yet another case concerned a candidate who was omitted from the ballot by the

76. *Id.* ¶ 14, 975 P.2d at 847.

77. See *Eturiagga v. Valdez*, 109 N.M. 205, 208, 784 P.2d 24, 27 (N.M. 1989); *Dinwiddie v. Bd. of County Comm'rs*, 103 N.M. 442, 445, 708 P.2d 1043, 1046 (N.M. 1985); *Montoya v. McManus*, 68 N.M. 381, 385, 362 P.2d 771, 774 (N.M. 1961).

78. *Eturiagga*, 109 N.M. at 208, 784 P.2d at 27 (citing *Ammerman v. Hubbard Broad., Inc.*, 89 N.M. 307, 551 P.2d 1354 (N.M. 1976)).

79. *Id.*

80. *Developments in the Law: Elections*, 88 HARV. L. REV. 1114, 1298 (1975).

81. *Id.* at 1315.

82. *Gunaji*, 2001-NMSC-028, ¶ 27, 31 P.3d at 1015.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Lakes v. Estridge*, 172 S.W.2d 454 (Ky. 1943).

87. *Hillard v. Lakes*, 172 S.W.2d 456 (Ky. 1943).

county clerk.⁸⁸ In addition, the Kentucky Court of Appeals has held that it was not necessary to show fraud or other wrongdoing to prove a violation of the constitutional clause.⁸⁹ Similar to New Mexico statutes at the time of *Gunaji*, Kentucky statutes made it necessary to show fraud, intimidation, bribery, or violence.⁹⁰ In one case, a voting machine had malfunctioned and the Kentucky court found “constructive fraud” in order to stay within the statute, arising from a breach of a legal duty that the “law would pronounce fraudulent because of its tendency to deceive others, to violate confidence, or to injure public interests.”⁹¹

In *Johnson v. May*,⁹² the Kentucky Court of Appeals held that an election is not free and equal if “a substantial number or percentage of qualified electors are deprived of their right to vote.”⁹³ The court showed deference to the election process by stating that the court’s only job is to determine whether there was substantial compliance with the law in an election; if not, the court should send the question back to the people so that the courts do not decide the outcome of an election.⁹⁴ The court also noted that regardless of whether the statute is insufficient or whether there was fraud, mistake, or other wrongdoing, the constitutional provision is mandatory.⁹⁵

Through the reliance on the reasoning of the Kentucky courts, the New Mexico Supreme Court demonstrated an apparent willingness to follow Kentucky’s lead. A malfunctioning voting machine, for example, might now rise to the level of “constructive fraud” in New Mexico. More importantly, election errors in New Mexico can now amount to state constitutional violations.

IV. RATIONALE AND ANALYSIS

The court had two basic jurisdictional questions to determine before it could address the constitutional issue. First, the court had to determine whether it would hear the case in spite of the fact that it was moot, and second, whether the candidates had standing to represent the voters in Precinct 31.

A. Mootness

The court first addressed the question of mootness. By the time the case had come to the New Mexico Supreme Court, the terms of office for state senate and county commission had expired. This meant there was no actual controversy left to decide and direct relief could not be granted. The court, however, decided, because the issues presented were of substantial public interest and capable of repetition, yet evading review, that it would review the moot case.⁹⁶

88. *Ferguson v. Rohde*, 449 S.W.2d 758 (Ky. 1970).

89. *Id.* at 761.

90. *Wood v. Kirby*, 566 S.W.2d 751, 753 (Ky. 1978) (referencing KY. REV. STAT. ANN. § 120.165(4) (Michie 1978)).

91. *Id.* at 755.

92. 203 S.W.2d 37 (Ky. 1947).

93. *Id.* at 39.

94. *Id.*

95. *Id.*

96. *Gunaji*, 2001-NMSC-028, ¶ 10, 31 P.3d at 1011.

The court found that the Contestants' state constitutional claim raised an issue of substantial public interest.⁹⁷ The particular issues of substantial public interest articulated by the court were first, whether the Election Code was the exclusive means to contest an election, and secondly, what the proper remedy is when the election error could have potentially affected the outcome of the election.

