

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

**Marian A. Spencer and
Donald A. Spencer,**

Plaintiffs,

vs.

Case No. 04CV738

J. Kenneth Blackwell, et al.,

Judge Dlott

Defendants.

**DEFENDANT BLACKWELL'S MOTION TO DISMISS AND
MEMORANDUM CONTRA PLAINTIFFS' MOTION FOR A
TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

Defendant J. Kenneth Blackwell moves this Court for an order dismissing Plaintiff Lawrence's complaint pursuant to Fed. R. Civ. P. 12(b)(6). A memorandum in support is attached.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

The Plaintiffs have asked this Court to exercise its equity jurisdiction by ordering the Secretary of State and the Hamilton County Board of Elections to declare unconstitutional Ohio Rev. Code §§3505.20 and 3505.21 and eliminate any process by which a voter may be challenged on the grounds of citizenship, residency in the State of Ohio, residency in the precinct in which the individual is voting, or the individual's age.

The Plaintiffs lack standing to bring this claim. Additionally, Plaintiffs' claim is barred by laches. Further, the Plaintiffs have failed to allege or plead the necessary requirements for injunctive relief. Finally, Plaintiffs cannot satisfy the standards for receiving equitable relief. Therefore, the Plaintiffs' motion should be denied for having failed to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6).

II. FACTS

On October 27, 2004, Plaintiffs filed a complaint and sought injunctive relief alleging that Ohio Rev. Code §§3505.20 and 3505.21 are unconstitutional. Throughout the complaint, Plaintiffs speculate as to what might occur during a possible challenge that could be made by a challenger and conclude without any cognizable evidence that the challenge procedure will result in racial discrimination. Plaintiffs also assert that only one political party will engage in the challenge process without, once again, any evidence.

As set forth below, Plaintiffs' speculative claims should, at this late date, be dismissed.

III. LAW AND ARGUMENT

A. Introduction.

This case impacts a fundamental right of all Ohioans the right to vote. It is important that all citizens of Ohio have confidence that an election occur free of fraud and other irregularities so that they have confidence in the fairness and integrity of the outcome. In order to guarantee this confidence, the United States Supreme Court has held 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). It is these precise state-process interests that are at stake in the instant case. These interests are further heightened by the allegations of fraud that have arisen in conjunction with the upcoming election.

The Supreme Court has also recognized that the right to vote, unlike some other individual rights that are exercised in essential opposition to the State, is a right that has meaning only in a highly regulated social context. A vote is not merely one individual's casual expression of political opinion at any particular time on a particular subject. Votes *count*, and because they count they must be sought and given in a structure environment that allows the votes of all other proper voters to count. Thus, the Court has said this about the role the State must be permitted to play in regulating elections:

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).

Maximizing voters' access to the process is just one part of the compelling interest the State has in regulating the architecture of elections. Preventing voters from voting more than once, preventing otherwise ineligible voters from voting, and preventing other kinds of election fraud, is part and parcel of this same compelling state interest, as the *Burdick* Court expressly recognized when it included the words "fair and honest" at the very beginning of its litany of state interests in structuring elections.

Plaintiffs' complaint seeking a preliminary injunction should be dismissed because they lack standing. Additionally, Plaintiffs' claim is barred by the doctrine of laches. Further, even if this Court was to determine that the Plaintiffs do have standing and that laches does not bar relief, it is clear that Plaintiffs have failed to allege or plead the necessary requirements for injunctive relief. Therefore, Secretary of State Blackwell requests that this Court grant his motion to dismiss.

B. Overview of Challenge Process.

It is necessary at the outset to set forth how the challenge process works pursuant to state law. In Ohio, election law permits challengers to be present at the polling place. Ohio Rev. Code §§3505.21, 3506.13.

The process for appointing challengers is specified in R.C. §3505.21. Under that statute, challengers are appointed in one of three ways. First, a political party may appoint a challenger by filing with the board of elections a "Notice of Appointment."¹ This notice is signed by both the political party central committee chairman 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

¹ All the forms prescribed by the Ohio Secretary of State are attached as Exhibit A.

ballot issue may create a committee to appoint challengers. This committee then files the notice of appointment.

