

§ 3501.05, to provide directives to each of the eighty-eight (88) county Boards of Elections in Ohio to assure uniform and consistent counting of these potentially determinative provisional ballots. The law is clear: the absence of specific standards and safeguards for counting of ballots in a uniform manner statewide violates the Equal Protection Clause of the United States Constitution. Bush v. Gore (2000), 531 U.S. 98. Intervenor therefore seeks a declaratory judgment that the current directives are unconstitutionally deficient and seeks a mandatory injunction requiring uniform standards, procedures and rules for the evaluation and counting of provisional ballots sufficient to protect the integrity of the votes cast by members of the Ohio Democratic Party (ODP) as duly qualified electors of the State of Ohio, as well as the integrity of the votes of each other duly qualified elector of Ohio, including each provisional voter.

Parties

2. Intervenor-Plaintiff Ohio Democratic Party (ODP) is a “major political party,” as defined in R.C. § 3501.1(F)(1). From an organizational standpoint, a principle function of ODP’s existence is to engage in activity that directly promotes the election of its nominees at the general election. This necessarily involves engaging in activities, including political speech and political association, which are protected by the First Amendment of the Constitution of the United States. The goal of such activity is to secure votes, including from provisional voters, in favor of the party’s candidates. ODP is comprised of hundreds of thousands of members from across the state. Individuals who have requested a Democratic ballot in a primary within the current year or the past two calendar years are

legally considered to be affiliated with, or members of, the Democratic party. R.C. §3513.05. ODP had candidates on the ballot throughout the state, including candidates for President, Vice President, United States Senate, United States Congress and also hundreds of candidates for state and county offices. Accordingly, ODP and its constituent membership have an interest in seeing that all legitimate votes cast in the election, including those cast by provisional ballot, are counted, from county to county, using consistent standards.

3. Defendant J. Kenneth Blackwell is the Ohio Secretary of State. In that capacity, he acts as Ohio's chief elections officer and is responsible for administering all statewide elections, including those for federal office. Among other duties, Defendant Blackwell: appoints all members of local boards of elections to serve as his representatives; issues instructions by directives and advisories to members of the boards as to the proper methods of conducting elections; determines and prescribes the forms of ballots and the forms of all blanks, cards of instructions, pollbooks, tally sheets, certificates of election, and forms and blanks required by law for use by candidates, committees, and boards; compels the observance by election officers in the several counties of the requirements of the election laws; and oversees the canvassing of election results and totals and announces election results. R.C. § 3501.05. Defendant Blackwell is sued in his official capacity.
4. This case is brought under 42 U.S.C. § 1983. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 and 1343. Plaintiffs'

action for declaratory and injunctive relief is authorized by 28 U.S.C. §§ 2201 and 2202.

5. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391(b) because a substantial part of the real and immediate harm faced by the Plaintiff and its members is threatened in this judicial district.

The November 2, 2004 Election

6. The November 2, 2004 general election resulted in a massive turnout of Ohio electors. Under Ohio law, a significant percentage of these voters were issued provisional ballots that may be counted, if at all, no sooner than eleven (11) days after the election.
7. Provisional ballots are cast by individuals for several reasons, including: that the individual has been registered to vote but their name does not appear on the voter rolls; the individual shows up at the incorrect polling place; the individual has moved but did not update their voter registration information; or the individual did not have proof of identity when they attempted to vote.

Directive 2004-48

8. Defendant, pursuant to R.C. § 3501.05(C), issued Directive 2004-48 on October 29, 2004 to all eighty-eight (88) Boards of Elections throughout Ohio. This directive provides instructions for the “Absentee/Provisional Counting and Ballot Security” to be employed throughout the state following the closing of the polls for the Tuesday, November 2, 2004 election. A copy of Directive 2004-48 is attached as Exhibit A.

