No. 04-4311

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Marian A. Spencer, et al.	:	
	:	
Plaintiffs-Appellees,	:	On Appeal from
	:	the United States District Court
v.	:	for the Southern District of Ohio:
	:	District Court Case No. 04 CV 738
J. Kenneth Blackwell, et al.	:	
	:	
Defendant-Appellant.	:	

INTERVENOR-DEFENDANT-APPELLANT STATE OF OHIO'S RESPONSE TO REQUEST FOR BRIEF

JIM PETRO
Attorney General of Ohio
DOUGLAS R. COLE
State Solicitor*
**Counsel of Record*
D. MICHAEL GRODHAUS
First Assistant Attorney General
STEPHEN P. CARNEY
Senior Deputy Solicitor
RICHARD N. COGLIANESE
ARTHUR J. MARZIALE, JR.
DAMIAN W. SIKORA
Assistant Attorneys General
30 East Broad Street, 17th Floor
Columbus, Ohio 43215-3400
614-466-8980; 614-466-5087 fax

Counsel for Intervenor-Defendant-Appellant State of Ohio

INTRODUCTION

The U.S. Constitution firmly commits to the States the power to regulate their elections to prevent voter fraud, a function that goes to the very core of State sovereignty. But, on the day before the election, a federal district court has substituted its own judgment for that of Ohio's legislature—and the legislatures of the 48 other States who have similar laws—on how best to accomplish this goal. Ohio urges this Court to stay that decision.

Indeed, the last minute nature of the order below is reason enough to stay it. The Ohio law challenged here, which permits on-site "challengers" to request elections officials to investigate a voter's eligibility by asking the voter three or four brief questions, has been on the books for a century. For months now, news reports have indicated that the political parties would exercise their rights to have such challengers at the polls. Yet, Plaintiffs filed this suit last Wednesday, less than a week before the election, and the district court ruled this morning at 1:24 a.m. While the district court found that allowing challengers would cause chaos in the election, Ohio submits that the reverse is true: having federal trial courts rewrite the election laws on election eve is no way to run an election, and is no way to maintain the respect of a citizenry already concerned that lawyers and judges, not voters, decide elections.

Even putting aside the concerns raised by the last-minute nature of the challenge, it fares no better on the merits. All validly registered voters are entitled to have their votes count. If the final tally includes votes from "Mary Poppins," "Dick Tracy," "Michael Jordan," and "George Foreman"—just a few of the fictitious registrants in recent weeks—then legitimate votes will be canceled by fraudulent ones. See Toledo Blade, 10-19-04, *Voter fraud case traced to Defiance County registrations volunteer: 124 registrations falsified, allegedly for crack cocaine*.[1] The law and procedure at issue here is a vital part of policing that fraud.

Contrary to the picture Plaintiffs painted, and that the district court implicitly accepted, the process is neither partisan, nor does it disenfranchise anyone. Admittedly, it is partisan challengers who initiate the process. But, it is neutral arbiters (the precinct judges), following neutral rules, who ultimately decide. Moreover, even if they decide *against* the voter, the voter is still entitled to cast a provisional ballot—a ballot that will count just like any other if, after further investigation in the days after the election, it turns out the voter was validly registered. This system, in place almost everywhere in the Union, deserves praise, not condemnation.

Plaintiffs challenged this system based on a purely speculative theory that certain private challengers, the Hamilton County Republican party, would use this

[1] Attached as Ex. 1, and available at www.toledoblade.com/apps/pbcs.dll/article?AID=/20041019/NEWS09/410190343

system to intimidate black voters. But Plaintiffs offered no proof of their charges, nor did they offer any credible legal theory to support the race-based claim.

In fact, the district court's opinion did not accept this theory. It nowhere mentions *any* legal principles involving race or the Voting Rights Act. Instead, the district court accepted the Plaintiffs' alternate theory that the challenger law violates the First Amendment, by restricting the right to vote. The district court's legal theory of the First Amendment is wrong, though, for at least four reasons. First, as noted above, challengers cannot stop a vote. Second, contrary to the court's decision, these private challengers are neither state actors, nor, as the court describes them, "elections officials." Third, there is simply no evidence in the record supporting the court's conclusion that the challenge process will cause delay. The plaintiffs proceeded on a racial harassment theory (which the court apparently did not accept), not a delay theory, and thus the record contains no evidence regarding delay. Finally, in reaching its decision, the court failed to grant the State the deference that the U.S. Supreme Court and this Court mandate for review of State decisions on elections procedures. Moreover, the court also committed clear error by inexplicably extending the reach of its opinion to elections officials at "polling places throughout Ohio," see Op. at 18, notwithstanding that the plaintiff directed their claims solely to, and only presented evidence on, the impact of the challenge process *in Hamilton County.*

