

**In The United States District Court  
For The Southern District Of Ohio  
Western Division**

Marian A. Spencer, et al.,	:	
	:	
Plaintiffs,	:	
	:	
v.	:	District Court Case No. 04 CV 738
	:	
J. Kenneth Blackwell, et al.,	:	Judge Dlott
	:	
Defendants.	:	

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**TRIAL BRIEF AND MEMORANDUM OPPOSING INJUNCTIVE RELIEF OF  
INTERVENOR-DEFENDANT STATE OF OHIO**

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## INTRODUCTION

All who value our election process agree on two principles, and the State's role here is to uphold them both: First, all validly registered voters are entitled to vote, and second, all validly registered voters are entitled to have their votes *count*. But Plaintiffs asks this court, on the eve of an election, to knock down one of Ohio's last remaining barriers to open fraud, and while they purport to fight for the right to vote, their efforts would undermine the rights of voters to have those votes count. For, if the final tally includes votes from "Mary Poppins," "Dick Tracy," "Michael Jordan," and "George Foreman"—all of whom were new registrants in Ohio a few weeks ago—then legitimate voters would not truly have their votes count, as the legitimate votes would be canceled out by the frauds. See Toledo Blade, 10-19-04, *Voter fraud case traced to Defiance County registrations volunteer: 124 registrations falsified, allegedly for crack cocaine*, at [www.toledoblade.com/apps/pbcs.dll/article?AID=/20041019/NEWS09/410190343](http://www.toledoblade.com/apps/pbcs.dll/article?AID=/20041019/NEWS09/410190343), and attached as Ex. 1. In order to protect the integrity of this election, Ohio's Attorney General, on behalf of all of Ohio's citizens, strongly urges the Court to stay its hand. The law and procedure at issue—a system allowing private "challengers" to stand at polling places and raise questions about voters' qualifications—is not just a legitimate process, but it is a critical one.

Contrary to the picture that Plaintiffs seek to paint here, Ohio's law does not allow challengers to stop anyone's vote. It merely allows those challengers—who may represent a party or an issue, or who may be any citizen in line waiting to cast a vote—to ask certain pollworkers, called precinct judges, to ensure that a voter is legitimate. While challengers may initiate the process, it is neutral arbiters, following neutral rules, who ultimately decide. In the voting context, having partisan challengers at the polls merely allows all sides to have a chance to "keep the other side honest," and it ultimately gives the losing side confidence in the process

and the result. This system, in place almost everywhere in the Union, deserves praise, not condemnation.

Plaintiffs attack this system, or at least its alleged use by some challengers this coming Tuesday, based on a purely speculative theory that those private challengers, the Hamilton County Republican party, will use this system in a racially offensive manner to intimidate black voters. But Plaintiffs have offered no proof on the facts, nor have they offered a credible legal theory that entitles them to any legal relief at all, let alone the extraordinary relief of locking only one side's challengers out of the polling places.

Instead of proof, Plaintiffs bemoan the unfortunate underside of America's history, and they tell anecdotes of more-recent wrongdoing around the nation, but they offer no proof that Ohio's statutory process is invalid, nor do they even show that it will be used in a racist way in Hamilton County, Ohio. Plaintiffs claim that the challengers at issue will be deployed disproportionately in mostly black precincts, but the evidence shows that the Republican challengers are deployed, not surprisingly, at precincts dominated by Democrats. Some have mostly white voters, and some have mostly black voters, but all satisfy this race-neutral criterion, and any racial skew simply reflects the reality that black voters in America today vote Democrat more often than Republican. See Columbus Dispatch, 10-31-04, *Eight Votes Apart*, and accompanying poll results, A3 (showing 91% of African-American voters supporting Democratic presidential candidate John Kerry), at [www.dispatch.com/election/election-president.php?story=dispatch/2004/10/31/20041031-A3-00.html](http://www.dispatch.com/election/election-president.php?story=dispatch/2004/10/31/20041031-A3-00.html), and attached as Ex. 2. That reality does not turn every partisan motivation into a racist one. Plaintiffs also fail to show that the challenger process will block a single valid voter, as they simply speculate about how anticipated intimidation might scare voters away.

Just as Plaintiffs fail to show factual proof of their claim, so, too, do they fail on the law, as they do not establish that the equitable factors tilt their way, and in fact, the opposite is true: keeping challengers out will call the legitimacy of our election into question, while allowing challengers in will not cause anyone harm, let alone irreparable harm. If no challengers are allowed to keep an eye on the polls—or worse yet, if just one party is barred, and are specifically barred from the precincts that their opponents may carry with over 90% of the vote—Ohioans will rightly question Wednesday morning whether something was amiss on Tuesday. Aside from the danger of actual fraud, even this perception will harm our already-frayed political culture.

It will be even worse if our public perceives that our court system put a thumb on the scale in this manner. That would be especially harmful in light of the combination of last week's order in the *Miller* case with a potential one here. *Miller* shut down Ohio's efforts to remove invalid voters from the rolls before the election, and an injunction here would strip the last line of defense at the ballot box. That would truly give Ohio voting "on the honor system," and although 99% of voters and activists may be honest, it will take only a few unscrupulous souls to tilt Ohio, and perhaps change the fate of our Nation.

By contrast, while the harm to Ohio would be severe if challengers are locked out, allowing challengers in will not truly harm Plaintiffs, for several reasons. Their claims of harm are purely speculative, but even if the worst happens, and many voters are questioned, all legally registered voters will pass the test and cast a vote. Even if the bipartisan group of precinct judges—led in almost all cases by a Democrat, who is also likely to be of the same race as the challenged voter—rules against a voter, that voter will still get to cast a provisional ballot. The purported inconvenience of verifying one's residence or age is not an irreparable harm.