Ohio Rev. Code §3505.20 provides that the right of a person to vote on election day may be challenged by a challenger appointed pursuant to Ohio Rev. Code §3505.21, or by any elector then lawfully in the polling place, or by any judge or clerk of elections. A potential elector may be challenged on the grounds that the elector is not a citizen, or that the elector has not resided within the state for thirty days immediately prior to the election, or that the elector is not a resident of the county or precinct, or that the elector is not of legal voting age. Ohio Rev. Code §3505.20. For each of these circumstances, the Revised Code lists the questions to be asked by the judges of the precinct.

The “judges” referred to in the Revised Code are precinct officials appointed by a board of elections. There must be at least four in number with not more than half from one political party. One of these judges is selected as the “presiding judge.” The presiding judge must be from the “dominant political party.” 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. Therefore, the political party affiliation of the presiding judge will vary from precinct to precinct. The presiding judge performs a number of functions, some involving challenges.

The presiding judge shall put other such questions to the person challenged under respective heads designated by this section, as are necessary to test the person’s qualifications as an elector at the election....If a person disqualified under division (C) of this section because the person does not now reside 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.

The judges are also responsible for maintaining order in the polling place. The judges may order any challenger to leave if the judges determine that the challenger is engaging in “improper practices or attempts tending to obstruct, intimidate, or interfere with any elector...in voting.” Ohio Revised Code §3501.33.

To provide guidance and assistance, the Secretary of State, in conjunction with the Ohio Association of Elections Officials (“OAEO”), issued a memorandum to the county boards of election to give guidance and suggestions on how to handle the challenge procedures. See Memorandum, attached as Exhibit B. The memo discusses the applicable Ohio statutes and then, in a section titled “Policy and Procedures by the Ohio Association of Elections Officials,” makes additional suggestions as to how to handle a challenge. Because these are merely suggestions from the OAEO, local boards are free to establish their own procedures. Thus, contrary to Plaintiffs’ claims, there is no binding directive from the Secretary of State on this issue.

C. Standard of Review.

Federal Rule of Civil Procedure 12(b)(6) allows a district court to dismiss any complaint that fails “to state a claim upon which relief can be granted.” In applying this standard, a court must presume all factual allegations in the complaint as true and draw all reasonable inferences in favor of the non-moving party. *Mayer v. Mylod*, 988 F.2d 635, 638 (6th Cir. 1993). The court need not, however, accord the presumption of truthfulness to any legal conclusions, opinions or deductions, even if they are couched as factual allegations. *Sexton v. Barry*, 233 F.2d 220, 223 (6th Cir. 1956), *cert. denied*, 352 U.S. 870 (1956). Applying these well-settled standards to this case, the Court should dismiss Plaintiffs’ complaint because it fails to state a claim upon which the Court can grant relief.

D. The Plaintiffs Lack Standing to Sue.

In order for a federal court to exercise jurisdiction over a matter, the party seeking relief must have standing to sue. Standing has both constitutional and prudential dimensions. The constitutional requirements for standing emanate from U.S. Const. art. III, §2, which grants federal courts jurisdiction over cases and controversies. *Kardules v. City of Columbus*, 95 F.3d 1335, 1346 (6th Cir. 1996). Cases have established that the irreducible constitutional minimum of standing contains three elements:

First, the plaintiff must have suffered an “injury in fact” -- an invasion of a legally-protected interest which is (a) concrete and particularized, and (b) “actual or imminent, *not 'conjectural' or 'hypothetical.'*” Second, there must be a causal connection between the injury and the conduct complained of -- the injury has to be “fairly . . . traceable to the challenged action of the defendant, and not . . . the result [of] the independent action of some third party not before the court.” Third, it must be “likely,” as opposed to merely “speculative,” that the injury will be “redressed by a favorable decision.”

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (citations and footnote omitted, emphasis added).

Plaintiffs argue that Defendants’ practices with regard to Ohio Rev. Code §§3505.20 and 3505.21 are racially discriminative, and therefore, in violation of 42 U.S.C. §1973. However, Plaintiffs’ complaint is based on nothing but conjecture and apocalyptic hypothetical speculation of what might occur during the November 2, 2004 general election. Plaintiffs’ Complaint contains no allegations of actual harm suffered by any voters. Nor does Plaintiffs’ Complaint contain any concrete and particularized, actual or imminent injury of fact. And, Plaintiffs can point to no past history involving Ohio’s statutory scheme as the pretext for racial discrimination.