The court also found that the issues in this case were capable of repetition.⁹⁸ The Contestees had argued that because the specific election between the candidates who were parties in this case was not going to happen in the future, they would also be unlikely to litigate these issues ever again.⁹⁹ However, the court responded that there was no requirement under the New Mexico mootness doctrine that the repetition must be between the same parties.¹⁰⁰ The court reasoned that the specific parties to a suit were irrelevant and that the crucial part is that the issue could be raised in a future lawsuit. The court found that the issues were capable of repetition because human error could not be eliminated from the election process, and, thus, an incorrect ballot face could be the basis for an election contest in the future.¹⁰¹ The court also indicated that it was important to decide the issues at that time because the problem of mootness could occur again in future election contests because of expiring terms of office.

The legislature has since addressed the facts of this case, so the court will not be faced with filling in the specific statutory gap in the future. With that said, given the court's long history of liberally granting certiorari in election contests, it is not a surprise the court reviewed this case despite its mootness. This is especially true because this case raised novel and important issues. Moreover, the court may have been alluding to a more general sense of "election error" as opposed to the specific errors in this case. Thus, this case presented a vehicle for the court to examine how it should address future election errors, particularly when there is a gap in the statutory scheme.

B. Standing

Gunaji was the first time the court had expressly decided whether a candidate has standing to assert the constitutional claim that there was a violation of the free and open election clause. The Contestants asserted that the sixty-six voters who voted on the incorrect ballot were denied their basic right to vote for the lawful candidates of their choice.¹⁰² The Contestants also argued that the candidates had a right to be on the ballot and, therefore, their rights were violated as well.

97. *Id.*

98. *Id.*

99. In briefing, the Contestees-Appellees had argued that Senator Macias was retiring and would not be running for the seat again. Appellees' Supplemental Memorandum at 3, *Gunaji* (No. 25,896).

100. *Gunaji*, 2001-NMSC-028, ¶ 11, 31 P.3d at 1011.

101. Of course, if this issue were raised before a court now, the Election Code would cover the circumstances that led to this contest. See N.M. STAT. ANN. § 1-12-37 (Michie 2002).

102. *Gunaji*, 2001-NMSC-028, ¶ 18, 31 P.3d at 1013.

Past election contest cases had only indirectly referenced the rights of candidates but not within an Article Two, Section Eight context.¹⁰³ The court consequently looked to other states with similar constitutional provisions.

The court found other states were divided on the issue of candidates asserting voter rights.¹⁰⁴ The court cited several cases involving whether a "write-in" candidate should be allowed on the ballot. In *Kasten v. Guth*,¹⁰⁵ the Supreme Court of Missouri held that an elector is not required to vote for the names printed on the ballot but may instead write in the candidate of her choice. In turn, the Missouri court noted that a candidate is entitled to be on the ballot for the benefit of voters who want to support that candidate.¹⁰⁶ The Supreme Court of Utah, however, has held that a candidate does not have a right to appear on the ballot.¹⁰⁷ The *Gunaji* court agreed with those states that hold that candidates do not have the right to bring this constitutional claim "in the name of the right to vote."¹⁰⁸

While the court dismissed any right of the candidate to be voted for under Article Two, Section Eight, it was left to decide whether a candidate had standing to assert the rights of voters. New Mexico case law also provided little guidance to the court on third-party standing for an Article Two, Section Eight claim.¹⁰⁹ The court turned to the U.S. Supreme Court for guidance.

The New Mexico Supreme Court found that the candidates met the standing requirements outlined in *United States v. Raines*:¹¹⁰ when a party seeks to assert the constitutional rights of a third party, the litigant must show an injury in fact and prudential considerations support advancing the claim. The court recognized two prudential considerations: "constitutional rights should not be litigated unnecessarily, and...the third party may not be able to advocate the right as effectively as its actual holder."¹¹¹

The court found the Contestants' injury in fact was the loss of emoluments of office.¹¹² The court stated that constitutional rights were not being litigated unnecessarily and that the Contestants were working in favor of upholding voters'

103. See *State ex rel. Read v. Christ*, 25 N.M. 175, 199, 179 P. 629, 637 (N.M. 1919) (stating, "nor should the successful candidate suffer").

104. *Gunaji*, 2001-NMSC-028, ¶ 19, 31 P.3d at 1013 (citing *Kasten v. Guth*, 375 S.W.2d 110, 114 (Mo. 1964); *Preisler v. City of St. Louis*, 322 S.W.2d 748, 753 (Mo. 1959); *Anderson v. Cook*, 130 P.2d 278, 285 (Utah 1942)).

