

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Marian Spencer, et al.) Case No. 1:04-cv-00738
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Plaintiff,) (Judge Dlott)
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-v-)
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J. Kenneth Blackwell, et al.) PROPOSED INTERVENORS'
) MEMORANDUM IN OPPOSITION TO
) PLAINTIFFS' MOTION FOR A
Defendant.) TEMPORARY RESTRAINING ORDER
)

I. INTRODUCTION

This matter is before the Court upon Plaintiffs Marian Spencer's and Donald Spencer's (collectively, "Plaintiffs") Motion for a Temporary Restraining Order and Preliminary Injunction Relief against J. Kenneth Blackwell, Secretary of State, the Hamilton County Board of Elections ("BOE"), Timothy Burke, Chair of the BOE, Michael Barrett, Todd Ward, and Daniel Radford as individual members, in their official capacities, of the BOE, John Williams, Director of the BOE, and Michael Barrett, individually in his official capacity as the Chair of the Hamilton County Republican Party (collectively, "Defendants"). In their Motion, Plaintiffs seek to have this Court issue an order prohibiting the Defendants from permitting challengers in the polling places of Hamilton County during the November 2, 2004 election.

II. LAW AND ANALYSIS

Under Rule 65 of the Federal Rules of Civil Procedure, the district court may issue a temporary restraining order upon a movant's showing of irreparable injury in the event that an activity is not enjoined. In re King World Productions, Inc., 898 F.2d 56, 59 (6th Cir. 1990).

The Sixth Circuit's standard governing the issuance of a temporary restraining order or preliminary injunction is well established. In order to grant injunctive relief, the court must consider four factors: (1) the movant's likelihood of success on the merits in the action; (2) the extent to which the movant is being irreparably harmed by the conduct complained of; (3) the extent to which the defendant will suffer irreparable harm if the temporary restraining order is issued; and (4) whether the public interest would be served by the issuance of injunctive relief. See ACLU v. McCreary County, 354 F.3d 438, 445 (6th Cir. 2003); Shepard's Co. v. The Thomson Corp., 1999 U.S. Dist. LEXIS 21051, at *10-11 (S. D. Ohio July 15, 1999) (See Ex. A attached) (stating that the Sixth Circuit applies the same four-part test for motions for preliminary injunction and in determining whether to grant a temporary restraining order).

On review of the factors, it becomes evident that this Court's issuance of a TRO and enjoining the Defendants from performing their duties under Ohio law is unnecessary and not appropriate under the circumstances presented here.

A. Plaintiffs Are Not Likely To Succeed On The Merits.

Plaintiffs have not shown a likelihood of success on the merits. Ohio Revised Code §3505.20(C) expressly provides that voters may be challenged on the basis that they do not reside in the precinct in which they vote. This is a statutorily enumerated right that is a critical and fundamental step in the process aimed at preventing false registrations and fraud and completely within a state's well-established authority to govern the electoral process. Ohio law further provides that these challenges may be performed at the polling site, O.R.C. §3505.20, and that a qualified challenger is "permitted to watch every proceeding of the judges and clerks of elections from the time of the opening until the close until the closing of the polls." O.R.C. §3505.21.

Before performing these duties, all challengers are administered an oath by one of the judges of the elections. The oath states:

You do solemnly swear that you will faithfully and impartially discharge the duties as an official challenger and witness, assigned by law; that you will not cause any delay to persons offering to vote, further than is necessary to procure satisfactory information of their qualification as electors; and that you will not disclose or communicate to any person how any elector has voted at such election.

O.R.C. §3505.21.

Barring any deviation from this oath, the challenger will effectively administer their duties assigned by law. The mere fact that a challenger is present is not an act of voter intimidation or discrimination. Similarly, the fact that challenger questions the qualification of an elector is also not an act of voter intimidation or discrimination. Indeed, challenging the qualifications of an elector to vote is not only a right of a qualified challenger but a duty they swore to uphold. Any argument, which calls to question one who furthers this statutory duty, must fail.

As such, enjoining the Defendants from performing their statutory duties in furtherance of ensuring an accurate and proper election is not a proper remedy and Plaintiffs will not succeed on the merits.

B. The Plaintiffs Will Not Be Irreparably Harmed If Challengers Are Present At The Polling Sites As Permitted By Law.

As required under Rule 65, Plaintiffs are required to establish that irreparable harm will occur if the injunction is not granted. Plaintiffs cannot carry this burden. There is no direct harm to the Plaintiffs and they are not entitled to the extraordinary relief of an injunction.

If the Plaintiffs are challenged at the polling station they will still each be permitted to vote, at a minimum, a provisional ballot in the November 2, 2004 election. There is an adequate

remedy at law. This was established by the Help America Vote Act of 2002 (“HAVA”), codified at 42 U.S.C. §15482 *et seq.* As such, there is no irreparable harm.

Congress created HAVA to specifically address state procedures for casting ballots. Among its many provisions, HAVA requires that state and local election officials permit any individual whose name does not appear on the official registration list for the polling place, or whose eligibility to vote is called into question, to vote a provisional ballot. 42 U.S.C. §15482.

If Plaintiffs are registered, as their Complaint alleges, and are challenged at the polling site, there is a remedy already in place. A remedy enumerated under HAVA, which grants each individual a right to cast—at a minimum—a provisional ballot. Since such remedy exists there is no reason to grant Plaintiffs the relief demanded and in turn strip the BOE of an essential shield to protect against voter fraud in the administration of the election.

C. **Intervenors And The Public Will Likely Suffer Irreparable Harm If The Boards Of Election Are Enjoined From Permitting Challengers At The Polling Sites.**

Finally, the public interest will not be served by the injunction. The purpose of the challengers is to identify those names from the official voter roll that appear as a result of fraudulent registrations or residency outside of a particular precinct. The challengers will quash the opportunity of individuals to cast duplicate votes, provide a safeguard against vote dilution, and ensure the legitimacy of the election process.

The voting public has a substantial interest in casting votes that will not be diluted by the fraudulent votes of others and will be irreparably harmed if individuals are allowed to cast duplicate votes or votes as a result of a fraudulent registration.

Moreover, The Ohio Constitution authorizes Ohio’s legislature to establish the laws related to running elections. Ohio’s elected officials deliberately established a procedure that

allowed for challengers to be present at the polling place. In doing so the legislature accounted for challenges, and made certain that all qualified voters who were at their polling place would be permitted to cast a ballot, and to have that ballot count. Plaintiffs seek to end run the clear and considered structure of elections by using this Court to overrule Ohio's Statutes. Clearly, the public is greater served by respecting the authority granted to the legislature and protecting the administration of an election that is not clouded under the cloak of fraud or illegitimacy.

III. CONCLUSION

For the foregoing reasons, Intervenors Charles H. Winburn, Sam Malone and Clara Pugh, respectfully urge the Court to deny Plaintiffs' Motion for a Temporary Restraining Order and Preliminary Injunction.

Respectfully submitted,

/s/ James E. Burke

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing document, namely, PROPOSED INTERVENORS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR A TEMPORARY RESTRAINING ORDER, was served upon counsel of record via the Court's ECF/CM system this 28th day of October, 2004.

/s/ James E. Burke

James E. Burke