

**RECEIVED**  
**UNITED STATES COURT OF APPEALS**  
**FOR THE SIXTH CIRCUIT**

NOV 1 2004

Marian Spencer, et al.,  
**LEONARD GREEN, Clerk**  
Appellees-Plaintiffs.

v.

J. Kenneth Blackwell, et al.

Appellants-Defendants,

and

Clara Pugh, Sam Walton, Charles Winburn,

Appellants-Intervenors-Defendants.

---

**MOTION OF APPELLANTS-INTERVENOR DEFENDANTS**  
**CLARA PUGH, SAM MALONE, AND CHARLES WINBURN**  
**FOR EMERGENCY STAY OF DISTRICT COURT'S NOVEMBER 1, 2004**  
**ORDER GRANTING PLAINTIFF'S MOTION FOR TEMPORARY**  
**RESTRAINING ORDER AND PRELIMINARY INJUNCTION**  
**PENDING APPEAL AND MOTION TO EXPEDITE APPEAL**

---

1. Pursuant to Federal Rules of Appellate Procedure 2 and 8, and Sixth Circuit Rule 2, Intervenor Defendants-Appellants Clara Pugh, Sam Malone, and Charles Winburn (hereinafter "Intervenors"), respectfully move this Court for an emergency order staying enforcement of the District Court's Order rendered November 1, 2004 (*Spencer v. Blackwell, et al., Case 1:04-cv-00738-SJD, S.D. Ohio*) granting

Plaintiffs, Maria Spencer, *et al* ("Plaintiffs"), a temporary restraining order and preliminary injunction in this case.<sup>1</sup> Specifically, the Court granted "Plaintiff's motion for injunctive relief and ENJOINS all Defendants from allowing any challengers other than election judges and other electors into the polling places throughout the state of Ohio on Election Day."

2. The District Court's decision was entered on the Clerk's docket at 1:24 a.m. on November 1, 2004, the day after a decision was rendered by Judge Adams on the very same challenger issue. *See Summit County Democratic Central and Executive Committee et al v. Blackwell et al., Case 5:04-cv-02165-JRA, (N.D. Ohio, Eastern Division (Akron)).* Judge Adams' Order in that case granting a temporary restraining order was entered before Judge Dlott's Order; it was entered on the Clerk's docket at 11:47 p.m. on October 31, 2004. Judge Adams' Order granted in part Plaintiff's Motion for a TRO. Specifically, the Order granted the motion "to the extent persons appointed as challengers may not be present at the polling place for

---

<sup>1</sup> Intervenor's have requested that the District Court issue a stay of the temporary restraining order pending the appeal. The District Court has not acted on this request, and it would be impracticable to do so as time is of the essence with the general election tomorrow. Thus, this request for emergency stay is proper, pursuant to Fed. R. App. P. 8(a)(2).

the sole purpose of challenging qualification of other voters." Both District Court orders addressed the issue of challenger exclusion and ordered injunctive relief statewide. For the reasons set forth herein, Appellants respectfully request that Judge Dlott's Order be stayed. But, at a minimum, Judge Adams' Order should be enforced pending this appeal.

3. This is a case filed under the Fourteenth and Fifteenth Amendments and the Voting Rights Act. The court issued its temporary restraining order without any finding of a violation of the Fourteenth or Fifteenth Amendments or of the Voting Rights Act. In fact, the court made no finding of purposeful discrimination based on race or of voting procedures that would deprive African Americans of their right to engage in the political process.
  4. In Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrag, 945 F.2d 150 (6th Cir. 1991), this Court enunciated the four factors that are applicable in considering whether a stay should be granted under Fed. R. App. P. 8(a). This Court held that the same four factors that are traditionally considered in evaluating a motion for preliminary injunction should be applied in considering a motion for
-

stay. Id. at 153. These factors are: (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay. Id. (citing Ohio ex rel. Celebrezze v. Nuclear Regulatory Comm'n, 812 F.2d 288, 290 (6th Cir. 1987)).