Finally, not only do the facts and the equities weigh against Plaintiffs, but so, too, do the laws that they invoke, as Plaintiffs offer no legal theory on which they could likely succeed on the merits. Plaintiffs offer an ill-defined theory that race-based challenges are illegal, but they do not satisfy the elements of any recognized claim, whether under the Voting Rights Act or the First, Fourteenth, or Fifteenth Amendments. Whether Plaintiffs' claim is viewed as a facial attack on the statute, or as an "as-applied" attack against the private challengers' use of the statute, they do not satisfy the elements, even through the "likelihood of success" prism, of any potential cause of action. The statute satisfies the Voting Rights Act and all constitutional rules, and the private challengers' actions do not violate those laws either.

In sum, while Plaintiffs may spin a scary story this Halloween, they fail to back it up with proof, and they fail to attach their story to the law. The Court should deny their requests, and allow Ohio to hold a free and fair election, open to all to see, without putting a thumb on the scale or opening the door to fraud.

### STATEMENT OF THE FACTS

**A. The challenger statute neutrally allows for private parties, including partisans, issue supporters or opponents, and any other voters, to initiate a challenge based solely on citizenship, residency, or age.**

Ohio's election law permits challengers to be present at the polling place. Ohio Rev. Code §§3505.21, 3506.13. Under Ohio Rev. Code §3505.21, challengers may be appointed in advance in any of three ways. First, a political party may appoint a challenger by filing with the local board of elections a "Notice of Appointment,"<sup>1</sup> signed by both the party's central committee chair and secretary. Second, a notice of appointment may be filed by a group of at least five candidates. Third, a committee supporting or opposing a ballot issue may create a committee to appoint challengers, and that committee may file a notice of appointment. Apart

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<sup>1</sup> All the forms prescribed by the Ohio Secretary of State were attached as Exhibit A to the Complaint.

from these appointed challengers, Ohio law also allows any voter who is at lawfully at the polling place to challenge another would-be voter. Further, any judge or clerk of elections may raise a challenge.

Regardless of whether a challenger is a partisan, another voter in line, or a pollworker, the challenger may raise the challenge based only on one of four grounds: (1) that the elector is not a U.S. citizen; (2) that the elector has not resided within the state for thirty days immediately before the election; (3) that the elector is not a resident of the county or precinct; or (4) that the elector is not of legal voting age. Ohio Rev. Code §3505.20. Once the private challenger raises the challenge, her role is done, as the precinct judges then administer and resolve the challenge.

**B. Challenges are administered by precinct judges, and in the precincts at issue, the presiding precinct judges are virtually all African-American Democrats.**

Once a challenge is raised, the precinct judges follow a statutory script, asking questions (detailed in Part C below) to determine whether the challenge has merit. One of these judges serves as the “presiding judge,” and the presiding judge questions the voter after a challenger initiates a challenge. Each precinct has four precinct judges, appointed by the county board of elections, with not more than half from one political party. The presiding judge must be from the “dominant political party.” Ohio Rev. Code § 3501.22(A). In Ohio, the “dominant political party” is the party that polled more votes *in that precinct* for the candidate for governor in the last governor’s race. Ohio Rev. Code § 3501.01(G). Therefore, the political party affiliation of the presiding judge will vary from precinct to precinct. Of the 373 precincts in Cincinnati, for example, the Democratic party candidate won 183 precincts in the last gubernatorial election, and the Republican won 189, with one tie. See John Williams testimony, and accompanying election results.

In the precincts at issue, the presiding judge will always, or almost always, be a Democrat, and in many or most cases, that presiding judge will also be African-American. The judge will be a Democrat because, as the evidence showed, the Republicans have chosen to post challengers in heavily-Democratic districts. See Michael Barrett Ex. 1 (spreadsheet reflecting voting patterns and placement of challengers). Therefore, the presiding judges in many of the precincts that the Plaintiffs appear most worried about will be Democrats. Further, that Democratic presiding judge is, by chance, likely to be an African-American, to the extent that Plaintiffs' claims focus on precincts that are largely African-American. For example, Plaintiff Marian Spencer testified that her precinct has had virtually 100% African-American pollworkers (and voters) for at least twenty years.

This fact is notable, for Plaintiffs' theory in the Complaint and original Motion relied heavily on the now-discarded notion that African-American voters will be intimidated by questioning from a Republican judge. See Complaint ¶¶ 13, 17, 18 (all mistakenly alleging that presiding judge is Republican), and ¶ 20 (attacking "partisan cross-examination," but examination is by presiding judge, so allegation assumes presiding judge is Republican and that challenged voter is statistically likely to be a Democrat); Motion by Plaintiffs for TRO and Preliminary Injunction ("TRO Mo.") at 3. While even that notion was factually questionable, the allegations are even weaker in light of the correction of Plaintiffs' initially-mistaken view of how Ohio's system works.

Moreover, the evidence showed that in about 40 precincts, the Republicans did not even put forth rank-and-file Republicans to serve as two of the four precinct judges; instead, the Republicans supplied the Board of Elections with Democrats or independents serving as "Republicans for a day" to fill the third and fourth slots. See Williams Testimony. So the voter

who is “put on the spot” is not facing the purportedly hostile questioners that Plaintiffs supposed, but is instead facing a bureaucratic clarification of, say, age or residence, from a friendly face.