9. Directive 2004-48 is vague, incomplete and insufficient to assure uniform evaluation and counting of provisional ballots throughout the state. In substance, Directive 2004-48 provides little more than vague generalities concerning provisional ballots:

“Before a provisional ballot may be counted in the official canvass, the board of elections must confirm that the voter:

1. was registered to vote somewhere in Ohio during the thirty days before the election,
2. did not vote from a former address of absentee ballot,
3. voted in the correct precinct,
4. completed and signed all required affirmation statements, and
5. in the case of a voter who did not provide HAVA required identification information when registering, has provided an acceptable proof of the applicant’s identity by the close of polls on election day at either the polling location of the board of elections.

The board of elections shall begin verifying the above information immediately following the election and must complete the process by the conclusion of the official canvass. If this information is verified, the provisional ballot is to be included in the official canvass. If any of this information cannot be verified, the ballot cannot be counted.’

Section 1983 Claim for Violation of Equal Protection of the Law

10. Directive 2004-48 is vague, incomplete and insufficient to provide direction to the eighty-eight (88) Ohio Boards of Elections sufficient to assure that they each evaluate and count the thousands of provisional ballots cast in the election on a uniform and consistent basis. Yet, the law requires that they do. In Bush v. Gore (2000), 531 U.S. 98, the United States Supreme Court held that the failure to provide specific standards for counting of ballots that are sufficient to assure a

uniform count statewide violates the Equal Protection Clause of the United States Constitution.

11. Directive 2004-48 fails to provide the eighty-eight (88) Boards of Elections of Ohio with sufficiently detailed and uniform rules to assure that recurring issues in the count of provisional ballots are handled uniformly throughout the state. As such, it is likely that, under Directive 2004-48, a provisional ballot that is deemed valid in one county, and thus included in the certified tabulation of election results, may be rejected in another county and not counted.
12. Inasmuch as Directive 2004-48 fails to provide standards, procedures and rules for counting of provisional ballots that are sufficient to assure that the provisional ballots cast in the Tuesday, November 2, 2004 election are reevaluated and counted on a uniform and consistent basis among the eighty-eight (88) counties, the Directive itself, and any evaluation and count undertaken pursuant to its procedures, violates the Equal Protection Clause of the Constitution of the United States.
13. Unless this Court intervenes, the evaluation and counting of provisional ballots by the eighty-eight (88) Ohio Boards of Elections will not be undertaken in a uniform manner, following consistent application of uniform standards, procedures and rules in each county, and therefore will result in denial of equal protection of the law to Plaintiff and other citizens of Ohio, including each citizen voting a provisional ballot.

14. ODP has standing to bring this action inasmuch as “[I]t must be remembered that ‘the right of suffrage can be denied by a debasement or dilution of the weight of a citizen’s vote just as effectively as by wholly prohibiting the free exercise of the franchise.’” Bush v. Gore (2000), 531 U.S. 98, 105.

15. In the absence of declaratory and injunctive relief from this Court, Intervenor-Plaintiff ODP and all other Ohioans will be irreparably harmed.

WHEREFORE, Plaintiff asks this Court to enter an Order and Final Judgment:

- (1) Declaring Directive 2004-48, as issued October 29, 2004, to violate the Equal Protection Clause of the Constitution of the United States;
- (2) Mandatorily enjoining and directing Defendant to issue a new Ohio Secretary of State Directive setting forth detailed standards, procedures, and rules for the evaluation and counting of provisional ballots to be implemented by each of the eighty-eight (88) Boards of Elections in Ohio;
- (3) Mandatorily enjoining and directing Defendant to ensure that all eighty-eight (88) counties comply in all respects with the newly issued Directive for the evaluation and counting of provisional ballots and to assure that the uniform standards, procedures and rules set forth therein are complied with in full prior to the certification of the tabulation of the election of November 2, 2004;
- (4) Granting Plaintiff such additional relief as justice may require, including supervision of the evaluation and counting of the provisional ballots if necessary, together with their attorneys’ fees pursuant to 42 U.S.C. §1988, and their costs and expenses in maintaining this action.

Dated: November 15, 2004.

Respectfully submitted,

s/ Donald J. McTigue

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