105. 375 S.W.2d 110, 114 (Mo. 1964).

106. *Id.* at 115 (citing 29 C.J.S. *Elections* § 180 (1964)). The *Gunaji* court also cited *Preisler*, 322 S.W.2d at 753 (holding that the Missouri constitutional provision gives "every eligible person...the right...to become a candidate"). *Gunaji*, 2001-NMSC-028, ¶ 19, 31 P.3d at 1013.

107. *Anderson*, 130 P.2d at 285.

108. *Gunaji*, 2001-NMSC-028, ¶ 19, 31 P.3d at 1013 (internal quote omitted).

109. The court referenced *Valdez v. Herrera*, 48 N.M. 45, 47, 145 P.2d 864, 870 (N.M. 1944), and *State ex rel. Read v. Christ*, 25 N.M. 175, 199, 179 P. 629, 637 (1919), both election contest cases, for the proposition that voters should not be lightly deprived of their rights due to the mistakes of election officers. *Gunaji*, 2001-NMSC-028, ¶ 18, 31 P.3d at 1013.

110. 362 U.S. 17, 22 (1960) (stating that the standing rule is not required by the U.S. Constitution but is instead a "weighty" rule of practice).

111. *Gunaji*, 2001-NMSC-028, ¶ 20, 31 P.3d at 1014 (quoting *Lewis v. Iowa Dist. Court*, 555 N.W.2d 216, 219 (Iowa 1996)).

112. *Id.*

rights.¹¹³ In addition, the court found that it was not as feasible for voters to organize into a body of plaintiffs.¹¹⁴

At first blush, it may appear unusual that the court decided to reach both the issues of mootness and standing. However, it was necessary to determine both issues because of the constitutional question. If the election contest was strictly a statutory claim, the court would only have had to address the mootness issue. In fact, the issue of standing was not addressed by the parties or the lower court at any stage of the litigation and was apparently raised *sua sponte* by the court.¹¹⁵

The *Gunaji* opinion, however, did little to clarify New Mexico law on standing.¹¹⁶ Although the opinion does not cite previously followed federal case law, the court's review of *United States v. Raines* is relevant because the case involves voter registration. However, the opinion does not attempt to reconcile the latest New Mexico or federal case law on standing. While this may seem a small point, New Mexico case law has been far from clear on standing, and this opinion now adds to the mix of sources and variations of the rule.

More important is how the court's decision on standing relates to the constitutional claim and the election contest. As stated previously, the legislature has addressed the specific facts of this case, which means the New Mexico Supreme Court would not have to search for its own remedy if a similar case were before it today. Yet, since it granted standing to candidates who assert the rights of voters under the New Mexico Constitution, it is possible for an entirely separate claim to be brought without the statutory election contest. And, since the court also decided that it may look outside the Election Code to provide a remedy when not addressed on the statute, the court may decide to do so in the future with a similar constitutional claim.

C. Remedy Outside of the Election Code

The court found that the statutory section relied on by the Contestants did not apply to the facts in this case. The Election Code provides that if the precinct board is not able to show that it upheld the purity and sanctity of the election and that there was no fraud, the votes from that precinct are to be rejected.¹¹⁷ The New Mexico Supreme Court disagreed with the trial court's finding that the precinct board did not comply with the Election Code even though there was no fraud.¹¹⁸ Instead, the court found that it was the county clerk, not the precinct board, who was responsible for

113. *Id.*

114. *Id.*

115. In fact, the court cited *Alvarez v. State Taxation & Revenue Department*, 1999-NMCA-006, 971 P.2d 1280, for the notion that standing may be raised *sua sponte* by the court.

116. The New Mexico Court of Appeals has indicated the lack of guidance and clarity in New Mexico's case law on standing in *John Does I through III v. Roman Catholic Church of the Archdiocese of Santa Fe, Inc.*, 1996-NMCA-094, ¶ 27, 924 P.2d 273, 279. This was also raised by the New Mexico Supreme Court many years ago in *De Vargas Savings & Loan Ass'n of Santa Fe v. Campbell*, 87 N.M. 469, 471, 535 P.2d 1320, 1322 (N.M. 1975) (quoting *State ex rel. Sego v. Kirkpatrick*, 86 N.M. 359, 363, 524 P.2d 975, 979 (N.M. 1974) ("[T]he entire question of standing in New Mexico is somewhat in a state of confusion, and it is impossible to reconcile in principle the many decisions of this Court upon this question.")).