Plaintiffs admitted in the pretrial conference that both their Complaint and their Motion for a Temporary Restraining Order and Preliminary Injunction inaccurately state that the presiding judge in each precinct is a Republican. The implication is, of course, that the largely Democratic African American inner-city voters are more likely to be successfully challenged by Republican election officials. However, there is no basis for this “factual” allegation. Ohio’s scheme is balanced and also tailored to be bipartisan at all times.

Ohio Rev. Code §3501.22 states that “[t]he board shall designate one of the precinct election officials who is a member of the dominant political party to serve as a presiding judge.” As previously noted, “dominant party in a precinct” or “dominant political party in a precinct” is defined as “that political party whose candidate for election to the office of governor at the most recent regular state election at which a governor was elected received more votes than any other person received for election to that office *in such precinct* at such election.” Ohio Rev. Code §3501.01(G). (Emphasis added.) Of the 373 precincts in Cincinnati, the Democratic party candidate won 183 precincts, with one tie, in the last gubernatorial election. Therefore, the presiding judges in many of the precincts that the Plaintiffs appear most worried about will be Democrats.

Further evidence that the Plaintiffs’ Complaint is merely conjectural or hypothetical is the Plaintiffs’ failure to mention the powers of the judges at each precinct 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.* Plaintiffs’ complaint presupposes that challengers will be able to unabashedly harass and intimidate persons attempting to vote. This simply is not the case.

E. The Plaintiffs' Complaint For Injunctive Relief Is Barred By Laches.

Plaintiffs' seek injunctive relief and argue that Ohio Rev. Code §§3505.20 and 3505.21 are unconstitutional on their face. However, this claim is barred by the doctrine of laches.

The doctrine of laches arises when there has been an unwarranted delay that would work a hardship to another. *See Libertarian Party v. Davis*, 601 F. Supp. 522, 525 (E.D. Ky. 1985). The Sixth Circuit has reiterated the applicability of this doctrine in a recent Ohio elections case. "A state's interest in proceeding with an election increases as time passes, decisions are made, and money is spent." *Nader v. Blackwell*, 230 F.3d 833, 835 (6th Cir. 2000).² In that case, individuals seeking to place the Green Party on the November 2000 ballot gave the Secretary of State until August 17, 2000 to respond to a demand to place them on the ballot or face a lawsuit. The Secretary did not respond by the deadline. Nevertheless, the *Nader* Plaintiffs did not file suit until September 27, 2000, a delay of only 40 days. The appellate court granted a stay of the district court's decision, holding that, "... we find that the plaintiffs' own delay has led to the grant of this stay pending review on the merits." *Id.*³

The Sixth Circuit previously noted that courts balance the interest of the parties and require that any claims against a state procedure be pressed expeditiously.

As time passes, the state's interest in proceeding with the election increases in importance as resources are committed and irrevocable decisions are made and the candidate's claim to be a serious candidate who has received a serious injury becomes less credible by his having slept on his rights.

² In *Nader*, the Plaintiffs prevailed at the district court level and the Ohio Secretary of State was before the Sixth Circuit seeking a stay. The decision of the district court to place the Green Party on the ballot was ultimately reversed. *See Nader v. Blackwell*.

³ The Sixth Circuit also noted the difficulty the State would have in maintaining a uniform ballot and concluded that "...the disruption to Ohio's orderly election processes would likely be extensive." 230 F.3d at 834.

Kay v. Austin, 621 F.2d 809, 813 (6th Cir. 1980), citing *Williams v. Rhodes*, 393 U.S. 23, 34-35 (1968). The *Kay* holding remains viable and was cited by the Sixth Circuit in *Nader*, 230 F.3d at 835. The Plaintiffs have not satisfied this mandate.

As previously noted, Plaintiffs waited until October 27, 2004, less than a week before the general election, to file the complaint. Plaintiffs are asking this court to strike down statutes that have been the law in Ohio for at least fifty years, and only now, six days before the election, do Plaintiffs sue. Plaintiffs presume that, just because they have no memory of this procedure being used in Hamilton County, this is “For the first time in more than one hundred and third (sic) years being used....” Plaintiffs’ Complaint, ¶12. With 87 other counties and local or state elections every year, this factual assertion appears out of thin air. Just as in *Nader, supra*, the Plaintiffs’ own delay prevents them from receiving injunctive relief. Accordingly, Plaintiffs’ complaint should be dismissed.