Further, the precinct judges, led by the presiding judge, have broad powers to maintain order at the polling place. Ohio Rev. Code §3501.33. Any judge has the power eject from the polling place any challenger who attempts to obstruct, interfere or intimidate electors. *Id.* Any judge may call upon law enforcement officers to assist the judge in enforcing the law. *Id.* Thus, it is the precinct officials who are in control, and any improperly-acting challenger can be quickly brought to heel or ejected. Thus, Plaintiffs’ image of domineering challengers, wielding statutes to scare off voters, does not match Ohio law or reality.

**C. Challenges proceed with questions controlled by statute, and are resolved by a vote of the precinct judges, based on the neutral statutory criteria; and all voters are entitled to at least a provisional ballot under the federal HAVA law.**

In proceeding to the questioning, the presiding judge and the other judges follow a straightforward statutory script. The statute details the questions to be asked, depending on whether the challenge is based on U.S. citizenship, residency in Ohio, residency in the precinct, or age.

If the challenge is based on the voter’s citizenship, the presiding judge asks the following, as required by Ohio Rev. Code §3505.20(A):

- (1) Are you a citizen of the United States?
- (2) Are you a native or naturalized citizen?
- (3) Where were you born?

The judge then proceeds based upon the challenged voter's answers. For example, if the person says she is a naturalized citizen, the judge asks follow-up questions regarding proof of naturalization.<sup>2</sup>

If the challenge asks whether the person has resided in the state for at least thirty days before the election, Ohio Rev. Code §3505.20(B) requires the judge to ask these questions:

- (1) Have you resided in this state for thirty days immediately preceding this election? If so, where have you resided? Name two persons who know of your place of residence.
- (2) Have you been absent from this state within the thirty days immediately preceding this election? If yes, then the following questions:
  - (a) Have you continuously resided outside this state for a period of four years or more?
  - (b) Did you, while absent, look upon and regard this state as your home?
  - (c) Did you, while absent, vote in any other state?

If a person is challenged on the grounds of not being a resident of the county or precinct in question, Ohio Rev. Code §3505.20(C) instructs judges to inquire accordingly:

- (1) Do you now reside in this county?
- (2) Do you now reside in this precinct?
- (3) When you came into this precinct, did you come for a temporary purpose merely or for the purpose of making it your home?

And if a person is challenged on whether he is old enough to vote, Ohio Rev. Code §3505.20(D) directs the judge to simply ask about that:

“Are you eighteen years of age or more to the best of your knowledge and belief?”

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<sup>2</sup> Specifically, if the person offering to vote claims to be a naturalized citizen of the United States, the person shall, before the vote is received, either produce for inspection of the judges a certificate of naturalization and declare under oath that the person is the identical person named therein, or state under oath when and where the person was naturalized, that the person has had a certificate of the person's naturalization, and that it is lost, destroyed, or beyond the person's power to produce to the judges. If the person states under oath that, by reason of the naturalization of the person's parents or one of them, the person has become a citizen of the United States, and when or where the person's parents were naturalized, the certificate of naturalization need not be produced.

Thus, all of the basic questions are set out by statute, and relate, of course, to legitimate requirements for voting, as no one has a right to vote if she is too young, or is an alien, or does not live in the precinct.

The statute further allows a judge to ask other such questions as needed to determine the person's qualifications to vote at that election. If a person is disqualified "because he does not now live in the county or precinct, the presiding judge shall inform the person of the person's right to vote in the person's proper county or precinct of residence and instruct the person to contact the appropriate board of elections for information concerning the location of the person's voting precinct." Ohio Rev. Code §3505.20(D).

Based on the answers to these questions, the four judges then vote on whether the person is entitled to receive a ballot and cast a vote under Ohio law. Notably, whatever the legal effect of the precinct judges' vote under Ohio's law in the past, the new federal Help America Vote Act (HAVA) changes the equation. Under HAVA, any person who affirms that she is a legal voter in that precinct is entitled to receive and cast a "provisional ballot." Such a ballot is then counted if elections officials can later confirm the voter's legitimate status; the provisional ballot goes uncounted only if it turns out that the person was *not* entitled to vote (or not entitled to vote at that precinct). See Secretary of State Directive 2004-48, Oct. 29, 2004, attached as Ex. 3.

**D. The Republican challenges at issue are explained by partisan motives, and the charge of racial discrimination remains purely speculative.**

While Plaintiffs allege that the Hamilton County Republican Party will try to use the challenger process in a discriminatory manner, the evidence at the hearing did not back up that claim, and in fact, it showed that partisan motives, not racial ones, drove the decisions regarding the deployment of challengers.

As a simple spreadsheet showed at the hearing, the Republicans apparently chose to send challengers to all precincts that 2000 Democratic presidential candidate Al Gore carried with 60% or more of the vote. See Barrett Ex. 1. That is not surprising, of course, as any party would likely want to focus challenger efforts on the other side's turf, not in their own strongest precincts. Nor is there anything wrong with such naked partisan maneuvering, as the whole idea of the statutory scheme is that both sides (or all parties, or candidates' committees, or even issue committees) can keep an eye of their opponents. Of course, because of the reality of today's politics, in which African-American voters choose mostly Democratic candidates, any plan targeting Democratic areas will include primarily-black precincts disproportionately, while including mixed or mostly-white districts as well. The evidence on this score is undeniable as a matter of math: all precincts with a 60%-or-over Gore vote were on the Republican challenger list.

While Plaintiffs' witnesses raised the specter of race-based selection of districts, all of their witnesses admitted that they had no direct knowledge of such race-based targeting, and none refuted the mathematical evidence that explained the precinct-selection on a partisan, not racial basis. For example, Timothy Burke testified that Michael Barrett, Hamilton County Republican Party Chair, did not tell him what the GOP strategy was. Dr. Howard Tolley, Jr. testified about historical disenfranchisement of African-Americans generally, but could not point to any recent evidence in Cincinnati.