In light of the law and the record, the balance of the equities shows that Ohio is entitled to an immediate stay. Keeping challengers out will call the legitimacy of Ohio's election (and possibly the Nation's) into question. By contrast, allowing challengers in harms no one, and certainly does not cause irreparable harm. If no challengers are allowed in to the polls, Ohioans will rightly ask on Wednesday whether something may have been 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 the 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 removes the last remaining line of defense at our ballot box. That would truly give Ohio voting "on the honor system," and it may well take only a few unscrupulous souls to tilt Ohio's outcome.

Once "Mary Poppins" has cast a regular (i.e., non-provisional) ballot, it is no longer traceable. So if Ohio discovers in coming weeks that Mary Poppins and Dick Tracy voted, and if those votes are the margin of decision for Ohio and the Nation, there will be no remedy. No recount process can turn up how Mary Poppins voted. All we would know is that fraud could well have decided our election, and that the federal courts helped to make it happen.

The Ohio legislature made a legitimate legislative choice as to how to best police such fraud. The court below overstepped its bounds in substituting its own judgment for that of the Ohio legislature. The State respectfully requests this Court to stay that order.

STATEMENT OF THE FACTS

The emergency situation here has prevented the parties from producing a transcript of the hearing held in District Court. Thus, citations to the record are not possible. The facts below are, to the best of counsel's memory, an accurate restatement of what happened below.

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," 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 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.

Ohio law also defines who is considered an "elections official," and that definition does *not* include challengers. Ohio Rev. Code 3501.01 provides:

> (U) "Election officer" or "election official" means any of the following:
>
> (1) Secretary of state;
>
> (2) Employees of the secretary of state serving the division of elections in the capacity of attorney, administrative officer, administrative assistant, elections administrator, office manager, or clerical supervisor;
>
> (3) Director of a board of elections;
>
> (4) Deputy director of a board of elections;
>
> (5) Member of a board of elections;
>
> (6) Employees of a board of elections;
>
> (7) Precinct polling place judges and clerks;
>
> (8) Employees appointed by the boards of elections on a temporary or part-time basis.

That list does not include challengers. Also, challengers are not appointed or hired by the boards of elections, as they are appointed by parties or candidates' committees or ballot-issue committees, and no government body pays them.

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, not by challengers, and every voter may still cast at least a provisional ballot, regardless of the outcome of the challenge.

Once a challenge is raised, the precinct judges follow a statutory script, asking a few questions (detailed 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. 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. See *id.*

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?"

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 un-counted only if it turns out that the person was *not* entitled to vote (or not entitled to vote at that precinct).

C. No evidence was presented regarding the length of time, if any, that challenges would add to the voting process, and the sole challenger who testified said that he likely planned to challenge three people all day.

Almost all of the evidence at the hearing focused on Plaintiffs' race-discrimination claims, which the district court did not rely on in its order, and almost no evidence was supplied regarding the length of time a challenge would add, if any, to the voting process.

Notably, even without a challenge, a voter waits in line in two separate stages in Ohio. First, voters line up to sign in the poll book and receive a ballot. Second, after signing in and receiving a ballot, voters on busy days frequently have to wait in line for a voting booth to be open. Thus, if the line is backed up at the second stage, a voter who is challenged at stage one before getting a ballot will actually not vote one second later, even if the challenge takes a minute, because that voter would still wait in a second line. Nor would such a challenged voter "lose her place" in line to another voter, as all four precinct judges must attend to the challenge.

All of the above is merely common sense about the voting process, but Plaintiffs presented no evidence to confirm or deny this. They presented no time-motion studies, no numbers regarding the number of voters per precinct, no calculations regarding the effect of challenges. They presented no evidence regarding the average wait that a voter encounters already, without challengers, in a high turnout election. They merely asserted that delay and chaos would result from the challengers' presence.