F. Plaintiffs Are Not Entitled To Injunctive Relief And Accordingly, Their Complaint Should Be Dismissed.

Even if this Court were to determine that Plaintiffs are challenging the constitutionality of Ohio Rev. Code §§3505.20 and 3505.21 as they are applied in this case, Plaintiffs have failed to either demonstrate or articulate how they are entitled to injunctive relief and this Court should dismiss the complaint against Secretary of State Blackwell.

Before a court can grant a preliminary injunction, it must examine four separate factors: (1) whether the movant has a “strong” likelihood of success on the merits; (2) whether the movant would otherwise suffer irreparable injury; (3) whether issuance of a preliminary injunction would cause harm to others; and (4) whether the public interest would be served by

the issuance of a preliminary injunction.⁴ *McPherson v. Michigan High Sch. Athletic Ass'n*, 119 F.3d 453, 459 (6th Cir. 1997) (en banc). Furthermore, the standard for granting a preliminary injunction is more “stringent” than that required for summary judgment. *Leary v. Daeschner*, 228 F.3d 729, 739 (6th Cir. 2000). This is because “the preliminary injunction is an ‘extraordinary remedy involving the exercise of a very far-reaching power, which is to be applied ‘only in [the] limited circumstances’ which clearly demand it.” *Id. quoting Direx Israel, Ltd. v. Breakthrough Med. Corp.*, 952 F.2d 802, 811 (4th Cir. 1991) (internal quotations omitted). The Plaintiffs fail to articulate in their motion any legitimate basis upon which they are entitled to a court order directing the State of Ohio and the Hamilton County Board of Elections to ignore Ohio law and do away with an elections procedure designed to help ensure a fair and accurate election.

1. **Plaintiffs’ Complaint Should Be Dismissed Because They Have Failed To Show They Have A Strong Likelihood Of Success On The Merits Of Their Claims.**
 - a. **Plaintiffs’ complaint should be dismissed because Ohio’s statutory scheme imposes reasonable and nonburdensome regulations that help ensure the integrity of the election process.**

Ohio Rev. Code §3505.20 provides a very limited set of circumstances in which a person offering to vote may be challenged at the polling place. In fact, the statute provides only four limited grounds under which a person offering to vote may be challenged. Those grounds are: (1) challenging that the person is unqualified on the ground that the person is not a citizen; (2) challenging that the person is unqualified on the ground that the person has not resided in this

⁴ Secretary of State Blackwell expressly reserves the right during the preliminary injunction hearing and also in a separately filed motion to dismiss and/or motion for summary judgment to expand the scope of both his legal as well as factual arguments. Secretary of State Blackwell is simply filing this memorandum contra on an expedited basis to place on record some of his arguments, both factual and legal, as to why the Plaintiffs’ motion for emergency relief should be rejected.

state for thirty days immediately preceding the election; (3) challenging that the person is unqualified on the ground that the person is not a resident of the county or precinct where he offers to vote; and finally, (4) challenging that the person is unqualified on the ground that the person is not of legal voting age. Ohio Rev. Code §3505.20

When a person is challenged on one of the specific grounds listed above, the statute sets out the specific questions a presiding judge is required to ask the challenged person. When a person is challenged regarding citizenship, Ohio Rev. Code §3505.20(A) provides that the judges shall ask:

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

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.

If a person is challenged on the grounds of not residing in the state for at least thirty days prior to the election, Ohio Rev. Code §3505.20(B) states that the judges shall ask:

- (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) states that the judges shall ask:

- (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?

If a person is challenged on the grounds of not being of legal voting age, Ohio Rev. Code §3505.20(D) states that the judges shall ask:

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

Contrary to Plaintiffs’ insinuations, no person can be challenged on the grounds of race, or any other ground other than the four listed above. Also contrary to Plaintiffs’ assertions, the questions presented to a challenged individual are simple, direct, and by no means intimidating. The judges may ask additional questions as are necessary. However, nothing in Ohio law permits, nor would the State tolerate, any question based on race.

b. Plaintiffs’ complaint should be dismissed because Plaintiffs’ have failed to establish any violation of the voting rights act by the State of Ohio or any of its local boards of elections.