117. N.M. STAT. ANN. § 1-14-13 (Michie 2002).

118. *Gunaji*, 2001-NMSC-028, ¶ 16, 31 P.3d at 1012.

the errors.¹¹⁹ However, the Election Code did not hold the county clerk responsible for this situation.¹²⁰ Since the court found the Code inapplicable, the court examined whether they had the power to fashion a remedy outside of the Code.

The court stated that the common law rule applied in election contests is to first determine who received the plurality of votes in the election.¹²¹ Once this is determined, the test is to subtract the number of invalid votes from the winner's total and add this number of votes to the loser's total.¹²² If the outcome is affected, the court may order a new election.¹²³

Contestants claimed that this remedy could be implied in Article Two, Section Eight.¹²⁴ Contestees, however, argued that the Election Code provided the exclusive remedy in an election contest and, since an election contest was a statutorily created cause of action, the court did not have the power to go outside of the statute. The court interpreted prior New Mexico case law, however, to show that courts must follow the specific procedures outlined in the Code and the grounds and remedies were not exclusive to the Code. Therefore, the court could fill in the gap and find a remedy outside of the statute. In addition, the court stated that "[c]ommon sense suggests that the grounds for an election challenge need not be found in the Code, such as the protection of the basic right to vote for the candidate of one's choice."¹²⁵

The court, however, rejected the Contestants' request for a new election. The court found several impractical and unrealistic reasons for granting such a remedy. To hold a second election would not capture the will of the electorate at the time of the first election. Holding another election would mean additional costs and there would be no guarantee that a new election would be free of irregularities, mistakes, or even fraud. The court was persuaded that factors of "election economy, relative certitude of result, and fairness to the candidates" precluded ordering a new election.¹²⁶

The court instead analogized to the Election Code for a remedy.¹²⁷ The Code, at the time, provided that when there was noncompliance with the statute, the votes of the entire precinct should be rejected.¹²⁸ Finding that there is great value in keeping with the legislative intent and policy of the statute and the fact that courts often look to statutes to provide common law principles, the court rejected the votes in Precinct 31.¹²⁹

The threshold question of determining who received the majority of votes was not possible to answer in this case because the invalid ballots had been mixed with valid ballots. In fact, the Contestants claimed the violation made it impossible to determine an accurate count of votes. The appellate court in *Darr v. Village of*

119. *Id.* ¶ 15, 31 P.3d at 1012.

120. *Id.* ¶ 17, 31 P.3d at 1013. Again, section 1-12-37.1 now makes the precinct board responsible for an incorrect ballot.

121. *Id.* ¶ 30, 31 P.3d at 1016.

122. *Id.* ¶ 16, 31 P.3d at 1013.

123. *Id.*

124. *Id.*

125. *Id.* ¶ 26, 31 P.3d at 1015.

126. *Id.* ¶ 32, 31 P.3d at 1016.

127. *Id.* ¶ 33, 31 P.3d at 1017.

128. N.M. STAT. ANN. § 1-14-13 (Michie 2002).

129. *Gunaji*, 2001-NMSC-028, ¶ 35, 31 P.3d at 1017.

*Tularosa*¹³⁰ held that the votes in a precinct could only be rejected if the contestant proves that the statutory violations made it impossible to determine a lawful winner. The *Gunaji* decision extends this rule to constitutional violations, as well.

The opinion noted that the “traditional” remedy, when there was no applicable statute, was to grant a new election.¹³¹ However, the court did not cite to New Mexico case law on point. A review of most New Mexico election contests either does not state the relief or does not show that courts have granted a new election as relief.

