

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION

SUMMIT COUNTY DEMOCRATIC CENTRAL  
AND EXECUTIVE COMMITTEE, et al.,

Plaintiffs,

v.

J. KENNETH BLACKWELL, et al.,

Defendants.

5:04CV 2165  
CASE NO. JUDGE ADAMS

PLAINTIFF'S MEMORANDUM  
AND AUTHORITIES IN SUPPORT  
OF THEIR APPLICATION FOR A  
PRELIMINARY INJUNCTION

MAG. JUDGE LIMBERT

**I. INTRODUCTION**

Pursuant to Rule 65(a) and (b) of the Federal Rules of Civil Procedure and Title 42, United States Code, Section 1983, Plaintiffs respectfully submit this Memorandum in support of their Application for a Preliminary Injunction enjoining Defendants J. Kenneth Blackwell, Patricia Wolfe, Bryan C. Williams, John N. Schmidt, Wayne M. Jones, Alex R. Arshinkoff, Joseph F. Hutchinson, Jr., Russell M. Pry, Unknown Government Officials 1 through 20 of the State of Ohio, Unknown Challengers 1 through 475, and their agents, employees, representatives and successors and all persons acting in concert with them from condoning, authorizing, conducting, or ordering any of the "challenge" process set forth in Ohio Revised Code Section 3505.20 ("Section 3505.20"). Such ongoing actions by Defendants and others acting in concert with them are in direct violation of the Plaintiffs' rights under the First and Fourteenth Amendments to the United States Constitution and Title 42, United States Code, Section 1983, including the rights of due process and equal protection.

## II. STATEMENT OF FACTS

The relevant facts of this case, summarized below, are fully set forth in Plaintiffs' Verified Complaint. Title XXXV of the Ohio Revised Code governs the conduct of all elections in the State of Ohio.<sup>1</sup> Section 3505.20 (entitled "Challenges"), provides that persons appointed as "challengers" may assert a challenge to any person attempting to cast a vote at the polling place where that challenger is stationed. Upon the assertion of such a challenge — based on alleged ineligibility of the prospective voter due to the potential voters' citizenship, residence, or age — the voter is subjected to an interrogation by an election judge at the polling place.

In addition to the specific questions listed in the statute covering these three specific areas, the statute also provides that "[t]he **presiding judge shall put other questions to the person challenged ... as are necessary to test the person's qualifications as an elector at the election.**" Section 3505.20 (emphasis added). The statute provides no limits or definitions to restrict the scope of questioning that the "presiding judge" considers "necessary to test the person's qualifications...."

Section 3505.20 further provides that if a challenged potential voter "refuses" to answer the questions posed, or is "unable" to answer the questions as they were answered on his or her registration form, "**or if for any other reason a majority of the judges believes the person is not entitled to vote, the judges shall refuse the person a ballot.**" Section 3505.20 (emphasis added). This provision also states that the potential voter has no recourse in the face of such a

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<sup>1</sup> Section 3501.06 of the Ohio Revised Code (Board of Elections; Vacancies) provides that there shall be a board of elections in each Ohio county. Section 3501.22 provides that the board of elections is responsible appointing four "judges" for each election precinct. Section 3505.21 states that at a general election, a political party supporting candidates to be voted upon at such election may appoint to any of the polling places in the county or city one person, a qualified elector, to serve as a "challenger" for such party during the casting of the ballots.

determination by the judges, and that **“[t]he decision of said judges shall be final as to the right of the person challenged to vote at such election.”** Section 3505.20 (emphasis added).

The challenge provisions of Section 3505.20 of the Ohio Revised Code permits the potential voter to be denied his or her right to vote, without an opportunity to be represented by counsel, to rebut evidence, to confront the challenger, to introduce evidence in his or her favor, or to otherwise participate in the process as anything other than an interrogated witness. If the potential voter is denied a ballot at the discretion of a majority of the judges, for any reason, the voter has no opportunity to appeal and is effectively denied his or her voting rights.<sup>2</sup>

On October 20, 2004, Defendant Wolfe, in her official capacity as Director of Elections of Ohio, issued a memorandum to all County Boards of Elections, under the letterhead of Defendant Blackwell (“the October 20 Memorandum”), which purported to set forth “guidelines” for the Section 3505.20 “challenge” process, and expressly recognized the lack of procedural safeguards in the Ohio election code:

Because **statu[t]les (sic) do not specify the procedures and limitations for challenging voters**, and because it is **widely anticipated that challenger confusion could cause undue delays in voting**, it is necessary to develop a policy for dealing with challenges posed at the precinct.