5. Intervenors are likely to succeed on the merits of this appeal because R.C. § 3505.20 is neutral on its face and as applied. See *Washington v. Davis*, 426 U.S. 229 (1976).
6. Ohio R.C. § 3505.20 is facially neutral. The statute allows for any challenger, elector lawfully in the polling place, judge, or clerk of elections to challenge any person who appears at the polling place and desires to vote. R.C. § 3505.20 permits a challenge to be lodged only on the basis of one of the qualifications to be an elector under Ohio law as set forth in R.C. § 3503.01: that the elector is a United States citizen, that the elector has been a resident of Ohio for the thirty (30) days preceding the election, that the elector is a resident of the county and precinct in which (s)he is attempting to vote, and that the elector

is of legal voting age. The statute provides no basis on its face to challenge an elector based on race.

7. R.C. § 3505.20 is also neutral as applied. The challengers assigned to various precincts in Hamilton County, Ohio were assigned to precincts won in the 2000 Presidential election by Democratic nominee Albert Gore by a margin of 60% or more. Plaintiffs did not show before the trial court (nor could they) that the Republican challengers were assigned based on race. They speculated that largely African-American precincts were chosen on the basis of race; but the undisputed evidence proffered before the trial court demonstrated that the voter registration information used to determine the selected precincts disclosed only prior voting history, not the race of the registered voters.
8. Of the 626 challengers that were assigned by the Republican Party to precincts in Hamilton County, only 251 were assigned to precincts that voted most heavily Democratic – at least 60% for Vice President Gore in the 2000 Presidential Election. The remaining 375 challengers were submitted in mostly Republican precincts. In fact, Plaintiff's expert, Mr. Maume, admitted he did not analyze the full set of Republican challengers. He stated he was only told about the 251

challengers that were assigned to "Democratic" or "Gore" precincts, and admitted he was not told about other 375 challengers that were mostly assigned to "Republican" precincts.

9. Plaintiffs offered no evidence in the trial court of racial hostility, purpose, or intent, and Plaintiff's own witnesses, Messrs. Burke, Yates, Maume, Hicks, and Tolley, and indeed Plaintiff Ms. Spencer herself, could not present any evidence showing racial animus in the Republican Party's decision to assign challengers to the most "Democratic" or "Gore" precincts from the prior presidential election.
10. Plaintiffs' expert, Professor Tolley of University of Cincinnati College of Law, specifically admitted that he had done no research of discrimination at polling places in Hamilton County, and admitted that his data involved voting districts only from the 1980s. This would be inconsistent with this Court's holding that "no such recent history of voter-related discrimination" exists in Hamilton County. *See Mallory v. Ohio*, 173 F.3d 377 (6th Cir. 1999).
11. Plaintiffs will not suffer irreparable harm if this stay is granted, and have an adequate remedy of law that otherwise exists.
12. Plaintiffs' central witness, Timothy Burke, chairman of the Hamilton County Democratic Party, admitted in his testimony that persons who

are successfully challenged on election day are still entitled to vote a provisional ballot under the federal Help America Vote Act ("HAVA"), 42 U.S.C. §§ 15481, *et seq.* Mr. Burke testified he simply did not like this remedy, not that it was inadequate. But, at a minimum, every person who has a desire to cast a ballot on election day will have the opportunity to do so. See Amicus Brief Letter of Department of Justice, at 1 (Doc. 13). Thus, no person would be denied his or her fundamental right to vote if a stay were granted. Moreover, Ohio has a specific attestation form (10-U)(copy attached as Exhibit A) for those challenged on election day. If the challenged person signs the form, attests to their residency or any other basis for the challenge, the individual will vote a regular ballot and not a provisional ballot. It would be unusual for a challenged person to end up casting a HAVA provisional ballot. In fact, the only way that would happen is if the challenged person refused to attest to his residency (or other challenge basis). But a person desiring to cast a provisional ballot must nonetheless, execute a written affirmation that includes his residency pursuant to Secretary of State Directive 2004-42 (copy attached as Exhibit B). That person's affirmation (copy attached as Exhibit C) will then be attached to his provisional ballot.

envelope. Thus, there can be no harm — let alone irreparable harm. Every challenged voter will receive a ballot and that ballot will count if the voter attests to his residence.

