BALLOT ACCESS NEWS

San Francisco, California March 8, 1994 Volume 9 Number 13

ARKANSAS REPUBLICAN PARTY LOSES LAWSUIT

JUDGE SAYS STATE CAN MANDATE PRIMARIES AND NOT PAY FOR THEM

On February 25, federal Judge Stephen Reasoner ruled that Arkansas may force all political parties to pay for their own primary elections, and simultaneously may force them to nominate only by primary. The Republican Party, which brought the lawsuit, plans to appeal. *Republican Party v Faulkner County*, no. LR-92-cv-130.

Arkansas is the only state which doesn't pay for party primaries (each county is free to decide whether to pay for them or not, but only 6 of Arkansas' 75 counties do so).

The decision concedes that, under existing conditions, the Republican Party of Arkansas can't afford its own primary in certain counties. Voters who wish to vote in a Republican primary sometimes must travel as far as sixty miles to reach the nearest Republican primary polling place. The Republican Party always fails to run candidates in at least two-thirds of the state legislative races; sometimes 80% of the races have no Republican candidate. When the Republican Party does hold a primary in certain areas, it is only because wealthy individuals pay for it, to help the party.

Also, Republicans frequently are not permitted to put their polling places in the locations at which general election polling occurs, whereas Democrats can use these desirable sites. Some Republican voters never learn where their Republican primary polling place is. The decision even acknowledges that some counties pay for the Democratic primary but not for the Republican primary.

PARTIAL NORTH CAROLINA VICTORY

On February 25, U.S. District Court Magistrate Russell Eliason ruled three North Carolina ballot access laws unconstitutional:

1. The mandatory checking fee of 5¢ per signature;
2. Mandatory notarization of petitions;
3. Wording on the petition to create a new party that the signers "intend to organize a new political party".

The Magistrate ruled that the fee (which amounts to $3,500, if a new party submits 70,000 signatures) and notarization of new party petitions, are unconstitutional because the state doesn't impose these burdens on initiative petitions.

The Magistrate upheld the 10% vote requirement for a party to remain on the ballot, and also the law which says that no one can register other than as a member of a qualified party, or "Independent". The Magistrate's findings must be approved by a federal judge. Assuming the findings are affirmed, the Libertarian Party, which brought the lawsuit, will probably appeal the parts it lost to the 4th circuit. *McLaughlin v N.C. Board of Elections*, no. 2:93cv100, Middle District.

CONGRESS TERM LIMITS STRUCK DOWN

On February 10, federal Judge William Dwyer ruled that Washington state term limits on members of Congress violate the U.S. Constitution. *Thorsted v Gregoire* and *Colony v Munro*, no. C92-1763WD

The decision will be appealed to the U.S. Court of Appeals, 9th circuit. Then it will be appealed again, to the U.S. Supreme Court, no matter how the Court of Appeals rules, unless another case on congressional term limits gets to the U.S. Supreme Court sooner.

The decision is 36 pages long. Judge Dwyer first ruled that the case is ripe for a decision now. Then he ruled that states cannot add to the qualifications to be a member of Congress which are contained in the U.S. Constitution. For this conclusion, he depended on a 1969 U.S. Supreme Court decision, *Powell v McCormack*, which said that the House had to seat Congressman Adam Clayton Powell, despite his criminal activities, because he met the qualifications contained in the Constitution.

Term limits proponents had anticipated that objection when they wrote the Washington term limits law, and had provided that any member of Congress could always run for re-election, regardless of the length of service, as a write-in candidate. This transforms the case into a ballot access case, rather than an Article I Qualifications case.

The State Supreme Courts of Alaska, Nebraska, North Dakota, and Wyoming, and various federal courts, had upheld ballot access restrictions, when these laws were challenged under the *Powell* doctrine, by differentiating between outright bans on voting for someone for Congress, versus laws which keep someone off the ballot. For example, "The test to determine whether or not the 'restriction' amounts to a 'qualification' within the meaning of Article I, section 3, is whether the candidate could be elected if his name were written in by a sufficient number of electors" (*Hopfmann v Connolly*, 2nd cir., 1984, emphasis added).