October 20 Memorandum at 5 (attached hereto as Exhibit No. 1) (emphasis added).

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<sup>2</sup> The election challenge provisions of Section 3505.20 were enacted prior to 1953 but have been rarely, if ever, invoked by any political party or organization in a general election in Ohio for more than 50 years. Upon information and belief, the subject and unlimited ballot-denial provisions of Ohio Revised Code Section 3505.20 were adopted and enforced in other statutory forms in Ohio before 1953; and are strikingly similar to so-called “Jim Crow”- era voting restrictions instituted for the actual purpose of preventing and discouraging African-Americans and other minority voters from lawfully casting ballots. *See, e.g., Monroe v. Collins*, 17 Ohio St. 665 (1867) (declaring unconstitutional a similar Ohio statute permitting polling place challenges and allowing “challengers” to place additional “qualifications” upon black would-be voters, using a “procedure” like the one at issue here). Whether or not the purpose is the same in the case at bar is immaterial; it is the *effect* that is unconstitutional.

On October 22, 2004 the Board of Elections of Summit County (the "BOE") was notified of the names and addresses of 475 electors designated as challengers for Election Day by the Republican Party of Summit County.<sup>3</sup> Although Plaintiff SCDC has also notified the BOE of its own designation of challengers, the purpose in so doing was to maintain a presence at the polls, to protect against mass vote suppression. *See* Affidavit of SCDC Executive Director Andrew Padrutt (attached hereto as "Plaintiffs' Exhibit 2" or "PX2").

### III. ARGUMENT

#### A. Plaintiffs Satisfy The Standard For Injunctive Relief In This Circuit

In order to obtain preliminary injunctive relief in this Circuit, Courts consider the following factors: "(1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would suffer irreparable injury without the injunction; (3) whether issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuance of the injunction." Rock & Roll Hall of Fame & Museum, Inc. v. Gentile Prods., 134 F.3d 749, 753 (6th Cir. 1998). These are "factors to be balanced, not criteria to be met." Washington v. Reno, 35 F.3d 1093, 1099 (6th Cir. 1994) (internal citations omitted). Accordingly, each factor need not be satisfied to issue a preliminary injunction. *See* Dayton Area Visually Impaired Persons, Inc. v. Fisher, 70 F.3d 1474, 1480 (6th Cir. 1995). Nevertheless, as we next demonstrate, consideration of these factors weighs heavily in favor of granting the preliminary injunction sought by the Plaintiffs.

Plaintiff SCDC represents not only its own interests in promoting and protecting the full and fair participation of all voters in the election process, but also represents the interests of its

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<sup>3</sup> Plaintiffs did not bring this suit prior to October 22, 2004, because Plaintiffs could not be certain whether the challenge process in Section 3505.20 would be utilized by the Republican Party.

membership and the general electorate. Powers v. Ohio, 499 U.S. 400, 410-11 (1991); see also, Tesmer v. Granholm, 333 F.3d 683 (6th Cir. 2003); Northampton County Democratic Party v. Hanover Township, Civ. Action No. 04-CV-00643, 2004 U.S. Dist. LEXIS 7755 (E.D. Pa. April 26, 2004); See, Affidavit of SCDC Executive Director Andrew Padrutt at PX2 hereof. Similarly, the Individual Plaintiffs Sommerville, Doty , Gorbach and McCarthy assert not just their own rights in this matter, but also the rights of their fellow Summit County voters and, as to elected officials Plaintiffs Sommerville and McCarthy, the rights of their constituencies. See, Affidavits of Plaintiffs Sommerville, Gorbach, Doty and McCarthy (attached hereto as "Plaintiffs' Exhibit" or "PX" 3, 4, 5 and 6, respectively).

