

# Election tampering in plain sight: What two federal judges just did in Minnesota

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Late last week, two federal appellate judges disgraced themselves in a Minnesota voting-rights case, issuing a [slapdash opinion](#) that mangled the Constitution, flouted binding Supreme Court precedent, upended legitimate states' rights, and betrayed the deepest ideas of democracy and the rule of law. Because of this disgraceful duo, honest Minnesotans who squarely relied on seemingly authoritative state-issued voting instructions now risk having their ballots tossed into the trashcan, and other Minnesotans planning to vote in person on Election Day may stay home instead.

One of the two troublemakers, Nebraska's L. Steven Gras, is a 2018 Trump appointee who in late 2017 became the first federal judicial nominee [in over a decade](#) to be [unanimously rated "not qualified" by the American Bar Association](#). The other, Arkansas's Bobby Shepherd, is an otherwise unremarkable jurist [placed on the federal appellate bench](#) by President George W. Bush in 2006.

Thursday night, just two days after oral arguments, Gras and Shepherd issued a rushed ruling in a federal lawsuit brought by Republican Party operatives bent on minimizing the vote in Minnesota.

The case involved state voting deadlines. The strict letter of the Minnesota statute says that absentee ballots must arrive back with election officials by 8 p.m. Election Day. Mid-summer, as COVID-19 ravaged America and

clouded the horizon, Minnesota Secretary of State Steve Simon announced that he would relax strict enforcement of this rule so that voters worried about possible infection on Election Day could more easily use the mail option. With the blessing of a state judge, Simon promised that mailed ballots postmarked by 8 p.m. Election Day would count, so long as they arrived within the following week.

Grasz and Shepherd lawlessly interfered with this sensible plan. Late-arriving ballots must be segregated and presumptively disallowed, the two judges said, because Simon's actions "likely" violate the federal Constitution.



Grasz and Shepherd got it very wrong. (Obtained by Daily News)

Thursday's order is a textbook example of what the United States Supreme Court has told lower courts not to do close to elections. This [Purcell principle](#) — that the federal judiciary shouldn't upend election rules just before an election because doing so is likely to confuse voters and create problems for election officials — respects both citizens' reliance interests and states' rights. Surely, some Minnesota voters had no idea about this Thursday night

monkey wrench when, on Friday or Saturday, they mailed off their ballots per the longstanding “Simon Says” rules. Some of these ballots may not arrive until Wednesday morning.

The ruling also disrupts the lives of other Minnesotans who planned to mail in ballots Monday or Tuesday but cannot now do so with confidence. Some of these would-be voters are COVID-positive or self-isolating to be extra-safe. A subset may now risk infecting others or being infected on Election Day. Others, fearing increased risk, may forgo their vote. *Oy vey!*

Grasz and Shepherd said that it was Simon who violated Purcell. Nonsense. Simon acted long ago, and Purcell applies to federal judges precisely to protect state election officials. The judicial duo turned the idea on its head.

Grasz and Shepherd claimed that Simon violated state law. That is not for them to say. A state court blessed Simon’s promise to Minnesotans, and state judges are the last word on the meaning of state law. That is Constitutional Law 101, thanks to a landmark case called [Erie](#) familiar to every first-semester law student.

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Minnesota judges and Minnesota’s secretary of state answer to Minnesota voters — the ultimate legislative power in Minnesota. State judges and state executives hold offices created by the state legislature and interact in myriad ways with state lawmakers, who pay their salaries and regulate their conduct. No such accountability to Minnesota voters and lawmakers constrains Nebraska’s Grasz and Arkansas’ Shepherd.

Beyond Erie and Purcell, Grasz and Shepherd ignored two other binding

Supreme Court cases, involving elections in [Arizona](#) and [North Carolina](#). These [cases recognize](#) that a given state's election rules are defined not solely by its state statutes but rather by the state's entire legal system including its state constitution, its state electorate, its state courts and its state election officials [deputized by state law](#). Grasz and Shepherd instead pasted together a hodgepodge of dubious quotations from Supreme Court concurring and dissenting opinions of zero legal weight.

Worst of all, Grasz and Shepherd resurrected the infamous [Bush v. Gore](#) case. That 2000 decision is generally understood by the legal community as an embarrassing judicial fart. No subsequent Supreme Court majority opinion has ever cited it.

Grasz and Shepherd should reverse course. Their ruling was preliminary; they have not yet definitively determined that Simon's protocol is unconstitutional. If this duo does not reconsider, they — and any judge or justice inclined to follow them in the possibly unruly days ahead — will live in judicial infamy.

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