Therefore, the interesting aspect to Judge Dwyer's opinion is how he managed to rule term limits unconstitutional when the law says anyone may be a write-in candidate. This is how he handled it:

> "It is argued that Initiative 573 is not a term limits law but a ballot access measure...The initiative does not impose a total ban on re-election. While barring the targeted incumbents from the ballot, it leaves open a pinhole of opportunity: a barred incumbent may run a write-in campaign...

(continued on page 2)

> ...The right of a party or an individual to a place on a ballot is entitled to protection and is intertwined with the rights of voters. The inquiry is whether the challenged restriction unfairly or unnecessarily burdens the availability of political opportunity. On this basis, unduly restrictive ballot access measures have been held unconstitutional as violating the First & Fourteenth Amendment rights of voters and candidates.
>
> The state election laws that have been upheld have been general ground rules designed to make elections "fair and honest" and to impose "some sort of order, rather than chaos" on the electoral process, see *Burdick v Takushi*, or to prevent "voter confusion, ballot over-crowding, or the presence of frivolous candidacies, *Munro v Socialist Workers Party*.
>
> All such laws have been open to compliance by candidates who take the necessary steps, or make the required showing, in the election process itself.
>
> Initiative 573, in contrast, is aimed not at achieving order and fairness in the process but at preventing a disfavored group of candidates from being elected at all...The record shows that in the country as a whole only three candidates for the House have been elected by write-in votes since 1958, and only one candidate for the Senate has been elected by that method since 1954. The Initiative would thus have the practical effect of imposing a new qualification: non-incumbancy beyond the specified periods." (cites omitted)

Those who have better knowledge of Supreme Court ballot decisions can only laugh at Judge Dwyer's words.

The True Supreme Court record:

1. In 1971, the Court upheld Georgia's ballot access laws in ***Jenness v Fortson.*** Georgia defined a party to be a group which polled 20% in the last gubernatorial election, or 20% in the entire nation for president. Georgia required other parties, and independent candidates, to collect signatures equal to 5% of the number of registered voters. Each candidate had to submit a separate petition.

If this law existed in every state today, a new party would need 76,000,000 valid signatures to run a full slate of candidates for all partisan office in 1994 (138,000,000 registered voters, multiplied by 5%, multiplied by eleven...there are eleven partisan offices on the ballot in the average state). The actual laws of the 50 states require 4,454,579 signatures for 1994.

Another way to measure the harshness of the law upheld in *Jenness* is to note that in the 5% petition's entire history for statewide office, 1943 to 1979, only one third party or independent candidate ever qualified! And for elections for the U.S. House, where the 5% petition law is still in place, only one third party or independent candidate has qualified for the ballot in the last 28 years!

2. In 1974, the Supreme Court ruled in ***Storer v Brown*** that it was constitutional for California to ban anyone from the general election ballot, for Congress, if he or she had changed registration from a qualified party to "Independent" within 17 months of a congressional election. Storer, who had changed his registration from "Democrat" to "Independent" eleven months before the election, and who was thereby barred from both the general election ballot and the primary (even if he had switched back to "Democrat"), argued that the law imposed an additional requirement to become a Congressman and thereby violated Article I. California argued that it did not, since Storer could still be a write-in candidate. The Supreme Court said in a footnote at the very end of the decision that Storer's Article I argument was "wholly without merit", but didn't explain why!

3. In ***Munro v Socialist Workers Party*** in 1986, the Supreme Court upheld a Washington state ballot access laws for third parties which is so severe, it has kept all third party candidates for Governor and U.S. Senator off the Washington state general election ballot, ever since it was enacted in 1977.

4. In ***Norman v Reed*** in 1992, the Supreme Court did rule in favor of a lenient interpretation of an Illinois ballot law, but in the decision, the Court again stated that a 5% petition requirement is constitutional, thus reaffirming the *Jenness* decision described in paragraph one.

5. In ***Burdick v Takushi***, also in 1992, the Supreme Court ruled that there is no constitutional right to cast a write-in vote. This decision made mincemeat of the careful delineation between Article I Qualifications Clause cases, and ballot access cases (the distinction between keeping someone off the ballot for Congress, versus preventing voters from voting for that person), but the Court didn't seem to notice or care.

Unanswered Questions:

1. If it doesn't violate the First Amendment to keep all but a handful of third party and independent candidates off the ballot in Georgia for over 50 years, and if it doesn't violate the First Amendment to ban write-ins, how can congressional term limits (with a write-in loophole) violate the First Amendment?