Plaintiffs also alleged that race would be used to target voters within a precinct, along with using race in picking precincts to begin with, but on that, too, they produced nothing more than speculation. First, of course, in precincts that are 80% or 90% African-American, the majority of challenged voters—whether two, twenty, or more are challenged—will be black

voters. Plaintiffs offered nothing to show that, for example, challenges in an 80%-black precinct would disproportionately amount to 90% or 95%. Nor did they show that challenges in 50%-black precincts would be more than 50%, etc.

The numbers, and racial ratio, of challenges within precincts will of course depend on what the challengers do on Tuesday, but Plaintiffs offered no proof of plans of a skew in Hamilton County, and indeed, admitted that history here suggests otherwise, with the only indications of racism coming from other times in other places. Plaintiffs specifically noted in the Complaint that Ohio's challenger law has not been used in a racially discriminatory manner before, as they allege that this year would mark "the first time in more than one hundred and thir[ty] years" that the law would be "used for a racially discriminatory purpose." Compl. ¶ 12. Instead, Plaintiffs' allegations center on the Jim Crow era, or on allegations from recent years in Georgia and New Jersey. Compl. ¶¶ 31-32.

Even outside the area of polling-site challengers, Plaintiffs admitted to facts concerning a lack of racial discrimination in Ohio's elections. For example, Dr. Tolley acknowledged that, as the Sixth Circuit found in *Mallory v. State of Ohio*, 173 F.3d 377 (6th Cir. 1999), there is no evidence of legally significant bloc voting, or racially polarized voting, in Ohio's eight largest counties. And the U.S. Supreme Court said the same of Ohio overall, in *Voinovich v. Quilter*, 507 U.S 146, 158 (1993).

In sum, the evidence showed that Ohio's voting, and now the challenger process, is driven by partisan motives, not racial considerations.

## **ARGUMENT**

The Court should not enjoin Ohio's challenger system, or enjoin the Hamilton County challengers at issue from participating in the system, for several reasons. First, an injunction

would threaten the legitimacy of Ohio’s election, both by permitting actual fraud to seep in and by creating a public perception that fraud might go uncorrected. Second, Plaintiffs have not shown how the challenger system will irreparably harm them, or those they represent, as the system cannot result in blocking legitimate voters, and the claims of intimidation are too vague and speculative to warrant relief. Third, Plaintiffs have not shown that they are likely to succeed on the merits of their claims, as they do not satisfy the elements of any legal claim under the Voting Rights Act or under any constitutional provision.

**A. Shutting down Ohio’s challenger system would threaten the legitimacy of Ohio’s election, as the challenger system serves the laudable purposes of preventing actual and of assuring the public that the election is fair.**

No one denies—or no one should deny—that a free and fair election turns equally upon allowing all validly registered voters into the ballot booth and upon keeping all would-be frauds out. That is, it cannot fairly be said that one or the other is a “worse evil.” Just as a vote is lost if a voter is wrongly denied the right to vote, so, too, is a valid vote “lost,” in effect, if it is cancelled out by a vote that was fraudulently cast. And on both sides of the scale, public perception is ultimately just as important. The key to our peaceful election process is that all citizens, especially those on the losing side, accept the results as legitimate. That acceptance is lost if the public learns that voters were wrongly disenfranchised, and that acceptance of legitimacy is equally lost if the public cannot be assured that the election was not tainted by fraud. Here, locking out the challengers would increase the danger of actual fraud and of public concern about the election’s legitimacy, so the equitable factors regarding harm to the State and to the general public weigh against an injunction.

Courts have long recognized the importance of the State’s interest in maintaining elections free of fraud. The Supreme Court, for example, has explained that States have an

interest in protecting the integrity, fairness, and efficiency of their ballots and election processes as means for electing public officials. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 364 (1997). The Court has also explained that this interest is legitimately met by the State's detailed regulation of the electoral process:

Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections; "as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes."

*Burdick v. Takushi*, 504 U.S. 428, 433 (1992), quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974). In particular, as noted above, the State must work as hard to keep fraud out as it does to open the process to legitimate votes. As one court explained it:

Professor Chemerinsky has it only half right, and perhaps not even that, when, in the aftermath of the controversy of the 2000 election, he wrote "What good is the right to vote if every ballot isn't counted?" Erwin Chemerinsky, *Fairness at the Ballot Box*, 40 Trial – April 23 (2004). A complete description of the state's interest in regulating elections should have included something like, "What good is the right to vote, even if every ballot is counted, if the votes of duly registered voters are diluted by the votes of the people who had no right to vote?"

*Colorado Common Cause v. Davidson*, unreported, Colorado Dist. Court Case No. 04CV7709 (October 18, 2004), attached as Ex. 4.

The Sixth Circuit has also affirmed, in cases just months ago and just days ago, that Ohio has a legitimate need to follow its rules for an orderly election, in order to ensure that voters are entitled to vote and are in the right place. See *Bell v. Marinko*, 367 F.3d 588 (6th Cir. 2004); *Sandusky County Democratic Party v. Blackwell*, -- F.3d --, No. 04a0367p.06 (6th Cir. Oct. 26, 2004). In *Bell*, the Court upheld the validity of Ohio's statutory scheme for challenging voters pre-election, and the Court explained that if it did not uphold Ohio's law, it "would effectively grant, and then protect, the franchise of persons *not* eligible to vote." *Bell*, 367 F.3d at 592.

(emphasis added). And in *Sandusky*, the Court upheld the requirement that voters must vote in the correct precinct. Notably, the “correct precinct” question is one of the grounds that challengers may raise, so *Sandusky* speaks directly to the concerns in this case.