In order to remedy the historical disenfranchisement of certain minority groups, Congress passed the Voting Rights Act, 42 U.S.C. §1973. This Act prohibits any voting practice or procedure that results in “a denial or abridgement of the right of any citizen of the United States to vote on account of race or color....” 42 U.S.C. §1973(a). In order to show a violation of this Act, a minority group must demonstrate that as a result of the challenged practice or procedure:

[B]ased on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

42 U.S.C. §1973(b). The protections provided for by this Act, as well as the Equal Protection Clause and the Fifteenth Amendment, “are aimed only at ensuring equal political opportunity: that every person’s chance to form a majority is the same, regardless of race or ethnic origin.” *Nixon v. Kent County*, 76 F.3d 1381, 1392 (6th Cir. 1996) (*en banc*). The Plaintiffs have failed to allege or plead that Ohio’s voter challenger statutes actually interfere with a minority’s ability to elect representatives of his or her choice.

i. A Voting Rights Act Claim Must Demonstrate A Challenged Voting Practice Causes An Unequal Opportunity For African-Americans To Elect Their Preferred Representatives.

The central issue surrounding any §2 claim is that “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). The intent of the Voting Rights Act is “to combat electoral structures and procedures that deprive minority voters of an opportunity to participate effectively in the political process.” *Southwest Voter Registration Education Project v. Shelley*, 278 F. Supp. 2d 1131, 1142 (C.D. Cal.) *aff’d* 344 F.3d 914 (9th Cir. 2003) (*en banc*).

The Sixth Circuit has recognized that, although the Voting Rights Act is remedial legislation meant to correct historical discrimination, the 1982 Amendments to the Act were heavily contested in Congress and because the Act is a “significant intrusion into the rights of States,” “the words of the 1982 amendment were chosen with particular care and courts should

be cautious in construing them.” *Kent County*, 76 F.3d at 1390. Instead of stating a traditional Voting Rights Act claim, the Plaintiffs claim that the rights of minorities by creating a challenge procedure that might be used by some challenger as a pretext to deny an African-American elector the right to vote in the upcoming election. Plaintiffs make this claim without any evidence that the statutory procedure gives them “less opportunity to participate” in Hamilton County if this Court fails to issue an injunction. However, this allegation is based upon nothing but speculation, as Plaintiffs do not allege any personal knowledge that the any of the challenges will be racially motivated or based on racial animus.

Additionally, for a Plaintiff to argue that a statute is racially discriminatory and is unconstitutional because it violates the First, Fourteenth or Fifteenth Amendments, it must show that the statute contains a racially discriminatory purpose. *See, Washington v. Davis*, 426 U.S. 229 (U.S., 1976). Here the Ohio challenger provisions do not have a racially discriminatory purposes. Further, the statutes do not demonstrate any intent on the part of the State to discriminate against a person seeking to vote.

ii. Prior Voting Rights Act Litigation Against The State of Ohio Has Demonstrated That No Recent History Of Racial Discrimination Exists.

In the past, the State of Ohio has defended itself from §2 Voting Rights Act cases. One of those cases, *Mallory v. Ohio*, 38 F. Supp. 2d 525 (S.D. Ohio 1997) *aff'd* 173 F.3d 377 (6th Cir. 1999), demonstrates why the Plaintiffs in this case cannot prevail.

Mallory represented a class of plaintiffs who claimed that Ohio’s system of “at large” elections for judicial candidates diluted African-American voting strength in violation of §2 of the Voting Rights Act. In its opinion, the Sixth Circuit complemented the District Court’s

“carefully written, solidly reasoned, and extremely comprehensive opinion” and adopted it as its own. *Mallory*, 173 F.3d at 380.

The District Court noted that the *Mallory* Plaintiffs failed to allege any recent history of voting-related discrimination in Ohio and that plaintiffs’ expert in that case testified, “there was, in fact, no such recent history of voting-related discrimination.” *Mallory*, 38 F. Supp. 2d at 541. The District Court also noted that the State of Ohio prevailed in litigation over its 1990 redistricting plan, in part, because “the United States Supreme Court found no legally significant racial bloc voting in Ohio legislative elections and, therefore, no Voting Rights Act violation in the reapportionment of Ohio’s legislative districts...” *Id. citing Voinovich v. Quilter*, 507 U.S. 142 (1993). The City of Cincinnati did not violate the Voting Rights Act by electing its City Council members in at-large elections. *Id. citing Clarke v. City of Cincinnati*, 40 F.3d 807 (6th Cir. 1994) *cert. denied*, 514 U.S. 1109 (1995). And finally, the Ohio Supreme Court rejected a Voting Rights Act and Fifteenth Amendment claim to the at-large election of judges and county commissioners in Mahoning County. *Id. citing State, ex rel. Rogers v. Taft*, 64 Ohio St. 3d 193 (1992).