2. If it is constitutional to tell California plaintiff Thomas Storer that he cannot be on any ballot for Congress in 1972 because of a political action he took eleven months beforehand (his action was changing his voter registration from "Democrat" to "Independent"), why is it unconstitutional to bar Washington state plaintiff Thomas Foley from the 1998 ballot because of political actions he took in the past (being elected to Congress in the preceding six years)?

A cynic might answer that the difference is that Thomas Storer was an ex-county supervisor, whereas Thomas Foley is Speaker of the House. Will the Supreme Court see the inconsistency, and **either** uphold congressional term limits, **or** strike them down and admit that its ballot decisions of 1971, 1974, 1986 and 1992 were wrong?

LEGISLATIVE NEWS GENERALLY GOOD

1. Connecticut: Raised Bill 5528 had a hearing in the House Elections Committee on March 4. No vote has been taken yet. It would reduce the number of signatures for statewide third party and independent candidates from 1% of the last vote cast (over 15,000 in 1996) to a flat 5,000. It also makes it easier for Democrats and Republicans to get on the primary ballot.

2. Florida: HB 1201, by the House Elections Committee, has passed that committee. It would abolish candidate filing fees for third party and independent candidates. Requests by Libertarians that the bill also include a provision, letting an unqualified party circulate its presidential petition before the party knows the identity of its presidential candidate, were rebuffed, but the Committee staff promised to look at the idea next year.

3. Georgia: HB 606 is unlikely to pass the Senate. It would reduce the number of signatures for third party and independent candidates for statewide office and for Congress. The Republican Party of Georgia opposes the bill, and even though the Republican Party is a minority in the State Senate, it holds a majority on the Subcommittee which is handling the bill.

SB 680, which would abolish statewide general election run-offs (held when no one polls at least 50% of the vote), passed the Senate on March 1 by a vote of 33-17.

4. Hawaii: On February 18, the Senate Judiciary Committee passed SB 2831, legalizing write-in votes. The bill is now in the Ways and Means Committee.

5. Illinois: Representative Cal Skinner's bill to lower the number of signatures for third party candidates for Congress, state legislature and county office (if the third party has statewide candidates on the ballot) will be introduced in the second week in March.

6. Indiana: The last *B.A.N.* said that SB 138 (which would have deleted offensive language from third party petitions that none of its candidates have a criminal conviction) had been defeated. However, the contents of that bill were transferred into another bill, HB 1272, and it is expected to pass.

7. Kansas: HB 2998, which changes the new party petition deadline from April 11 to June 1, passed the House on March 2 by a unanimous vote.

8. Kentucky: SB 317 was introduced on March 2. It would let an unqualified party circulate a petition to get on the ballot for president, before it knows who its presidential candidate will be.

9. New Hampshire: On February 16, the House defeated HB 1246 by 186-146. The bill, by Libertarian Don Gorman, would have made it easier for a party to meet the definition of "political party". Current law says a party must poll 3% for Governor; the bill said that it would also be a "party" if it polls an average of 3% of the vote for Governor's Council. Most Democrats voted for the bill; most Republicans voted against it.

10. Maryland: SB 181 was defeated in the Senate Committee which handles election law bills on March 1. It would have improved ballot access for third parties.

At the hearing on February 17, Senator Idamae Garrott said she didn't think a party should be on the ballot if it couldn't poll 3% of the vote. She didn't understand that a party can't be on the ballot for office other than president (without collecting hundreds of thousands of signatures at each election), unless it has 10% of the registered voters, enrolled publicly as members. No third party has held even 5% of any state's registration in 80 years.

On March 2, a hearing was held in the House Constitutional & Administrative Law Committee on HB 901, a somewhat different bill which also improves ballot access. The House members appeared better informed and more receptive than the Senators. The House Committee will probably vote on HB 901 sometime in mid-March.

11. New York: The last *B.A.N.* reported that the Assembly had passed a bill, A1a, which specifies that minor petition irregularities should not invalidate petitions. A companion bill, S3853a, has been introduced in the State Senate, but no hearing has been scheduled for it yet.

12. Ohio: the Secretary of State had written an omnibus election law bill, which included a provision that independent candidates should have the word "independent" on the ballot, next to their names. Although the bill was introduced (HB 584), the sponsor, Representative Jerry Luebbers, deleted this portion of the bill. A U.S. Court of Appeals had ruled in 1992 that Ohio must permit such labels, but the legislature refuses to amend the law.