One person trained as a Republican-appointed-challenger testified as to his plans for Election Day. Drew Hicks explained that the party provided him with a list of names of those who had already requested an absentee ballot, and that he intended to question only those voters if they also arrived to vote in person. The list for his precinct contained **three names.** The district court noted that Hicks said that he might also call a phone number for further advice if he saw questionable voting, and he also said that he might seek to "raise issues," but not formally challenge, if he could.

Finally, the court made no findings as to whether the delay would simply be a delay to some individual voters' time, or whether there would be a cumulative effect over the day in getting all voters through the process. Ohio law provides that the polls may be kept open past the 7:30 PM closing time to allow voting by

any voters who are in line by 7:30 PM. In other words, the line is cut off, but the voting continues.

D. Precinct officials may eject any challenger who impedes the voting process.

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, any image of domineering challengers, wielding statutes to scare off voters, does not match Ohio law or reality.

Plaintiffs offered no evidence regarding precinct judges' ability or willingness to use these powers to eject challengers.

The district court's opinion cites several Ohio statutory provisions regarding challengers and the voting process, but it does not cite or acknowledge the election officials' ability to eject challengers. The district court cited county and state policies and memoranda on this point, but said that those were of "questionable enforceability." Order at 11. But the court omitted noting that this ejection power *is statutory,* and the memoranda merely worked from the *statute.*

E. The media have reported stories about on-site lawyers and challengers for months; this case was filed last week; and this order came out this morning.

As almost everyone in the Nation knows, this year's election includes a hotly-contested presidential campaign, and it comes upon the heels of the 2000 presidential election, which went into overtime in the courts. Thus, both political parties have "lawyered up" all year, leaving many citizens concerned that lawyers, not voters, would determine elections.

The specific issue here—having lawyers, witnesses, and challengers at or near polling places—has been discussed for months, if not all year, in the media. For example, the New York Times reported in July that both presidential campaigns were recruiting lawyers down to the precinct level, and it specifically mentioned the idea that some lawyers would serve as pollwatchers, not just as morning-after recount lawyers. See New York Times, 7-19-04, page A5 (attached as Ex. 2, *Kerry Building Legal Network for Vote Fights.* It explained that the Republican National Committee chair had "been rebuffed by his Democratic counterpart when he recently proposed that the two parties agree on a list of pivotal precincts and send bipartisan pairs of lawyers to monitor them." A Kerry campaign spokesman said in response that his side had "not much interest in depending upon Republican agents to police the polls."

In Ohio, the Columbus Dispatch noted the issue at least by September 6, as an article noted both the recruitment of lawyers "at the precinct level," and while it did not explain which groups would have challengers in the polls, versus outside the polls to offer advice, it explained that both would occur. See Columbus Dispatch, 9-6-2004, page 01D (front page of "Metro" section)(attached as Ex. 3), *Efforts to Protect Polls Begin: Security, fraud concerns behind increased vigilance by counties, campaigns*. That article explained that "groups are recruiting monitors to watch precinct voting locations" and in an accompanying "box," the article cited the Ohio law permitting designated challengers to stay "inside the flags." The article also noted that the Kerry campaign would have "attorneys and trained volunteers" on hand "in hundreds of Ohio voting locations," though it suggests that they would be outside, not inside. The article mentioned the same Republican proposal that the New York Times cited, and said that the "GOP hasn't organized its own precinct-monitoring effort, but that could change between now and the election if problems surface, a campaign spokesman said."

Plaintiffs filed this case on Wednesday, October 27. The court held a phone hearing that day, and held an evidentiary hearing on Friday night and Sunday night, and issued its order Monday morning at 1:24 A.M.

F. The district court enjoined Ohio from allowing designated challengers at the polls in Hamilton County *and statewide,* based on a First Amendment right-to-vote theory, not on any race-based claim.

The district court granted injunctive relief, but it did not do so on the race-based grounds that were the focus of the hearings. Instead, the district court said that allowing challengers at the polls could violate the right to vote. The court made no specific finding that any vote would actually be likely to be prevented. Instead, the court said the challengers could cause "an enormous risk of chaos, delay, intimidation, and pandemonium inside the polls and in the lines outside the door."

The district court acknowledged that the State's concerns about ballot fraud are a compelling interest, but it said that the law was not "narrowly tailored" to serve that purpose. The court found that pollworkers could adequately police against fraud without the challengers, so that they were not necessary.