In the present case, the Plaintiffs, much like the plaintiffs in *Mallory*, have failed to allege a recent history of racial discrimination in elections. Of course, as demonstrated through *Mallory*, such a recent history does not exist in the State of Ohio. This court, like numerous others before it, should reject the notion that the State of Ohio has violated §2 of the Voting Rights Act in the manner in which it conducts elections.

iii. The Plaintiffs Cannot Show A Political Process Not Equally Open To African-Americans Preventing Them From Engaging In The Political Process Or Electing Representatives Of Their Own Choice.

As noted above, Section 2 of the Voting Rights Act requires a covered racial minority to demonstrate that the State has enacted a voting practice or procedure that results in a denial or abridgement of the right to vote because its members “have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.” The Plaintiffs have failed to prove such a situation exists in Ohio and, as a result, the Secretary of State is entitled to dismissal on the Plaintiffs’ Voting Rights Act claim. Similarly, although the Plaintiffs allege that African-American voters could possibly be intimidated into not voting, they have failed to demonstrate that African-American voters in Ohio have not been able to elect their chosen candidate or will not be able to elect their chosen candidate.

2. This Court Should Dismiss The Plaintiffs’ Complaint Because They Fail To Demonstrate They Will Suffer “Irreparable Injury.”

In this case, Plaintiffs can only offer speculation that they may be harmed if a challenger, as of yet unidentified, brings unwarranted challenges secretly based on race. While the claim is that any challenge will result in a chilling effect is overly broad on its face, the solution is equally unpalatable. Plaintiffs proposed solution to a problem that does not yet exist is to remove the ability to challenge the right of an unqualified elector to cast a ballot. At a minimum, Plaintiffs must be required to wait until a cognizable claim based on actual circumstances may be presented to the Court. Otherwise, not only do their claims remain speculative but so too do any allegations of harm.

3. This Court Should Dismiss The Plaintiffs' Complaint Because The Defendants Will Suffer Substantial Harm.

Based on the previous arguments, there is a significant probability that granting the requested relief will cause substantial harm to the State. Plaintiffs completely fail to balance the interest of the State in having a fair election that commands the confidence of the voters in the ultimate outcome.

This case is considered against the backdrop of allegations of frequent and serious of fraud in applications to vote. The processes set forth in Ohio Rev. Code §3505.20 serve to protect the integrity of the election and increases the confidence of voters that only **qualified** voters cast ballots. A precondition to being entitled to vote in Ohio is residency. If a person is not a resident of the specific precinct, that person cannot be considered a qualified elector. *Bell v. Marinko*, 235 F. Supp.2d 772, 776 (N.D. Ohio 2002), *aff'd.*, 367 F.3d 588 (6th Cir. 2004). It is inconceivable that such a challenge procedure will be prohibited based only on the speculation that some as-of-yet unidentified challenger might use a racially motivated pretext to challenge an African-American voter. Such a speculative rationale is doubly suspect because it presumes that the judges of the precinct will permit such challenges. There is absolutely nothing that Plaintiffs can factually present to support such a presumption.

As previously noted, the judges in any precinct may order a challenger to leave the precinct if that challenger is disrupting the polling place. Reasons set forth in the law include any “improper practices or attempts tending to obstruct, intimidate, or interfere with any elector...in voting.” Ohio Rev. Code §3501.33. The State is entitled to the presumption that its officials will enforce the law. Ohio law clearly does not list race as a basis for a challenge and prohibits attempts at challenges that are not reasonably based upon the statutory causes.

Therefore, prohibiting the use of the challenge procedure, which serves a valid purpose in preserving the integrity of the voting process, will cause substantial harm to the State.

4. The General Public Would Be Greatly Harmed By This Court Issuing An Injunction.

As noted, the provisions set forth in Ohio Rev. Code §3505.20 serve the important purpose of preventing election fraud by allowing challenges based on residency and citizenship. This provision creates an orderly process by which challenges based on these fundamental prerequisites can be made. Such a process is not prohibited by federal constitutional principles.