Thus, Ohio and her citizens have a strong interest in keeping the challenger system in place, including in Hamilton County, to guard against fraud, especially in light of the allegations of fraud that have already arisen in this election year. See Toledo Blade, 10-19-04, *Voter fraud case traced to Defiance County registrations volunteer: 124 registrations falsified, allegedly for crack cocaine*, website above at 1, and attached as Ex. 1 (noting that man hired by NAACP National Voter Fund submitted registrations for Mary Poppins, Dick Tracy, Michael Jordan, and George Foreman; a woman connected to him said that she paid him crack cocaine for the registrations); Cleveland Plain Dealer, 10-31-04, *Voters double-dip in Ohio, Fla.: More than 27,000 are registered in both states, could cast ballots in either place*, available at [www.cleveland.com/election/plaindealer/index.ssf?/base/cuyahoga/1099218812191381.xml](http://www.cleveland.com/election/plaindealer/index.ssf?/base/cuyahoga/1099218812191381.xml) and attached as Ex. 5. These incidents take on greater importance in light of the widely-known concern that Ohio could be the “Florida of 2004.” That is, we all know that Ohio could tip the presidential election, and that just a few votes could tip Ohio. That makes the danger of fraud greater than ever. If one assumes that 95%, or even 99%, of citizens are honest, that may still leave room for the bad apples to carry the day—thus Ohio’s situation surely creates motive. And if one further assumes, for argument’s sake, that those bad apples are evenly distributed across the partisan divide, and are evenly distributed by every demographic measure, the critical question becomes opportunity.

Nothing would create the opportunity for fraud more than ordering challengers out of the precincts that might be heavily dominated by one side, and that could be equally true regardless

of which party dominated a precinct. That is, Ohio stresses that we are not in any way casting aspersions on some voters or groups, but are merely acknowledging that human nature weakens when the motive is strong and no one is watching, and that could be the situation here with a one-sided lockout order. Nor would the problem be cured by locking out both sides, or all challengers, as the idea behind the challenger system is that each side watches the other, so allowing either side to go unchallenged in some or all precincts would be problematic. Of course, the pollworkers can watch for fraud on their own, but Tuesday will be a hectic and harried day for them as it is, and challengers have a proper role to play in not only raising legitimate questions, if warranted, but also in acting as a deterrent—to fraud, not to legitimate voting—merely by their public presence. A challenger who merely witnesses all day, and raises no challenges, is still important. That is especially true in those precincts in which no truly Republican pollworker exists, but instead, a Democrat or independent serves as “Republican for a day” to satisfy the statutory goal of balance. See Williams Testimony.

Equally important, an order against challengers here would not only allow for actual fraud, but it would contribute to a public perception that fraud infected our election in Ohio. The factors laid out above, regarding motive and opportunity for actual fraud, are well-known to the general public, so it would not take a great leap for many to conclude that something might be amiss in the precincts where partisan watchdogs were expressly precluded. That public concern may be magnified in light of this Court’s earlier order in *Miller*, which stopped the pre-election challenge processes in Ohio’s counties. The State does not mean to re-litigate *Miller* here, but it is legitimate to consider the combined effect of that case with this one in considering relief here. Without a pre-election process, an election-day challenge is the sole remaining barrier to fraud,

and knocking it down would truly leave Ohio on the honor system. For the public to have such worries, and to connect them to judicial oversight of our elections, would be devastating.

To all this, Plaintiffs do not even acknowledge the State's legitimate concerns, let alone explain them away, or explain any alternative way to ferret out fraud. Indeed, one useful way to approach this case is this: instead of asking how much fraud is out there, assume that one person intends ill, and ask how the system would catch him. With no challenges before the election, and no challengers on site, and pollworkers busy keeping up with the crowd, the coast is likely clear for the cheater.

For these reasons, the Court should not enjoin Ohio's challenger system, or anyone's use of that system, as to do so would drastically harm our electoral process and our faith in it.

**B. Plaintiffs have not shown how they will be harmed by the challenger law or by the use of the process this Tuesday, as legitimate voters will not disenfranchised, and the claims of intimidation are purely speculative.**

In contrast to the drastic harm that would befall our election if the challenger system is enjoined, Plaintiffs have not shown any irreparable harm that will suffer if the challengers are allowed at the polls. Claims of actual disenfranchisement ring hollow, for the challenger process by its nature can lead to rejection of a would-be voter only if that voter does not satisfy age or residency requirements. Claims of harm suffered by virtue of the "intimidating" questioning, or of delays at the polls, are also speculative, and at worst are a matter of inconvenience, not disenfranchisement. Finally, claims that voters will stay home, for fear of challengers, are not substantiated, and in any case, are not enough to outweigh the harm caused by locking out the challengers.

First, no actual disenfranchisement can be caused by the challengers, because the judges decide such challenges by neutral criteria of citizenship, residency, and age. If the person

challenged meets the criteria, the judges will see that and the person will proceed to vote. If the judges determine collectively that someone is not a qualified elector, and it turns out that the person is indeed unqualified, then that challenger-triggered “catch” is a good thing, not a bad thing. And even if the judges determine that the person is not qualified to vote, she is still entitled, under HAVA, to a provisional ballot, as long as she is willing to affirm her eligibility to vote (even though the judges disbelieve her). So not one valid voter will be blocked.