13. Furthermore, Plaintiffs would not suffer irreparable harm because any challenger that violates Ohio law by harassing or intimidating a voter would be subject to removal from the voting area for such conduct. Under Ohio law, and as the testimony proffered before the trial court clear showed, challengers may not speak to potential voters, may not touch potential voters, and may not harass potential voters. And as Plaintiffs' witness, Mr. Burke, testified, the presiding judge of the precinct must enforce this provision. Thus, any voter feeling that they were being intimidated or harassed could go to the presiding judge at the precinct and point out the harassing or intimidating conduct. This is yet another remedy and protection that the law affords voters.
14. Third parties and the public also have an interest in the granting of this stay, and neither will be harmed if the stay is granted. All voters have an interest in the enforcement of Ohio's rational and reasonable voting requirements. See *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) ("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 chaos, is to accompany the democratic process”); *Anderson v. Celebreeze*, 460 U.S. 780, 788 (1983). As this Court held in *Bell v. Marinko*, 367 F.3d at 592, states have the right to see that all applicants for registration to vote actually fulfill the requirements of *bona fide* residency. Ohio R.C. § 3505.20 is a fundamental part of the Ohio process aimed at preventing voter fraud and improper voting, and is completely within Ohio’s well-established authority to govern the electoral process. *See, e.g., Dunn v. Blumstein*, 405 U.S. 330, 343-44 (1972); *Bell v. Marinko*, 367 F.3d 588, 591-94 (6th Cir. 2004).

15. The public also has an interest that is met by other obligations of the challengers. For example, R.C. § 3506.13 gives challengers the specific duty to watch that the ballots are properly placed in the containers to be sent to the Board of Elections. If a stay is not granted, this additional check against the improper or inadvertent mishandling of ballots would also be lost.
16. Additionally, the presence of challengers in polling place on election day will decrease the risk of fraud in the election process. Thousands of voter registration cards have been returned because of unknown address or unknown person at the address. Numerous instances of voter fraud have been uncovered around Ohio through the use of the

pre-challenge hearings before county boards of elections. In light of the injunction disallowing additional pre-challenges from going forward, the opportunity for fraud is heightened by the lack of challengers at the polling place.

17. Voters also have an interest in not having their legitimate vote diluted by voter fraud. See *Hawkins v. Blunt*, 2004 U.S. Dist. LEXIS 21512, \*21-22 (W.D. Mo., Oct. 12, 2004) (voters have the "right not to have their votes offset or diluted by fraudulently cast votes"). Intervenors and those similarly situated will be irreparably harmed if fraudulent votes are cast and counted. The mechanism established by R.C. § 3505.20 is a preventive measure against such fraudulently cast ballots.
18. The Supreme Court has also recognized that the activities of political parties, including their governance, structure, and related activities, receive high constitutional protection. See *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214, 230 (1989). The right of political parties to ensure that fraudulent voting does not occur, in this case by both the Republican and Democratic parties who named challengers to both Republican and Democratic precincts, must be given Constitutional protection.

19. The evidence demonstrates that there exists over 40 polling places in Hamilton County where there is not a single Republican precinct judge. The absence of challengers in the polling places will mean there is no Republican Party representative in the polling places at all and will undermine confidence in the system.
20. Pursuant to Federal Rule 8 Appellate Procedure 8, Intervenors have moved for a stay pending appeal in the Circuit Court. As of the time of this Motion, the Court has failed to rule on the Motion. Given the time constraints of this appeal, Intervenors request immediate relief in the Sixth Circuit.

For the foregoing reasons, Intervenors respectfully request that this Court immediately issue an order staying the District Court's decision granting a temporary restraining order and preliminary injunction and expedite consideration of this appeal, which affects tomorrow's general election.

In the interests of clarity, Intervenors further request that this Court expressly order the Secretary of State to instruct the Board of Election to permit challengers.