In *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997), the United States Supreme Court extensively discussed and reviewed a state's ability to regulate its election procedures. In that case, the New Party filed suit in federal court contending that Minnesota's "antifusion" laws violated its associational rights under the First and Fourteenth Amendments. In upholding Minnesota's law, the United States Supreme Court held that such a prohibition did not violate the First and Fourteenth Amendments. The Supreme Court noted that the First Amendment protects the right of citizens to associate and to form political parties for the advancement of common political goals and ideas. *Id.* at 357 (citations omitted). As a result, political parties' government, structure, and activities enjoy constitutional protection. *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 230 (1989).

The *Timmons* court also reiterated the test to be used when deciding whether a state election law violates First and Fourteenth Amendment associational rights. A court must weigh the "character and magnitude" of the burden the State's rule imposes on those rights against the interests 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.

In *Timmons*, the New Party claimed that it was entitled to have the nominee of its choice appear on the ballot as that party's candidate, even though its candidate had appeared on the ballot as the candidate of another party. However, the Supreme Court held that a party was not absolutely entitled to have its nominee appear on the ballot as that party's candidate, noting that such a holding did not severely burden the party's association rights. *Timmons*, 520 U.S. at 359; *see, also, Burdick*, 504 U.S. at 440, n.10.

The Court also examined the state's asserted regulatory interests, which it noted had only to be "sufficiently weighty to justify the limitation" imposed on the Party's rights. *Id.* at 364, citing *Norman v. Reed*, 502 U.S. 279, 288-289 (1992); *Burdick*, 504 U.S. at 434. *Timmons* also repeated the long-standing principle that states had an interest in protecting the integrity, fairness, and efficiency of their ballots and election processes as means for electing public officials. *Timmons*, 520 U.S. at 364. It is these precise state-process interests that are at stake in the instant case. These interests are further heightened by the allegations of fraud that have arisen in conjunction with the upcoming election.

The Supreme Court has also recognized that the right to vote, unlike some other individual rights that are exercised in essential opposition to the State, is a right that has meaning only in a highly regulated social context. A vote is not merely one individual's casual expression of political opinion at any particular time on a particular subject. Votes *count*, and

because they count they must be sought and given in a structure environment that allows the votes of all other proper voters to count. Thus, the Court has said this about the role the State must be permitted to play in regulating elections:

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).

Maximizing voters’ access to the process is just one part of the compelling interest the State has in regulating the architecture of elections. Preventing voters from voting more than once, preventing otherwise ineligible voters from voting, and preventing other kinds of election fraud, is part and parcel of this same compelling state interest, as the *Burdick* Court expressly recognized when it included the words “fair and honest” at the very beginning of its litany of state interests in structuring elections. Another court has noted that:

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 Exhibit C.

Courts must balance the needs and rights, and the fears, of voters against a State’s right to reasonably regulate an election. Ohio provides for precinct-based voting. The State must

provide some mechanism to challenge a possible elector's residency or citizenship up to and including the day of election.

Plaintiffs' also allege that intimidation may be heightened by the warning to electors that election falsification is a felony. However, this warning, a common sense warning designed to deter fraud, appears on many forms signed by qualified electors. The warning appears on the voter registration application. 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; qualified electors should have no concerns.

Despite the fact that these sorts of basic elections regulations may operate to "disenfranchise" or chill some voters, the State's important interest in holding structured elections will generally trigger only a rational relationship kind of judicial review. *Anderson v. Celebreeze*, 460 U.S. 780 (1983); *Burdick v. Takushi*, *supra*; *Storer v. Brown*, *supra*. As the *Burdick* Court held, as long as state elections regulations are not too "severe" or discriminatory, they will be upheld. 504 U.S. at 434.

Plaintiffs cannot raise anything more than speculation as to the potential harms it may suffer.⁵ Given the reality that unqualified voters may cast ballots in the upcoming election, any balancing of harm weighs in favor of preventing harm to the public that will arise from a lack of confidence in the outcome, fairness, and integrity of the election.

⁵ It is unclear as to how Plaintiffs could assert to this Court that no Democratic Party challengers will be raising any challenges, inasmuch as the Hamilton County Democratic Party is not a party to this suit. And, Plaintiffs have failed to this necessary party. Of course, while unsupported, it is a remarkably self-serving allegation.

III. CONCLUSION

For the foregoing reasons, this Secretary of State Blackwell requests that the Court dismiss the claims against him.

Respectfully submitted,

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Certificate of Service

This is to certify a copy of the foregoing was served by means of the Court's electronic filing system on Robert B. Newman and Dave Stevenson on this 28th day of October, 2004.

/s/ Arthur J. Marziale, Jr. _____
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