The district court also said that other procedures helped to guard against fraud, such as the pre-election challenges to registration that Ohio law allows. The court acknowledged that such pre-election processes were halted by court order last week, but it said that did not change that the statutory process still exists. The court did not explain how the process's existence helps now.

Also, the district court made no specific finding that challengers are state actors as a matter of federal state action doctrine, as it said this: "Challengers serve

as elections officials on Election Day and must take an oath of office." The court cited Ohio Rev. Code 3505.21 for that point, but that provision does not formally identify the challengers as "elections officials." The statute does require an oath, but it is not labeled an "oath of office."

The court did not clarify whether its order is a temporary restraining order or a preliminary injunction. The title of the order references just a TRO, but the court's language granting the order refers to both TRO and preliminary injunction (at page 2), and the order concludes by granting "injunctive relief." The court's holding of an evidentiary hearing, and its use of the four factors used in preliminary-injunction cases, suggests that this is a preliminary injunction.

The court also stated that its injunction would apply *statewide*, not just in Hamilton County. However, Plaintiffs submitted no evidence regarding the usage of challengers in any other part of the county, and no other counties' boards of elections were defendants. In fact, all other counties were (and are) part of a separate lawsuit in the U.S. District Court for the Northern District, in Akron (*Summit County Democratic Central and Exec. Committee v. Blackwell*, separately on appeal to this Court).

ARGUMENT

The law and equities in this case compel a stay pending appeal. Without a stay pending appeal, Ohio loses the ability enforce its election laws not as the result of complete and fair litigation process, but as a result of an eleventh-hour decision on the eve of a presidential election. Ohio's case on the merits is likely to succeed; however, the urgency of the election means that Ohio's ability to enforce its challenger law is all but lost without a stay of the district court's order.

A. Ohio is entitled to a stay pending appeal under the Court's standards.

This Court's balancing test for granting stays pending appeal weighs heavily in favor of granting a stay here. The following factors guide the Court's decision: "1) whether the applicant has demonstrated a likelihood of success on the merits; 2) whether the applicant will be irreparably injured absent a stay; 3) whether issuance of the stay will substantially injure the other interested parties; and 4) where the public interest lies." *Nader v. Blackwell*, 230 F.3d 833, 834 (6th Cir. 2000) ("These factors weigh in favor of granting a stay given the close proximity of the November [] election."); *id*. at 835 ("A state's interest in proceeding with an election increases as time passes, decisions are made, and money is spent."). "The probability of success that must be demonstrated," the Court has held, "is inversely proportional to the amount of irreparable injury plaintiffs will suffer absent the stay[,]" meaning that "a movant need not always establish a high probability of

success on the merits." *Mich. Coalition of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991). Moreover, this Court recognizes that "[t]hese factors are not prerequisites that must be met, but are interrelated considerations that must be balanced together." *Id*.

Each factor, discussed more fully below, compels granting the stay. Most important are the equities here, as the court's order opens the door to fraud in Ohio, and threatens to taint our citizens' faith in the election and in the courts. By contrast, the presence of challengers will not block a single vote. Finally, Ohio, not Plaintiffs, will ultimately succeed on the merits, as this is a valid law that does not infringe on the right to vote. To the contrary, it protects the right to vote, as help to ensure that Ohio's real voters, not Mary Poppins, decide our elections.[2]

B. Shutting down Ohio's challenger system on the eve of the election seriously threatens Ohio's interest in preserving a fair and legitimate election system for its citizens.

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

[2] If the district court's order is considered a TRO, Ohio may appeal now because anything less than an immediate appeal will be too late. When a party, like the intervenor-appellants here, show that a district court's interlocutory order "might have a 'serious, perhaps irreparable, consequence,' and that the order can be 'effectually challenged' only by an immediate appeal," a Court of Appeals has jurisdiction under 28 U.S.C. § 1291(a)(1). *Carson v. Am. Brands*, 450 U.S. 79, 84 (1981). This Court allowed an appeal of a TRO in *Miller* last week.

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.