NOV-1-2004 14:28 FROM:KMK 513 579 6457

TO:916147287592

P:16/23

Respectfully submitted,



Patrick F. Fischer (0039671)  
 James E. Burke (0032731)  
 Louis F. Gilligan (0021805)  
 1400 Provident Tower  
 One East Fourth Street  
 Cincinnati, Ohio 45202  
 Tel: (513) 579-6428  
 Fax: (513) 579-6457  
 pfischer@kmklaw.com  
 jburke@kmklaw.com  
 lgilligan@kmklaw.com  
 Attorneys for Appellants-Intervenor  
 Defendants, Charles H. Winburn,  
 Sam Malone and Clara Pugh

**OF COUNSEL:**

**KEATING, MUETHING & KLEKAMP,  
P.L.L.**

1400 Provident Tower  
One East Fourth Street  
Cincinnati, Ohio 45202  
(513) 579-6400

and

Kurtis A. Tunnell (0038569)  
Randolph C. Wiseman (0021992)  
Anne Marie Sferra (0030855)  
Stephen C. Gray (0067877)

**BRICKER & ECKLER LLP**

100 S. Third St  
Columbus, Ohio 43215-4291

Tel: (614) 227-2300

Fax: (614) 227-2390

[ktunnell@bricker.com](mailto:ktunnell@bricker.com)

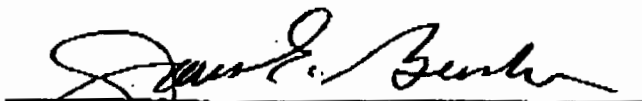
[rwiseman@bricker.com](mailto:rwiseman@bricker.com)

[asferra@bricker.com](mailto:asferra@bricker.com)

[sgray@bricker.com](mailto:sgray@bricker.com)

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true copy of the foregoing document, namely, **MOTION OF APPELLANTS-INTERVENOR DEFENDANTS CLARA PUGH, SAM MALONE, AND CHARLES WINBURN FOR EMERGENCY STAY OF DISTRICT COURT'S ORDER GRANTING PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION PENDING APPEAL AND MOTION TO EXPEDITE APPEAL**, was served via telefax upon the following counsel of record this 1<sup>st</sup> day of November, 2004.

  
James E. Burke

13567371

NOV-1-2004 14:28 FROM:KNK 513 579 6457

TO:916147287592

P:19/23

①

Form 10-U Prescribed by Secretary of State (12/97)

BILLYE BROTHERS, SPENCER, OHIO 1-800-322-7711

**Affidavit-Oath-Examination of Person Challenged**  
*Revised Code Section 2505.20*

The State of Ohio, \_\_\_\_\_ County, ss:

I, \_\_\_\_\_ the undersigned, swear or affirm that I will fully and truly answer all of the following questions put to me, touching my place of residence and my qualifications as an elector at this election.

(Check all that apply) Being challenged as unqualified on the ground(s) that:

(A) \_\_\_\_\_ The person is not a citizen, the following questions shall be put:

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

If a naturalized citizen, then

I am the identical person named in the certificate of my naturalization herewith produced for the inspection of the Judges of Election.

Or,

I was naturalized on the \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_ at \_\_\_\_\_ I have had a certificate of my naturalization which is lost, destroyed or beyond my power to produce to the Judges.

Or,

By reason of the naturalization of my parent(s) \_\_\_\_\_ I have become a Citizen of the United States and my parent(s) \_\_\_\_\_ was naturalized on the \_\_\_\_\_ day of \_\_\_\_\_ at \_\_\_\_\_

(B) \_\_\_\_\_ The person is not a resident of the state for thirty days immediately preceding election, the following questions shall be put:

(1) Have you resided in this state for thirty days immediately preceding this election?

If yes:

(a) Where have you resided?

(b) Names of two persons who know your place of residence.

(1) \_\_\_\_\_

(2) \_\_\_\_\_

<sup>1</sup> Cross out words or lines not applicable so that statements and answers made shall be factual.

Form 10-U Prescribed by Secretary of State (12-97)

(2) Have you been absent from this state within the thirty days immediately preceding this election?

If yes:

(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?

(C) The person is not a resident of the county or precinct where he/she offers to vote, the following questions shall be put:

(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? \_\_\_\_\_

(D) The person is not of legal voting age, the following question shall be put:

(1) Are you eighteen years of age or more to the best of your knowledge and belief? \_\_\_\_\_

Other Questions and Answers:

(Refusing or failing to answer any question fully or refusing to sign this form will result in the loss of your right to vote.)