Second, Plaintiffs’ complaints about the “intimidating” process, or the delays caused thereby, are unfounded. As noted in the Facts above (at 4-6), Plaintiffs originally spun a story of overbearing “Republican judges,” until they realized that they had the facts wrong, and that the presiding judges would always be Democrats, and would often be of the same race as most voters in the precinct as well. So their claims are exaggerated, to say the least. The mild questioning, to confirm age or residency, is not overly burdensome or intrusive. Concerns about delays and long lines are also not enough to merit relief. A huge voter turnout will by itself cause delay and long lines. Many voters may be delayed on Election Day, regardless of the cause, and it does not amount to a constitutional injury. And if challengers do cause problems, whether by intimidation or by delay, the precinct judges are empowered to keep order, by expelling the challengers if needed. Thus, this Court need not pre-emptively expel them all now.

Plaintiffs also miss the mark in complaining that intimidation occurs if a voter might be required to sign a statement affirming his qualifications, when such a statement is accompanied by warnings that election falsification is a felony. Such warnings are properly designed to deter fraud, and they appear on many forms signed by qualified electors. For example, that warning appears on the voter registration application, and it also appears on the petitions circulated by

candidates for office as well as petitions for issues. The warning is a deterrent to the prospective wrongdoer, not to the validly registered voter.

Finally, Plaintiffs offered no concrete proof that voters will be so afraid of potential challengers that they will stay home. Rep. Yates, for example, testified that he based his concern for this problem on what he heard on talk radio. While a truly vote-suppressive effect would be cause for concern, mere speculation is not enough to show a likelihood of irreparable harm—especially when measured against the flood of *actual incidents* of voter fraud that have already occurred.

In short, not only would an injunction harm the State, but on the other side of the scale, Plaintiffs do not face a harm concrete enough to warrant an injunction in their favor.

**C. Plaintiffs have not shown a likelihood of success on the merits of their claims, as Ohio’s challenger statute is a race-neutral valid law, and their generic claims of racially discriminatory challenges do not establish a claim under the Voting Rights Act or under any constitutional provision.**

Finally, Plaintiffs’ requests for relief should be denied not only because the equities weigh so strongly against them, but because they do not establish a likelihood of success on the merits of their claims. Plaintiffs’ core theory is that the Hamilton County Republican challengers will, in their view, use the challenger statute in a racially discriminatory manner, and Plaintiffs claim that such usage makes either the challengers’ actions and/or the statute illegal. While Plaintiffs are consistent in that theme, they have been much less clear in specifying what legal theory they are actually pursuing. They have sent mixed signals on whether their claim is against the statute or against these challengers’ use of it, and their Motion gave little detail on exactly what recognized theory of the Voting Rights Act they are pursuing, or of what constitutional claim they advance. However their claim is viewed, though, Plaintiffs fail to show a likelihood of success, as the challenger statute is a valid, race-neutral law, and they fail to

satisfy the elements of any cognizable claim, whether against the Ohio law or against these challengers' alleged actions.

**1. Ohio's challenger statute is a race-neutral law that serves a vital role in the electoral process.**

Ohio's law holds up against any attack, statutory or constitutional, because it is a perfectly valid regulation of our electoral process, and it has no racial component to it. The statute allows challengers to invoke any of several concerns, such as age, residency, or citizenship; a challenger may not use race as the basis for a challenge. Ohio Rev. Code §3505.20. The statute also limits the precinct judges' consideration of the challenge to those same legitimate factors.

Ohio's challenger statute is a common-sense regulation, and that is probably why almost every State in the Nation (all except Oklahoma) has a similar law allowing election-day challenges at the polls. The States' laws vary in some details, but all share the common thread of allowing same-day challenges. Depending on the State, the challenger may be an election official, or a person assigned by a political party to monitor a polling site, or even another voter. See, e.g., Ky. Rev. Stat. Ann. §117.316 (challenger can be chosen by party) and Neb. Rev. Stat. §32-926 (poll clerk or any registered voter). The State also vary on whether the challenged voter may be required to provide answers to oral questioning, an affidavit, an oral oath, or some other form of response. See, e.g., Mich. Comp. Laws §168.729 (oath) and Ind. Code §3-11-8-22 (affidavit); see also 26 Am. Jur.2d Elections §329 (listing common state rules regarding challenges to voter eligibility), and see State laws listed in the margin.<sup>3</sup>

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<sup>3</sup> Ala. Code §17-10A-2; Alaska Stat. §15.15.210; Ariz. Rev. Stat. §16-590; Ark. Code Ann. §7-5-312; Cal. Election Code §14240; Colo. Rev. Stat. §1-9-201; Conn. Gen Stat. §9-232; Del. Code Ann. 15 §4934; Fla. Stat. Ann. §101.111; Ga. Code Ann. §21-2-230; Haw. Rev. Stat. §11-25; Idaho Code §34-304; Ill. Comp. Stat. 10 §5/17-9; Ind. Code §3-11-8-22; Iowa Code §49.79;

The widespread enactment of such laws shows that the States find the challenger system to be a valuable part of the electoral system. Thus it is not surprising that we have found no cases striking down such a system, under any theory, while such a law has been upheld when attacked. *Vargas v. Calabrese*, 634 F. Supp. 910 (D.N.J. 1986). It is also not surprising that the United States government—specifically, the Civil Rights Division of the Department of Justice—does not object to such challenger laws. See Letter Brief of Dept. of Justice, submitted to Court 10-29-04.

Thus, as detailed below, the Ohio law withstands any challenge, under any theory.