1. Plaintiffs Have A Substantial Likelihood Of Demonstrating That The Application Of Section 3505.20 Would Violate Their Constitutional And Statutory Rights

a. Application Of Section 3505.20 Will Violate Plaintiffs' Constitutional Rights To Due Process and Equal Protection

Voting rights are embodied in, among other statutory and constitutional provisions, the First and Fifteenth Amendments and are protected from state invasion by the Fourteenth Amendment. See, e.g., Smith v. Meese, 821 F.2d 1484, 1490 (11th Cir. 1987); see also, e.g., Reynolds v. Sims, 377 U.S. 533, 555 (1964). "The right to vote remains, at bottom, a federally protected right. If the election process itself reaches the point of patent and fundamental unfairness, a violation of the due process clause may be indicated and relief under § 1983 therefore in order." Marks v. Stinson, 19 F.3d 873, 888 (3d Cir. 1994) (quoting Griffin v. Burns, 570 F.2d 1065 (1st Cir. 1978)).<sup>4</sup>

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<sup>4</sup> Rejection of a ballot where a voter effectively has been denied the ability to cast a legal vote gives rise to due process concerns. See id. (citing Griffin). "[T]he court's focus was not upon the alleged prejudice to a candidate who endured the rigors of electioneering and who *may* have been the choice of the electorate, but rather upon the right of electors to vote and to have their votes counted." Id.

Moreover, inequalities in the voting process that result in the disenfranchisement of a group of voters give rise to a violation of the equal protection clause of the Fourteenth Amendment. Such inequalities violate the Fourteenth Amendment because, “[h]aving once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one’s vote over that of another.” Bush v. Gore, 531 U.S. 98, 104 (2000). Moreover, “[i]t must be remembered that ‘the right of suffrage can be denied by a debasement or dilution of the weight of a citizen’s vote just as effectively as by wholly prohibiting the free exercise of the franchise.’” Id. (quoting Reynolds v. Sims, 377 U.S. 533, 555 (1964)). “[O]nce the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment.” Id. (quoting Harper v. Virginia Bd. of Elections, 383 U.S. 663, 665 (1966)).<sup>5</sup>

State action that impairs the exercise of fundamental rights, including voting rights, will be subject to strict scrutiny by the courts. “When a statute burdens certain ‘fundamental rights’-- e.g., voting rights or the right to interstate travel--a reviewing court will strictly scrutinize that statute, upholding it only if the government can clearly demonstrate a compelling interest incapable of being served by less intrusive means.” Kittery Motorcycle, Inc. v. Rowe, 320 F.3d 42, 47 (1st Cir. 2003); see also, e.g., Idaho Coalition United for Bears v. Cenarrussa, 342 F.3d 1073 (9th Cir. 2003) (applying the strict scrutiny standard to state’s regulation of the election process). “Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement must be carefully and meticulously scrutinized.” Harper, 383 U.S. at 667.

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<sup>5</sup> “The idea that one group can be granted greater voting strength than another is hostile to the one man, one vote basis of our representative government.” Moore v. Ogilvie, 394 U.S. 814 (1969); see also Shelley V. Kraemer, 334 U.S. 1, 22 (1948) (“Equal protection of the laws is not achieved through indiscriminate imposition of inequalities.”).

Plaintiffs in the present case have a substantial likelihood of success on their claim that Defendants' application of Section 3505.20 will result in a direct violation of Plaintiffs' rights to freely exercise their expression and association rights under the First Amendment and their due process and equal protection guaranteed by the Fourteenth Amendment. Indeed, a potential voter who is interrogated by a judge pursuant to Section 3505.20 will have no right to a hearing, no right to present or cross-examine witnesses, and no right to counsel prior to the judges determining that they "believe[] the person is not entitled to vote," which requires that the judges "shall refuse the person a ballot." Section 3505.20. Moreover, such a potential voter will have no right to appeal or otherwise contest the decision of the judges as to whether that person is eligible to vote. Nor does Section 3505.20 provide for safeguards such as provisional ballots to be tallied in the event that potential voters are later found to be eligible voters. Accordingly, the complete absence of procedural safeguards throughout the "challenge" process set forth in Section 3505.20 amounts to a fundamental unfairness for potential voters subjected to this process and a violation of their constitutionally guaranteed right to due process.

Furthermore, the process in Section 3505.20 is not narrowly tailored to address a compelling state interest. For instance, if Defendants claim to have an interest in preventing voter fraud, the process set forth in Section 3505.20 is far too broad in its scope to be considered narrowly drawn to address that interest. Indeed, as explained above, Section 3505.20 purports to give the election judges unfettered discretion in making the determination whether they "believe" "for any other reason" that the person is "not entitled to vote." The provision does not even link that determination to whether or not the challenged voter is "eligible" pursuant to the statutory

requirements. In attempting to avoid election fraud, state statutory provisions with such sweeping coverage simply cannot be characterized as narrowly tailored.<sup>6</sup>