13. Oklahoma: HB 2307 was assigned to the Rules Committee on February 22. It would make third party and independent presidential candidate ballot access much easier (a change from collecting over 41,000 signatures, to paying a fee of $2,000).

14. Virginia: On February 24, HB 65 passed the legislature. It makes it easier for a third party or independent candidate for president to get on the ballot. Existing law forbids anyone from circulating a presidential petition outside his or her home congressional district, and requires that the petition contain 200 signatures from each district. The bill lets circulators petition in congressional districts which adjoin the circulator's home district. People who live in certain districts in eastern Virginia will now be able to petition in half the state's districts.

BALLOT ACCESS NEWS (ISSN 10436898) published by Richard Winger, Field Rep, Coalition for Free and Open Elections, $7 per year, 13 times per year, every 4 weeks, at Bx 470296, San Francisco CA 94147. Second class postage paid at San Francisco CA. Prodigy address: BBJK79A. Internet: ban@igc.apc.org.

POSTMASTER: Send address changes to *Ballot Access News* at Bx 470296, San Francisco Ca 94147-0296.

PETITIONS NEEDED FOR DEMOCRATS TO RUN FOR 1994 PARTISAN OFFICE

STATE	PARTY	ST-WIDE	HOUSE	DIST EXE	ST SEN	LOWER	COUNTY	TOTAL
Alabama	0	0	0	0	0	0	0	0
Alaska	0	0	0	0	0	0	0	0
Arizona	0	33,624	4,203	0	12,607	12,607	0	63,041
Arkansas	0	0	0	0	0	0	0	0
California	0	520	2,080	160	800	3,200	0	6,760
Colorado	0	0	0	0	0	0	1,500	1,500
Connecticut	0	0	0	0	0	0	0	0
Delaware	0	0	0	0	0	0	0	0
Florida	0	0	0	0	0	0	0	0
Georgia	0	0	0	0	0	0	0	0
Hawaii	0	50	50	0	180	765	360	1,405
Idaho	0	0	0	0	0	0	0	0
Illinois	0	0	0	0	0	0	0	0
Indiana	0	5,000	0	0	0	0	0	5,000
Iowa	0	8,932	5,864	0	2,500	5,000	13,845	36,141
Kansas	0	0	0	0	0	0	0	0
Kentucky	0	0	12	0	38	200	0	250
Louisiana	0	0	0	0	0	0	0	0
Maine	0	4,000	2,000	0	3,500	3,775	12,900	26,175
Maryland	0	0	0	0	0	0	0	0
Massachu.	0	55,000	20,000	8,000	12,000	24,000	30,150	149,150
Michigan	0	30,222	15,111	0	0	0	0	45,333
Minnesota	0	0	0	0	0	0	0	0
Mississippi	0	0	0	0	0	0	0	0
Missouri	0	0	0	0	0	0	0	0
Montana	0	0	0	0	0	0	0	0
Nebraska	0	0	0	0	0	0	0	0
Nevada	0	0	0	0	0	0	0	0
New Hamp.	0	0	0	0	0	0	0	0
New Jersey	0	1,000	1,300	0	0	0	4,200	6,500
New Mex.	0	3,625	3,625	0	0	5,438	0	12,688
New York	0	0	38,750	0	61,000	75,000	26,243	200,993
N Carolina	0	0	0	0	0	0	0	0
No Dakota	0	0	0	0	0	0	0	0
Ohio	0	6,000	950	0	850	4,950	8,800	21,550
Oklahoma	0	0	0	0	0	0	0	0
Oregon	0	0	0	0	0	0	0	0
Pennsylvan	0	5,000	21,000	0	12,500	60,900	0	99,400
Rhode Isl.	0	1,000	1,000	0	5,000	5,000	0	12,000
S Carolina	0	0	0	0	0	0	0	0
So Dakota	0	1,056	1,056	0	1,056	1,056	4,224	8,448
Tennessee	0	50	225	75	425	2,475	0	3,250
Texas	0	0	0	0	0	0	0	0
Utah	0	0	0	0	0	0	0	0
Vermont	0	3,500	500	0	3,000	7,500	5,600	20,100
Virginia	0	0	0	0	0	0	0	0
Washington	0	0	0	0	0	0	0	0
West Va.	0	0	0	0	0	0	0	0
Wisconsin	0	12,000	9,000	0	6,800	19,800	115,200	162,800
Wyoming	0	0	0	0	0	0	0	0
TOTAL	0	170,579	126,726	8,235	122,256	231,666	223,022	882,484