As this Court has also affirmed, in cases just months ago and just days ago, 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*, 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*, attached as Ex. 5. These incidents take on grater 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 polling places, as their presence alone helps to prevent fraud, and headlines touting their absence will tempt the ill-intentioned. Ohio asks the Court to recognize that human nature weakens when passions run strong and an opportunity exists. The idea behind the challenger system is that each side watches the other, and also that each side *knows* the other is watching. Reliance upon the official pollworkers is not enough, for as the district court said, Tuesday will be a hectic and harried day for them as it is.

Thus, 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. This is a longstanding practice is Hamilton County, as the hearing showed.

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, the district court's primary response is to point to the pollworkers' powers to look for fraud, and to the now-halted pre-election process for removing ineligible voters from the rolls. The district court's approach to the pollworkers is inconsistent, though: it placed great faith in their ability to control for fraud, without the additional presence of challengers, but it gave no weight to pollworkers' ability to eject any challengers that truly cause delay.

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.

Moreover, this Court should disallow this election-eve maneuvering for the simple reason that it was filed too late, and it is unfair to disrupt Ohio's machinery in this way. Stories about lawyers and challengers have abounded for months, and Plaintiffs waited. Plaintiffs said that they needed to wait until the parties actually filed their lists of challengers. That is wrong, as people knew, or should have known, that challengers were coming. Indeed, it has been in the national press, as well as the local press, at least in general enough terms to put people on notice.

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.

C. Plaintiffs have not shown how they will be harmed by the challenger law on Election Day, as legitimate voters will not disenfranchised, and the claims of delay or intimidation are purely speculative.

In contrast to the drastic harm that would befall our election if the challenger law 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, for as noted above, headlines about the absence of challengers will invite cheaters to take chances.

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, the district court's stated concerns about "intimidation and delay" are unfounded. As noted above, Plaintiffs produced not one shred of evidence

about how much time a challenge would take, and they produced no evidence about the time voting generally takes in a high-turnout year. In fact, because voters often receive a ballot and *then* need to wait in a second line for a voting booth to become open, a voter who is "delayed" at step one, even for three or five minutes, might end up voting at the precise time that she would have voted anyway. So the district court's order at most may have "saved" a minute at the first table, only to have no net effect on timing. Notably, Plaintiffs had several days to produce evidence of delays, or at least theoretical calculations—but they did not do so, as they focused on the race-based claims instead.

Second, the district court improperly gave no weight whatsoever to the fact that precinct officials are *statutorily* empowered to keep order, by expelling the challengers if needed, if those challengers cause problems. The district court noted the possibility of ejection, but the court clearly erred in understanding Ohio's law on that point. The court said that no statute existed:

> In the absence of any statutory guidance whatsoever governing the procedures and limitations for challenging voters by challengers, and the questionable enforceability of the State's and County's policies regarding good faith challenges and ejection of disruptive challengers from the polls [Court's footnote 8] here exists an enormous risk of chaos, delay, intimidation, and pandemonium inside the polls and in the lines out the door.

Order at 11. The court further said, in the footnote appearing at the word "polls," as indicated, that the order-keeping and ejection rules arise only from a

memorandum from the Secretary of State and not from a directive, so that it does not carry the force of law. But the district court somehow missed the point that the Secretary's and the county board's instructions reflected a *statute*, R.C. 3501.33, which gives the precinct officials express power to prevent voter intimidation or obstruction, and that statute specifically authorizes ejecting challengers, and even gives the power to arrest, and the law orders police to obey the pollworkers:

> All judges of election shall enforce peace and good order in and about the place of registration or election. They shall … prevent and stop any improper practices or attempts tending to obstruct, intimidate, or interfere with any elector in registering or voting. They shall protect challengers and witnesses against molestation and violence in the performance of their duties, and **may eject from the polling place any such challenger** or witness for violation of any provision of Title XXXV [35] of the Revised Code. … In the discharge of these duties they may call upon the sheriff, police, or other peace officers to aid them in enforcing the law. They may order the arrest of any person violating such title, but such arrest shall not prevent such person from registering or voting if he is entitled to do so. The sheriff, all constables, police officers, and other officers of the peace shall immediately obey and aid in the enforcement of any lawful order made by the precinct election officials in the enforcement of such title.

R.C. 3501.33 (emphasis added). This statute alone provides the "narrow tailoring" that the court said Ohio's law lacks, as it provides that if challengers provide more burden than benefit, they will be thrown out. The State cited this statute in its brief to the district court, but to no avail.

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 will the district court's 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.