Challenged Voter's Signature \_\_\_\_\_

Sworn to before me and signed in my presence, this \_\_\_\_\_ day of \_\_\_\_\_ (Month) (Year)

Presiding Judge of Election, \_\_\_\_\_

Precinct \_\_\_\_\_

Township or Ward and City or Village \_\_\_\_\_

Presiding Judge shall put such other questions to the persons challenged as may be necessary to test his qualifications as an elector at the election. R.C. 3505.20

WHOEVER COMMITS ELECTION FALSIFICATION IS GUILTY OF A FELONY OF THE FIFTH DEGREE



Ohio Secretary of State J. Kenneth Blackwell  
 Elections Division - 180 E. Broad St., 15<sup>th</sup> Floor, Columbus, OH 43215  
 Tel. (614) 466-2585 Fax (614) 752-4360 e-mail: [election@sos.state.oh.us](mailto:election@sos.state.oh.us)

(B)

Directive 2004-42  
 October 25, 2004

## ALL COUNTY BOARDS OF ELECTIONS

TO: Members, Directors & Deputy Directors

### Provisional Voting:

#### Home Precinct Balloting Only

##### Issuing and Processing Provisional Ballots

This Directive replaces Directive 2004-33, which has been declared in violation of federal law. Directive 2004-33 is therefore no longer in effect.

All boards of elections must instruct their poll workers on the provisional voting procedures authorized by state and federal law. In the event that any provision of Ohio law or any previous procedures or practices differ from these instructions, poll workers are instructed to follow the procedures set forth in this Directive.

All poll workers shall receive training on the contents of this Directive and be advised to contact your offices if they need additional information or have questions related to provisional voting. A copy of this Directive should be included in each poll worker handbook and be available to poll workers as a resource on Election Day.

#### New Provisional Balloting Procedures

The Help America Vote Act of 2002 (HAVA) set out new instructions for provisional balloting. Poll workers must follow its instructions, which follow:

If an individual's name does not appear on the official list of eligible voters for the polling place or an election official asserts that the individual is not eligible to vote, poll workers shall notify that individual that he or she has a right to cast a provisional ballot if he or she so desires.

No person will be denied the opportunity to cast a provisional ballot because he or she does not reside in the precinct in which he or she wishes to vote.

Before permitting an individual to cast a provisional ballot, the poll worker must:

- 1) Determine the address of the individual.
- 2) Determine if the address of the individual is located within the precinct.

If the address is not located within the precinct, the poll worker shall tell the voter both: (A) The precinct in which the voter's residence is located; and (B) The location of the polling place for that precinct. If necessary, the poll worker shall contact the board of elections to determine this information.

- 3) Advise the voter that, if he or she does not vote at the correct precinct, the voter's ballot will not be counted for any issue or office.
- 4) If the individual still desires to cast a provisional ballot, the poll worker shall require the individual to execute a written affirmation before an election official at the polling place stating as follows:

I affirm that my name is \_\_\_\_\_, that my date of birth is \_\_\_\_\_, and at this time my voting residence is \_\_\_\_\_ in the City/Village of \_\_\_\_\_ in \_\_\_\_\_ County of the State of Ohio and that this is the only ballot that I am casting in this election. If I am voting elsewhere than the precinct where I reside, I understand that my entire ballot will not be counted.

*Signature of Voter*

Once an individual has cast a provisional ballot, an election official shall affix the voter's completed affidavit to the provisional ballot envelope. A poll worker or election official shall then transmit sealed envelopes and affirmations to the county board of elections for prompt verification.

If the county board of elections determines that the individual is eligible under Ohio law to vote, the individual's provisional ballot shall be counted in accordance with Ohio law.

An individual's provisional ballot will only be counted if he or she has voted in the proper precinct.

Sincerely,



J. Kenneth Blackwell

NOV-1-2004 14:29 FROM:KMK 513 579 6457

TO:916147287592

P:23/23

Page 1 of 1