Chart shows how many signatures are needed in 1994 for the Democratic Party to nominate candidates for all partisan federal, state and county offices scheduled for the November 8 election. Judicial, special purpose and school offices are excluded. "St-Wide": petitions which qualify statewide candidates. "House": U.S. House. "Dist Exe" is a state executive office elected by district. "St Sen" & "Lower" are state legislative bodies. "County" is county office. No signatures are shown in Idaho and Illinois because the party is free to nominate by committee, if no one is nominated in the primary. SEE PAGE 5.

CHART ON PAGE FOUR

The chart on page 4 shows petitioning requirements in 1994 for Democrats. It shows that, in order to run for all policy-making and -executing partisan offices, individual Democrats, cumulatively, need 882,484 signatures to get on primary ballots. If there is a legal method for the party to nominate without the need for signatures, it is assumed for purposes of the chart that the party uses that method.

The February 8 *B.A.N.* carried a similar chart, for a new party. The chart showed that a new party, running for the same offices, would need a total of 5,141,472 valid signatures. However, because the Florida requirements have been re-interpreted in a more favorable light (see adjacent article), the correct figure for last issue's chart should have been 4,454,579 signatures.

What do the two charts show?

1. New parties are severely discriminated against, relative to old, major parties. The number of signatures needed for a new party and its candidates in 1994 is more than five times greater than the number needed for old party candidates.

2. However, the signature burden on old, major parties is itself too great, in some states. This is best shown by the fact that in November 1992, one-fourth of state legislative races had only one candidate on the ballot per seat.

Anyone who wishes a corrected copy of last month's chart showing the 1994 requirements for a new party to run candidates for all office, may receive one by asking for it.

SWP SUES DELAWARE

On February 18, the Socialist Workers Party filed a lawsuit in federal court, against the Delaware method for qualifying a new party. *Colton v Harper*, no. 94C-0051. Delaware is the only state in which the only method for a new party to get on the ballot, is by registering a certain number of people into the party, as shown on voter registration records. The SWP has won special privacy rights from the U.S. Supreme Court, based on its history of being harassed, and argues that the registration method interferes with those privacy rights. In Delaware, voter registration records are open to the public.

OKLAHOMA CANDIDACY GETS REACTION

In January, rumors spread that former Congressman Wes Watkins was considering running for Governor of Oklahoma as an independent. His proposed candidacy prompted two bills to stop him. Existing law merely requires a non-presidential independent to pay a filing fee. One bill, SB 960, by Senator Maxine Horner (D-Tulsa), would require a petition signed by 5% of the registered voters, for all non-presidential independent candidates. The other, SB 1066, by Senator Gene Stipe (D-McAlester), requires an independent to run in the primary, and win the primary, in order to be on the general election ballot. So far, no hearings have been set for these bills.

NEW RULINGS ON BALLOT ACCESS

1. California (1): the Secretary of State recently ruled that independent candidates for state office need not file a declaration of intent in February. The law requires all candidates for state office to file such a document, but the Legislative Counsel had earlier ruled the law unconstitutional for independents, and the Secretary agrees.

California (2): the Attorney General recently refused a request from State Senator Milton Marks, that he issue an Attorney General's ruling on the constitutionality of California law which makes it illegal for a political party to endorse, support or oppose candidates for local office. Marks made the mistake of saying he was asking on behalf of the city of Fairfax. The Attorney General pointed out that he isn't obliged to answer questions from cities. He is, however, obliged to answer questions from state legislators, so efforts are being made to have Senator Marks ask again, this time on his own behalf.

Meanwhile, the State Court of Appeals still hasn't set a hearing date for the Democratic Party's lawsuit against the ban on party speech.

2. Florida: the Secretary of State recently ruled that a new party which circulates a statewide petition (which needs 196,255 valid signatures, 3% of the number of registered voters), need not circulate separate petitions to qualify its district and county candidates.

