

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 94-40800  
Conference Calendar

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STEPHEN R. BREWERTON,

Plaintiff-Appellant,

versus

JOE CLAYTON, Honorable Judge  
of 241st State District Court,

Defendant-Appellee.

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Appeal from the United States District Court  
for the Eastern District of Texas  
USDC No. 6:93 CV 334  
- - - - -

(January 26, 1995)

Before POLITZ, Chief Judge, and HIGGINBOTHAM and DeMOSS,  
Circuit Judges.

PER CURIAM:\*

Stephen F. Brewerton challenges the constitutionality of Article 5, § 28, and Article 4, § 12, of the Texas Constitution, which provide for the appointment of interim judges by the Governor of the State of Texas in the event of judicial vacancies. Brewerton contends that the interim appointment process violates his right to equal protection because his "vote" for the judge, which he exercises through his vote in the previous gubernatorial election, is "`diluted' by the input of

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\* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

the millions of voters outside of Smith County who voted for the governor and who are not normally qualified to vote in the election for the state district judge and who do no[t] normally have an interest in [the judicial] election . . . ."

This Court reviews the district court's grant of summary judgment de novo. Weyant v. Acceptance Ins. Co., 917 F.2d 209, 212 (5th Cir. 1990). Summary judgment is appropriate when, considering all of the allegations in the pleadings, depositions, admissions, answers to interrogatories, and affidavits, and drawing all inferences in the light most favorable to the nonmoving party, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Newell v. Oxford Management, Inc., 912 F.2d 793, 795 (5th Cir. 1990).

"The Equal Protection Clause is essentially a direction that all persons similarly situated should be treated alike." Outb v. Strauss, 11 F.3d 488, 492 (5th Cir. 1993), cert. denied, 114 S. Ct. 2134 (1994) (internal quotation and citation omitted). "Only if the challenged government action classifies or distinguishes between two or more relevant groups must [this Court] conduct an equal protection inquiry." Id.

Brewerton's entire argument is based upon the premise that voters outside Smith County are allowed to "vote" to fill the judicial vacancy through their vote for the governor. However, no voter, inside or outside of Smith County, actually votes to fill the judicial vacancy. The new judge is appointed by the governor. Even assuming, however, that a vote for the governor

somehow constitutes a "vote" for the governor's appointee, Brewerton's equal protection argument fails because the challenged provisions of the Texas Constitution do not distinguish between any groups of voters.

Further, the interim appointment process utilized by the State is not unconstitutional. In upholding a Puerto Rico statute which vested in a political party the power to fill an interim vacancy in the Puerto Rico legislature, the U.S. Supreme Court stated that the decision to fill legislative vacancies by appointment rather than by a full-scale special election did "not fall disproportionately on any discrete group of voters" and that "the interim appointment system plainly serves the legitimate purpose of ensuring that vacancies are filled promptly, without the necessity of the expense and inconvenience of a special election." Rodriguez v. Popular Democratic Party, 457 U.S. 1, 5-7, 12, 102 S. Ct. 2194, 72 L. Ed. 2d 628 (1982). The Court concluded that the "Constitution does not preclude this practical and widely accepted means of addressing an infrequent problem." Id. at 12.

Brewerton has failed to show that the State's interim appointment process is unconstitutional or that it denies him equal protection of the laws; the defendant is thus entitled to judgment as a matter of law. The district court did not err by granting the defendant's motion for summary judgment.

AFFIRMED.