Granting a new election as a remedy is, in some sense, about who decides elections. The *Gunaji* court was persuaded that the will of the electorate at the time of the first election would not be truly captured by ordering a new election. Perhaps answering the dicta in *Darr* (raising the question whether a court has the power to order a new election), the opinion states that it is possible to order a new election, if there is no applicable statute, but finds such factors as election economy and fairness to candidates to outweigh holding a new election.¹³²

Kentucky case law espouses a different view:

Unless judgments of courts and boards are to be substituted for elections, the trial of a question like this is confined to determining whether there has been a substantial compliance with the law in the conduct of the election, and, if there has not been, to remand the question to the people concerned, where their will may be fairly and legally recorded.¹³³

It is fair reasoning that, while courts have a constitutional duty to protect candidates’ and voters’ rights, courts should not displace the will of the electorate.¹³⁴ New Mexico courts, as illustrated in the history of election contests, have vigorously protected the voter. But if a court has invalidated an election, then it is reasonable to argue that the court should order a new election so it does not judge who is the winner.¹³⁵ However, that would also mean invalidating the votes from the first election and replacing the will of the original electorate with that of the later election.

The court ultimately took a conservative approach in determining its own relief outside of the statute by analogizing to the Election Code. Yet, in the end, the voters of Precinct 31 were denied their right to have their votes counted. The court was both constrained and free to make a choice of remedy so long after the election and after the terms of office had expired. The court could not practically order a new election and had sound justification for not providing that remedy, in any case. At the same time, the court, free of any statutory obligation, could have found creative remedies such as censuring the county clerk in its opinion or even imposing some civil penalty. Directing the focus of the remedy towards those who the court found at fault, and away from the innocent voters, might have better aligned with the

130. 1998-NMCA-104, 962 P.2d 640.

131. *Gunaji*, 2001-NMSC-028, ¶ 30, 31 P.3d at 1016.

132. *Id.* ¶ 32, 31 P.3d at 1016.

133. *Johnson v. May*, 203 S.W.2d 37 (Ky. 1947).

134. Louise Weinberg, *When Courts Decide Elections: The Constitutionality of Bush v. Gore*, 82 B.U.L. REV. 609, 640 (2002).

135. *Id.*

notions underlying the “free and open” clause and New Mexico’s election contest jurisprudence.

In fairness, by analogizing to the Code, the court showed deference to the politically accountable branch of government and the principles of separation of powers. The effects of the discarded votes cannot sit only on the shoulders of the court. The legislature also has a responsibility to ensure that every eligible voter has the right to vote.

The legislature has, to its credit, addressed the facts of this case and provided a just remedy. The statutory provision passed as a result of this case provides that

[i]f a candidate contests the election results and the court finds that the number of eligible voters who relied on incorrect ballots is great enough to affect the outcome of the candidate’s race, the court may order the county clerk to send ballots for that candidate’s race to those voters who voted using an incorrect ballot.¹³⁶

Thus, if the particular issue is raised again, the court would not only be able to find a breach of duty by the precinct board but would also have an express remedy to rely on. This remedy is a better answer to the sanctity of elections and the right to vote because it ensures that each vote will count.

There are also remedies that should be explored by the legislature to address future election errors. Although it may not be possible in every situation, one solution might be to have an impartial tribunal specially designated to resolve election error or disputes before or during the election.¹³⁷ The legislature should explore these options because most post-election contests—even with the expedited procedures provided in the Code—do not reach their natural conclusion until long after the election is held. More often than not, as in this case, the terms of office expire. On the other hand, the nature of election contests in a litigation setting do not always afford expedient resolution. A significant amount of the delays in this case were caused by the parties themselves. Further, when the courts must grapple with filling in the gaps of the statutory scheme, a quick decision may not be forthcoming.

D. Free and Open Elections

Facing a matter of first impression, the court examined other states with the same or a similar constitutional provision. The court stated that Kentucky had the most developed jurisprudence of any state interpreting the “free and equal” clause in the Kentucky State Constitution.¹³⁸ The court, after reviewing relevant Kentucky case law, was persuaded that an election is only “free and equal” when the voter is allowed to choose between the lawful candidates on a ballot.¹³⁹ The sixty-six voters in Precinct 31 were, therefore, not able to choose between the lawful candidates in that election and accordingly the court held there was a constitutional violation.¹⁴⁰

136. N.M. STAT. ANN. § 1-12-37.1(E) (Michie 2002).

137. *Developments in the Law: Elections*, *supra* note 80, at 1298-99.

138. *Gunaji*, 2001-NMSC-028, ¶ 28, 31 P.3d at 1016.

139. *Id.* ¶ 29, 31 P.3d at 1016.