It is also noteworthy that voters denied a ballot on election day, pursuant to Section 3505.20, are not even afforded the same rights and process supplied to voters whose qualifications are challenged *prior* to election day, under O.R.C. 3505.19, which has also been challenged in Case No. 1:04CV2147 (Judge Matia)09 in this District. Voters challenged in advance of election day are to be provided notice and a hearing; and if there is no "final" decision on the challenged voters' eligibility to vote, by election day, the challenged voter is permitted a "second chance," to show, at his polling place., that he has a right to vote. The disparity in voter-protective provisions, between Sections 3505.19 and 3505.20 is unexplained and inexplicable. A voter challenged (but not disenfranchised) prior to the election under Section 3505.19, however, may nonetheless find himself subject to summary denial of his voting rights (under section 3505.20), when he reports to cast his vote; and it is likely that the second challenge would be based on an entirely new "reason," given the absence of objective standards or limits to questioning in Section 3505.20. It is the internal conflicts within Chapter 3505, as well as the unlimited, subjective ability for poll officials to deny a voter a ballot "for any reason" that support a finding that the statute is unconstitutionally vague, as well as violative of due process and equal protection. See, e.g., Citizens to Establish a Reform Party v. Priest, 970 F. Supp. 690 (E.D. Ark. 1996).

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<sup>6</sup> See, e.g., Buckley v. Am. Constitutional Law Found., Inc., 525 U.S. 182, 210 (1999) ("The State's dominant justification for its badge requirement is that it helps the public to identify ... petition circulators who perpetrate fraud. Even assuming that this is a compelling interest, plainly, this requirement is not narrowly tailored. It burdens all circulators, whether they are responsible for committing fraud or not. In any event, the State has failed to satisfy its burden of demonstrating that fraud is a real, rather than a conjectural, problem.") (J. Thomas, concurring).

b. Application of Section 3505.20 Will Violate Plaintiffs' Rights Under Title 42, United States Code, Section 1983

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Plaintiffs also have a substantial likelihood of success in their claims that Defendants and those acting in concert with them will violate Plaintiffs' rights under Title 42, United States Code, Section 1983, which provides equitable relief to any citizen who has been deprived of any right, privilege, or immunity secured to them by the Constitution and laws of the United States by any person acting under color of law.

To prevail on the merits of a Section 1983 claim, a plaintiff must establish two elements. See 42 U.S.C. § 1983; Adickes v. S.H. Kress & Co., 398 U.S. 144, 150 (1970); Chapman v. Higbee Co., 319 F.3d 825, 833 & n.7 (6th Cir. 2003). First, the plaintiff must show that the defendant deprived him of a right "secured by the Constitution and laws" of the United States. 42 U.S.C. § 1983; Adickes, 498 U.S. at 150; Chapman, 319 F.3d at 833. Second, the plaintiff must prove that a person was acting "under color of any statute, ordinance, regulation, custom, or usage." 42 U.S.C. § 1983; Chapman, 319 F.3d at 833. To obtain an injunction under Section 1983, a plaintiff must demonstrate (1) that it will suffer irreparable harm; (2) that it has no adequate remedy at law; and (3) that the irreparable harm it will suffer outweighs any countervailing public interest. Rizzo v. Goode, 423 U.S. 362, 378 (1976).

In the present case, Plaintiffs have made the requisite showing to succeed on the merits of a Section 1983 claim and to win injunctive relief on such a claim. As demonstrated above, it is clear that Defendants' actions will result in a clear violation of Plaintiffs' constitutional rights to due process and equal protection.

Furthermore, Defendants' actions at issue are under color of state law in that they would be carried out pursuant to Ohio's election statutes. For instance, Defendant Blackwell is the Secretary of State for the State of Ohio and the Chief Election Officer of Ohio, pursuant to Ohio

Rev. Code § 3501.04. In the exercise of his official duties, Defendant Blackwell is responsible for prescribing all rules, regulations, and instructions necessary to conduct elections in Ohio, and he appoints all Ohio County Board of Election members. To the extent that Defendant Blackwell condones, authorizes or orders any government officials to apply the Section 3505.20 challenge process in the upcoming election, he would certainly be acting under color of state law as Secretary of State and Chief Election Officer of Ohio. Similarly, Defendant Wolfe, as Director of Elections under Defendant Blackwell, is and was clearly acting under color of state law in issuing the October 20 Memorandum, which remains in place. The other Defendants, including the Unknown Challengers 1 through 475, would also be acting under color of state law, pursuant to the challenge process set forth in Section 3505.20.