D. Ohio is substantially likely to succeed on the merits because the challenger law is constitutional, both on its face and as applied here.

In the district court, the plaintiffs substituted speculation for a sound legal theory. The absence of a plausible legal theory, much less an adequate factual record, means Ohio is likely to succeed on the merits of an appeal.

Ohio's law holds up against any constitutional attack, because it is a perfectly valid regulation of our electoral process, and it has never been shown to diminish the right to vote. 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.[3]

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

[3] 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; 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.

Justice—does not object to such challenger laws. See Letter Brief of Dept. of Justice, submitted to district court on 10-29-04.

Thus, as detailed below, the Ohio law withstands any challenge, whether facial or as applied. Ohio also notes that the same factors outline above regarding the equities of the claim also relate to the merits, as the merits turn on the compelling state interest involved. Thus, to the extent they are not repeated below, the State refers to the equity arguments above as reasons why, under *Timmons* and similar cases, the State has a strong interest here that does not impinge on voters' rights.

1. Plaintiffs cannot succeed on any constitutional claim against the challenger statute on its face.

Plaintiffs cannot succeed on a constitutional attack against the statute itself under the First Amendment, as Ohio will show that our law is the type of reasonable regulation allowed by *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 357 (1997). 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.

2. The challengers' use of the statute cannot serve as a basis for a constitutional claim because 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.

Indeed, Ohio law specifically defines which actors are considered "elections officials," or state actors, and challengers are *not on that list*. Ohio Rev. Code 3501.01(U) (full text in Facts above at 6). The district court's only finding on this score was to say that "[c]hallengers serve as election officials on Election Day and must take an oath of office. Ohio Rev. Code § 3505.21" Order at 3. But the statute that the court cited does not say that they are "officials," and R.C. 3501.01(U) says that they are not. Further, they do not take an oath *of office*, as the

court would have it; they take an oath. But so, too, do witnesses at trials, and citizens in all manner of activities, without becoming state actors.

Moreover, a common-sense functional view of the challengers shows that they cannot fairly be described as State actors. As in our court system, they act as adversarial challengers, but the actual state officials then make the decisions. Indeed, any voter waiting in line can step up to the role of a challenger, but that does not transform that citizen into a state actor. All that is different about the designated challengers is that a party or issue committee appoints them in advance, but the same is true of many party functionaries, and they are not state actors.

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.

3. Plaintiffs cannot succeed on an as-applied claim on the facts here, as the presence of challengers cannot be shown to cause any special harm this year

Finally, Plaintiffs are wrong on the merits because nothing about the use of challengers this year distinguishes it from the law's constitutionality in other years. The district court pointed to the greater numbers of challengers being used this year, but this analysis is flawed. The greater use of challengers this year means only that they will be in more precincts, but in any given precinct, a party can still send only one. So the cumulative effects of a challenger's presence over the day will be the same, in a given precinct, if she were the sole challenger in the State, or if all the precincts statewide had challengers.

Ohio has seen the challenger law used before, such as in a local area when a race or issue is heated. Indeed, the small town of Lithopolis saw a flurry of challengers in 2001, and democracy in that city stayed rock-solid. See Columbus Dispatch, 11-5-2001, Page 01B, *Voters Can Expect Poll Policing*, attached as Ex. 5. In our view, democracy was enhanced that day, as it will be tomorrow if this Court stays the order below.

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. The order below should be stayed, and the injunction lifted.

Respectfully submitted,

JIM PETRO
Attorney General of Ohio

/s/ Douglas R. Cole
_____
DOUGLAS R. COLE
State Solicitor*
**Counsel of Record*
D. MICHAEL GRODHAUS
First Assistant Attorney General
STEPHEN P. CARNEY
Senior Deputy Solicitor
RICHARD N. COGLIANESE
ARTHUR J. MARZIALE, JR.
DAMIAN W. SIKORA
Assistant Attorneys General
30 East Broad Street, 17th Floor
Columbus, Ohio 43215-3400
614-466-8980
614-466-5087 fax

Counsel for Intervenor-Defendant-Appellant State of Ohio

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above brief was sent by email, fax or regular mail this 1st day of November to all counsel of record, to the best of our abilities, including to Plaintiffs' counsel Al Gerhardstein.

/s/ Stephen P. Carney

STEPHEN P. CARNEY