**2. Plaintiffs are not likely to succeed on a Voting Rights Act claim against the challenger statute on its face, as it is a valid, race-neutral law, and plaintiffs have not shown the elements of any type of Voting Rights claim.**

Plaintiffs purport to raise a claim under the Voting Rights Act (VRA), but they do not satisfy any of the tests that courts use to determine when the VRA has been violated. The gravamen of a typical VRA claim is that a State law is illegal, whether that law establishes a voting mechanism, or a particular apportionment of legislative districts, etc. In such cases, a court examines how the challenged law interacts with the facts, to see whether “a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives.” *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986). But the electoral practice is

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Kan. Stat. Ann. §25-414; Ky. Rev. Stat. Ann. §117.316; La. Rev. Stat. Ann. §18:565; Me. Rev. Stat. Ann. 21 §673; Md. Code Ann., Election Law §10-311; Mass. Gen. Laws ch. 54 §85; Mich. Comp. Laws §168.727; Minn. Stat. §204C.07; Miss. Code Ann. §23-15-571; Mo. Rev. Stat. §115.409; Mont. Code Ann. §13-13-301; Neb. Rev. Stat. §32-926; Nev. Rev. Stat. §293.303; N.J. Stat. Ann. §19:15.18; N.M. Stat. Ann. §1-12-20; N.Y. Election Law §8-502; N.C. Gen. Stat. §163-87; N.D. Cent. Code §16.1-05-06; Or. Rev. Stat. §254.413; Pa. Stat. Ann. 25 §3050; R.I. Gen. Laws §17-19-22; S.C. Code Ann. §7-13-830; S.D. Codified Laws §12-18-6.3; Tenn. Code Ann. §2-7-123; Tex. Elect. Code Ann. §63.010; Utah Code Ann. §20A-3-202; Va. Code Ann. §24.2-651; Vt. Stat. Ann. 17 §2564; Wash. Rev. Code §29.10.125; W. Va. Code Ann. §3-1-41; Wis. Stat. Ann. §6.92; Wyo. Stat. Ann. §22-15-101.

then upheld or struck facially, not just in certain circumstances. Plaintiffs cannot prevail because they cannot show that the challenger law is facially invalid, and because they do not satisfy the elements of a usual Section 2 claim.

First, Plaintiffs cannot show, or show that there are likely to succeed in showing, that Ohio's or Hamilton County's black voters are unable, or less able than white voters, to elect candidates of their choice, let alone that they are unable to do so as a result of the challenger law. See 42 U.S.C. §1973(b). Indeed, Plaintiffs admit that, in their view, the law was perfectly benign as to race for over a century, as this is, they say, "the first time in more than one hundred and thir[ty] years" that the law would be "used for a racially discriminatory purpose." Compl. ¶ 12. Further, they admit that not only is there no evidence of such discrimination in Ohio's elections, but also, that courts have repeatedly found that black voters can and do elect candidates of their choice, and that Ohio does not suffer from racially polarized bloc voting. *Mallory v. Ohio*, 38 F. Supp. 2d 525 (S.D. Ohio 1997), *aff'd* 173 F.3d 377 (6th Cir. 1999); *Voinovich v. Quilter*, 507 U.S. 142 (1993). Dr. Tolley frankly acknowledged the truth of the *Mallory* findings.

Unable to show a typical Section 2 claim, Plaintiffs would also be unsuccessful if they tried to portray the challenger system as an illegal "test or device" under 42 U.S.C. §1973a(b). The VRA elsewhere defines "test or device," and none of the descriptions fit here. See ¶1973b(c) (defining "test or device" to include literacy tests, knowledge tests, moral character tests, or requirements that another voter vouch for the challenged voter). Thus, Plaintiffs have failed to establish a viable VRA claim against the statute itself.

At most, Plaintiffs claim that the challenge procedure is problematic because these challengers might misuse it. While that claim also fails, as shown below, it should be plain that such an attack does not invalidate the statute itself.

**3. Plaintiffs are not likely to succeed on a Voting Rights claim against these challengers' use of Ohio law.**

Plaintiffs, unable to establish a VRA claim against the challenger statute on its face, primarily argue that the Hamilton County Republican challengers' actions under the statute are the problem—but this approach is also unlikely to succeed under the VRA.

First, the section cited by Plaintiffs, 42 U.S.C. §1973, does not apply to private parties. Subsection 1973(a) says plainly that “No voting qualification ... or procedure shall be imposed or applied by any State or political subdivision” if it would result in racial discrimination in voting. The Hamilton County Republicans are not the State.

Second, Plaintiffs' claims of private-party intimidation are specifically covered by another VRA provision, 42 U.S.C. §1971, but that provision does not allow a private cause of action. Section 1971's substantive provision is a better fit for Plaintiffs' claims than Section 1973, as Section 1971 specifically extends to private parties: “No person shall, whether acting under color of law or otherwise, shall intimidate, threaten, coerce, or attempt to intimidate, threaten, or coerce any other person for the purpose of interfering with the right of such other person to vote ... .” But unfortunately for Plaintiffs, this section does not support a private cause of action. See 42 U.S.C. § 1971(c) (attorney general may institute civil action to remedy voting rights act violation); *Willing v. Lake Orion Community Schools Bd. of Trustees*, 924 F.Supp. 815, 820 (E.D. Mich. 1996).

Thus, Plaintiffs have no likelihood of success in establishing a VRA claim regarding these challengers' use of the challenger statute.

**4. Plaintiffs are not likely to succeed on any constitutional claim against the challenger statute on its face.**

Just as Plaintiffs cannot show that they are likely to succeed on a VRA-based attack on the face of the statute, they are equally unable to show that they could succeed on a constitutional attack against the statute itself, whether under the First Amendment, Fourteenth Amendment, or Fifteenth Amendment.