Moreover, absent an injunction from this Court, Plaintiffs will suffer irreparable injury as a result of the application of Section 3505.20. As explained, Plaintiffs' seek such an injunction prior to the upcoming election on November 2, 2004. If Defendants are permitted to apply Section 3505.20, then Plaintiffs will be subjected to a "challenge" process that amounts to clear violation of their rights to due process and equal protection. Accordingly, Plaintiffs will be subject to disenfranchisement without any procedural safeguards. Such an injury is truly "irreparable" in that the courts would not be able to remedy such an injury after the election occurs. Moreover, it has been held that a violation of due process and equal protection rights can be "in and of itself, sufficient to satisfy the requirement. Such rights are 'so fundamental to our legal system and to our society that any violation thereof will cause irreparable harm irrespective of the financial impact.'" Bannum, Inc. v. City of Memphis, 666 F. Supp. 1091, 1096 (W.D. Tenn. 1986).

Plaintiffs do not have any plain, adequate or complete remedy at law to stop or prevent Defendants' unlawful conduct; the injunctive and declaratory relief they seek are their only means of securing full relief from these practices. Additionally, as acknowledged by this Circuit in Sandusky County Democratic party, et al. v. J. Kenneth Blackwell, et al. (6th Cir. October 26, 2004) Case Numbers 04-4265/4266, Opinion at 7, "...a voter cannot know in advance" that his or her eligibility to vote will be challenged at the polling place, making the identification of specific voters who *will* be challenged virtually impossible. In the instant case, however, the Individual Plaintiffs have each averred that the prospect of delay, discouragement and/or denial of their exercise of their voting rights (and in the case of the SCDC, the possible frustration of its organizational purpose and the rights of its members) constitute issues that "are not speculative or remote; they are real and imminent." *Id.* Further, the irreparable harm suffered by Plaintiffs clearly outweighs any countervailing public interest. Surely the public does not have a valid interest in allowing election judges to have unfettered discretion to interrogate a potential voter and "refuse the person a ballot" for "any other reason" that such judges "believe[] the person is not entitled to vote...." Moreover, it is clearly not in the public's interest to permit state officials to use an arcane statutory provision, with no known history of utilization in recent decades, to return Ohio voters to a time when failure to respond to poll workers' questions *quickly* enough, or inability to interpret a Constitutional provision to the subjective satisfaction of poll officials, could cost the voter his right to cast his ballot. See, e.g., Louisiana v. United States, 380 U.S. 145, 85 S. Ct. 817, 13 L.Ed. 2d 709 (1965). Like the state constitutional provision challenged in the Louisiana case, O.R.C. 3505.20 provides "no definite and objective standards" for its administration (as conceded within the October 20 Memorandum), in violation of the Fourteenth Amendment. *Id.* As Justice Black opined in Louisiana, "This is not a test [nor, in the instant case,

a polling place "procedure" for challenging unqualified or ineligible voters] but a trap, sufficient to stop even the most brilliant [or, in this case, voting-eligible] man on his way to the voting booth." *Id.*

2. Absent Injunctive Relief, Plaintiffs Will Suffer Irreparable Harm

As discussed above, Plaintiffs will suffer irreparable harm absent injunctive relief.

3. The Plaintiffs' Injury Outweighs The Harm That A Preliminary Injunctive May Cause Defendants

While Plaintiffs would suffer the loss of their fundamental constitutional right to vote if injunctive relief is not granted, any potential harm to Defendants would be negligible. Defendants would simply be required to refrain from enforcing an unconstitutional statute, and to direct county boards of elections to comply with the express requirements of federal law.

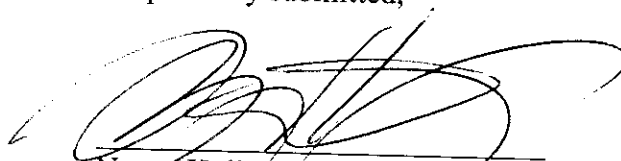
4. The Injunction, If Issued, Will Not Adversely Affect The Public Interest

The public interest would not be adversely affected, and would, in fact be served by the issuance of injunctive relief in this case, as it is in the public interest to have an equitable, lawful, and constitutionally valid voting process.

#### **IV. CONCLUSION**

Plaintiffs respectfully request that this Court enjoin Defendants and those acting in concert with them from condoning, authorizing, conducting, or ordering any of the "challenge" process set forth in Ohio Revised Code Section 3505.20.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Nancy Holland Myers', written over a horizontal line.

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