140. *Id.*

V. IMPLICATIONS

The court's holding may open the door for candidates to bring an independent or separate constitutional claim. Election contests have been traditionally statutory causes of action. "It is commonly said that there is no general state jurisdiction over election contests at all; that such jurisdiction must be given by statute."¹⁴¹ In *State ex rel. Denton v. Vinyard*,¹⁴² the court stated, "the right of contest and the jurisdiction to entertain it must be found in the statute law."¹⁴³ To this, the *Gunaji* court responded, "Our cases indicate that it is the procedure in an election contest which is exclusive, not the grounds and the remedy."¹⁴⁴ With *Gunaji*, the New Mexico Supreme Court recognized a claim under the free and open clause as valid grounds to contest an election.

The court may also be signaling that when there is an interference with the right to vote, the Election Code can be too narrow. With the exception of the reforms enacted after *Gunaji*, the Election Code requires a showing that there was fraud, undue influence, or coercion. A constitutional claim would not require any intentional wrongdoing, as in this case, where it was mistake. The constitutional claim would allow for much broader claims for any error that may occur in an election that would interfere with the right of a voter to choose between the lawful candidates.

The Kentucky courts, which guided the New Mexico Supreme Court with the constitutional question, have interpreted their election statute broadly to bring a claim within the statute, as in *Wood v. Kirby* where the court found "constructive fraud."¹⁴⁵ At the same time, the Kentucky courts have treated the constitutional claim as separate from the statutory claim, but it is not clear whether the constitutional claim is allowed independently without the statutory claim.¹⁴⁶

If New Mexico courts allowed the claim to be brought independently, candidates might find bringing a constitutional claim more attractive than the statutory cause of action because of the lesser burden of proof and lack of required statutory process. It is not clear whether a court would allow an independent claim separate from the statutory cause of action, but it is possible, given the court's ruling on standing and fashioning a remedy outside of the statute.

The *Gunaji* court also held that it may find a remedy outside of the Code. While the remedial possibilities to the court were endless, the court showed constraint by choosing to analogize to the Election Code. The court also may have foreclosed the possibility of ordering a new election in future election contests. The court showed a preference toward staying as close to the remedies provided by statute as possible. The court's deference to the legislature was a wise course of action because it

141. Weinberg, *supra* note 134, at 648-49.

142. 55 N.M. 205, 230 P.2d 238 (N.M. 1951).

143. *Id.* at 208, 230 P.2d at 239.

144. *Gunaji*, 2001-NMSC-028, ¶ 26, 31 P.3d at 1015.

145. 566 S.W.2d 751, 755 (Ky. 1978).

146. Both *Wallbrecht v. Ingram*, 175 S.W. 1022 (Ky. 1915), and *Johnson v. May*, 203 S.W.2d 37 (Ky. 1947), analyzed the constitutional claim separately, and it is clear that the contestants made the claims separately. However, the courts first looked to any applicable statutory provision to determine whether there was a violation. *Wallbrecht*, 175 S.W. at 1025-27; *Johnson*, 203 S.W.2d at 38-40.

permitted election matters to remain primarily governed by the representative branch of government.

For future election contestants and lower courts, this means every effort should be made to allow the Election Code to govern the contest. If a future election error occurs that is not covered by the Code, however, it may be possible to test the bounds of this decision by bringing an independent constitutional claim and requesting an appropriate common law remedy.

VI. CONCLUSION

The New Mexico Supreme Court, in a case of first impression, held that an election contest, although moot because the terms of office had expired, could still be heard because it raised issues of substantial public interest and was capable of repetition. Second, the court held that a candidate may assert the constitutional rights of voters. Third, the court held that, because the Election Code was not applicable to the particular case, the court had the power to fashion a remedy outside of the statute; only the procedure for contesting an election was exclusive, not the grounds or the remedies. Fourth, the court found there was a violation of the free and open clause of the New Mexico Constitution. The court chose to analogize to the Election Code in deciding on a remedy and to reject the votes of the precinct where the election irregularities took place instead of holding a new election. This did not affect the outcome of the election.

This opinion creates the possibility of a separate, and perhaps independent, cause of action for candidates to contest elections free from the burden of proof required by the Election Code. Although the court stated that the statute provided the exclusive procedure to be followed, it also stated that the court could find grounds and remedies outside of the statute. Through this opinion, the court has expressed an openness to address election issues that are not covered by statute and at the same time has shown deference to the legislature and separation of powers by analogizing to the statute to find a remedy.