However, the statewide petition must be circulated within any particular district or county in which the party intends to nominate district or county candidates, and it must bear the signatures of 3% of the registered voters in such areas.

3. New Mexico: the Secretary of State has interpreted the law on how a party retains its place on the ballot, in an unfavorable manner, so that the Natural Law and U.S. Taxpayers Parties are no longer considered qualified. Only the Green Party is still considered qualified, along with the Democrats and Republicans. Sec. 1-7-2C says "A qualified political party shall cease to be qualified if two successive general elections are held without at least one of the party's candidates on the ballot or if the total votes cast for the party's candidates for Governor or President do not equal at least one-half of 1% of the total vote cast."

The ambiguity is whether the clause "If two successive general elections are held" refers only to the clause about the party's candidates being on the ballot, or whether it also refers to the next clause about polling one-half of 1%. The Secretary ruled that it only refers to the first clause, not the second. Therefore, parties do not get two chances to meet the vote requirement.

ANONYMOUS CAMPAIGN LEAFLETS

The U.S. Supreme Court will hear a case over whether the Constitution protects the right to circulate anonymous campaign material sometime in October 1994. *McIntyre v Ohio Election Commission*, no. 93-986. The Ohio Supreme Court had upheld the ban on anonymous campaign literature last year 6-1.

SPECIAL ELECTIONS

1. Connecticut: On February 1, a special election was held to fill a vacancy in the Connecticut House, 26th district. The results: Republican 59.0%, Democrat 39.8%, Libertarian 1.2%. The last time this seat was voted on, in 1992, the results were Democrat/A Connecticut Party 67.5%, Republican 27.9%, Libertarian 4.7%.

2. Virginia: On February 24, a special election was held to fill a vacancy in the Virginia State Senate, 11th district. The results: Republican 74.8%, Democrat 22.1%, Libertarian-endorsed independent 2.4%, Patriot .8%. The last time this seat was voted on, in 1991, the results were Republican 53.6%, Democrat 46.3%.

COPENHAGEN MONTHLY VIOLATION

The Sep. 19, 1993 *B.A.N.* reported that the first hearings had been held, to establish that the U.S. is in violation of an international accord it signed in June 1990, the Copenhagen Document, part of the "Helsinki Accords".

Since then, each issue has featured a policy which clearly violates the Copenhagen Document. This issue's example concerns the Pennsylvania Commissioner of Elections' suppression of vote totals for some candidates.

> **--Ensure that votes are counted and reported honestly with the official results made public.**
>
> Point 7.4 of the Copenhagen Document

The true results of the November 3, 1992 election for Congress in the 13th district of Pennsylvania were:

M. Margolies-Mezvinsky, Dem.	127,685	49.58%
Jon Fox, Republican	126,312	49.05%
Ann Miller, indp. write-in	3,513	1.36%

The "Official" returns for the same election, as published by the Pennsylvania Commissioner of Elections, are:

M. Margolies-Mezvinsky, Dem.	127,685	50.27%
Jon Fox, Republican	126,312	49.73%

The official state returns are assumed by all other reporting sources to be the only fully correct returns.

Thus, all compilations of 1992 election returns, both private and governmental, published the incomplete figures, which show that Congresswoman Margolies-Mezvinsky received a majority of the vote cast. The votes for Ann Miller are not mentioned in any published source.

How does *Ballot Access News* know about the Miller votes? The editor visited the office of the Commissioner of Elections last year, and asked to see the election tallies as reported by the various counties. These documents were dutifully retrieved from storage. The 13th district is in Montgomery County. Montgomery County's handwritten certification of votes reveals the Miller vote. It is the only record of these votes.

Sec. 2621 of the Pennsylvania Election Code lists the duties of state elections officials. Included is the duty to "canvass and compute the vote cast for candidates...and to proclaim the results of such primaries and elections". Also, sec. 3159 requires the state to "tabulate, compute and canvass the vote for all candidates" (emphasis added).

However, in violation of the law, all Pennsylvania state election returns since 1980 have omitted all write-in results. Even the number of write-ins cast is omitted. Anyone looking at official Pennsylvania state election returns for 1980 on, would assume that write-in votes are not permitted in the state, since there isn't a whisper or hint of any such votes.

Pennsylvania's 14-year old policy of refusing to acknowledge any write-in votes in its official election returns has been the subject of complaints for five years, but the problem still persists.

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