First, Ohio's challenger law does not violate either the Fourteenth or Fifteenth Amendments, because the law is not intended to discriminate on the basis of race. The Supreme Court has made clear that plaintiffs bringing voting rights claims under these amendments must show intentional discrimination. See, e.g., *Reno v. Bossier Parish*, 520 U.S. 471, 481 (1996) ("Since 1980, a plaintiff bringing a constitutional vote dilution challenge, whether under the Fourteenth or Fifteenth Amendment, has been required to establish that the state or political subdivision acted with a discriminatory purpose."); see also *Mobile v. Bolden*, 466 U.S. 55, 62 (1980) (plurality opinion) ("Our decisions . . . have made clear that action by a State that is racially neutral on its face violates the Fifteenth Amendment only if motivated by a discriminatory purpose."). Facially, nothing in the Ohio statute discriminates on the basis of race. Moreover, the plaintiffs fail to support their claim that a discriminatory intent motivated Ohio's election laws. While they argue that his law is a successor statute to a Jim Crow-era law, they offer no evidence of its amendments and re-enactments over the year, other than to give the law a clean bill of health for the last 130 years, Compl. ¶ 12, so Ohio surely has not had any discriminatory animus in retaining and updating the law.

Second, Plaintiffs cannot show that they are likely to succeed on a First Amendment claim, as that Amendment provides no protection for race-based voting claims. In *Hadnott v. Amos*, the Supreme Court described the difference between First Amendment voting rights and

those based on race discrimination. 394 U.S. 358 (1969). “Fifteenth Amendment rights ... guarantee the right of people regardless of their race, color, or previous condition of servitude to cast their votes effectively,” while “First Amendment rights [] include the right to band together for the advancement of political beliefs.” *Id.* at 364. The First Amendment, then, does not protect the right to vote based on race, but on shared political beliefs. See *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 357 (1997) (“The First Amendment protects the right of citizens to associate and to form *political* parties for the advancement of common *political* goals and ideas.”) (emphasis added); *Norman v. Reed*, 502 U.S. 279, 288 (1992) (“The [First Amendment] advances the constitutional interest of like-*minded* voters to gather in pursuit of common political ends, thus enlarging the opportunities of all voters to express their own *political* preferences.”) (emphasis added). Here, Plaintiffs’ challenge centers on race discrimination, not shared political beliefs—so this alone dooms their First Amendment claim.

Alternatively, if Plaintiffs’ claim against the challenger statue is considered as a “regular” First Amendment challenge, not as some attempted hybrid race-based First Amendment claim, it fails as well. Under *Timmons*, an electoral statute’s validity, as against a claim of First Amendment associational rights, requires a court to weigh the “character and magnitude” of the burden that the State law imposes on those rights against the interests that the state contends justify that burden, and consider the extent to which the State’s concerns make the burden necessary. *Timmons, supra*, 351 U.S. at 358; citing *Burdick v. Takushi*, 504 U.S. 428, 434 (1992); *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983). Regulations imposing “severe” burdens on a plaintiff’s rights must be narrowly tailored and advance a compelling state interest. Lesser burdens, however, trigger less exacting review, and a state’s important regulatory interest will usually be enough to justify reasonable, nondiscriminatory restrictions. *Burdick*, 504 U.S. at

434. Here, the minimal burden occasioned by the challenger law is easily justified by the State's concerns about fraud. Thus, Plaintiffs are not likely to succeed on that claim.

Finally, Plaintiff is wrong in claiming that the challenger law is impermissibly vague, in violation of the Fourteenth Amendment. As Plaintiffs admit, the vagueness doctrine restricts *criminal* laws, to ensure that the average person knows what is outlawed, and to prevent arbitrary enforcement by law enforcement and courts. But the vagueness doctrine does not apply to civil laws, such as the challenger statute. Thus, all of Plaintiffs' facial constitutional claims fail.

**5. Plaintiffs are not likely to succeed on any constitutional claim against these challengers' use of the statute, as the challengers are private actors, not state actors.**

Plaintiffs cannot succeed on any constitutional claim aimed at the Republicans' use of the challenge statute, for the simple reason that the Hamilton County Republicans are a private party, so none of the Constitution's strictures apply. Plaintiffs alleged that they would show that the challengers are state actors, but the proof never arrived.

Moreover, any expansion of the state action doctrine to cover challengers would not only be wrong on the law, but it would also have drastic negative effects in several areas, including voter registration. Ohio, like most States, allows almost anyone to register new voters, and to send the forms in to elections officials. These "registrars" remain private, even as they sign up voters. But if challengers at the polls are state actors, merely because they invoke a governmental process, then so, too, are those who register voters. That means that in Plaintiffs' view, a group running a registration drive, such as the NAACP, could not focus its efforts on African-American voters, without risking a lawsuit over the "racially discriminatory" use of its "state" power. That is wrong, as such voter-registration volunteers should remain private, just as challengers should.

In sum, Plaintiffs provide no showing that they are likely to succeed on any constitutional claim that is based on the Hamilton County Republicans' acts. That leaves Plaintiffs with no other counts to raise, and no way to show likelihood of success on the merits.

### CONCLUSION

For the above reasons, the State of Ohio asks this Court to allow its election to proceed without further judicial intervention, and we especially ask the Court not to provide a free-fraud zone to those who would poison our democratic republic. Plaintiffs' requests for a temporary restraining order and/or for preliminary injunction should be denied.

Respectfully submitted,

Jim Petro  
Attorney General of Ohio



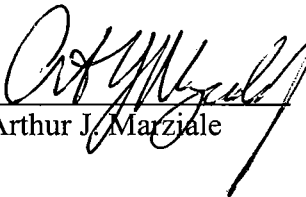
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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the Trial Brief And Memorandum Opposing Injunctive Relief Of Intervenor-Defendant State Of Ohio was sent by email, fax and regular mail this 31st day of October, 2004, to the following counsel for Plaintiffs:

  
Arthur J. Marziale