

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

**5:04 CV 2165**

SUMMIT COUNTY  
DEMOCRATIC CENTRAL AND  
EXECUTIVE COMMITTEE,  
438 Grant St,  
Akron, Ohio 44311,

and

MARCO SOMMERVILLE,  
618 Copley Road,  
Akron, Ohio 44320,

and

KAREN DOTY,  
345 Jefferson Avenue,  
Akron, Ohio 44313,

and

TIMOTHY GORBACH,  
2319 14th Street,  
Cuyahoga Falls, Ohio 44223,

and

JAMES B. McCARTHY,  
2273 Greensburg Road,  
North Canton, Ohio,

and

JANE DOE,  
CITIZENS OF THE UNITED STATES  
AND RESIDENTS OF OHIO NOS. 1 THROUGH  
20; and JOHN DOE CITIZENS OF THE UNITED  
STATES AND OHIO NOS. 1 THROUGH 20;

Plaintiffs,

v.

) CASE NO. \_\_\_\_\_  
)  
) JUDGE \_\_\_\_\_

) VERIFIED COMPLAINT:  
) Type: Other Civil; §1983 Claim

) (Request for Declaratory Judgment  
) and Injunctive Relief)

**JUDGE ADAMS**

**MAG. JUDGE LIMBERT**

Office of the Clerk of Court  
Northern District of Ohio  
Akron, Ohio 44303  
Tel: 330.263.1234  
Fax: 330.263.1235

OHIO SECRETARY OF STATE )  
J. KENNETH BLACKWELL, )  
in his official and individual capacities, )  
180 East Broad Street, )  
Columbus, Ohio 43215, )

and )

PATRICIA WOLFE, )  
DIRECTOR OF ELECTIONS FOR THE )  
STATE OF OHIO, )  
in her official and individual capacities, )  
180 East Broad Street, )  
Columbus, Ohio 43215, )

and )

ALEX R. ARSHINKOFF, MEMBER, )  
BRYAN WILLIAMS, DIRECTOR, )  
JOHN N. SCHMIDT, DEPUTY DIRECTOR, )  
WAYNE M. JONES, MEMBER, )  
JOSEPH R. HUTCHINSON, JR., MEMBER, )  
RUSSELL M. PRY, MEMBER, )  
SUMMIT COUNTY BOARD OF ELECTIONS, )  
in their official and individual capacities, )  
470 Grant Street, )  
Akron, Ohio 44311, )

and )

UNKNOWN CHALLENGERS 1 )  
THROUGH 475, sued in their official capacities as )  
appointed election challengers and in their individual )  
capacities; )

and )

UNKNOWN GOVERNMENT OFFICIALS 1 )  
THROUGH 475, sued in their official capacities as )  
individuals who are currently charged with enforcing, )  
overseeing or otherwise administering the process of )  
elections in Ohio, and in their individual )  
capacities; )

Defendants. )

COME NOW Plaintiffs, by and through undersigned counsel, and state the following complaint for declaratory and injunctive relief:

### **NATURE OF THE ACTION**

1. Plaintiffs, pursuant to Title 42, United States Code, §1983, bring this Complaint for a declaratory judgment and for preliminary and permanent injunctive relief against Defendants J. Kenneth Blackwell, Secretary of State of Ohio; Patricia Wolfe, Director of Elections of Ohio; Bryan C. Williams, Director of the Summit County Board of Elections; John N. Schmidt, Deputy Director of the Summit County Board of Elections; Wayne M. Jones, Chairman and Member of Summit County Board of Elections; Unknown Government Officials 1 through 20 of the State of Ohio, and Unknown "Challengers" 1 through 475, as that term is used in Ohio Rev. Code §3505.21 ("§3505.21") (collectively referred to as the "Defendants"). Specifically, Plaintiffs seek an order prohibiting Defendants, while acting under color of state law, from depriving citizens of Ohio of their constitutional rights to due process and equal protection, through the application or enforcement of the so-called "challenge" procedure set forth in Ohio Rev. Code §3505.20 ("§3505.20") in the Ohio general election for local, state, and national offices on November 2, 2004, and thereafter.

### **JURISDICTION AND VENUE**

2. This Court has subject matter jurisdiction over this civil action under 28 U.S.C. §§ 1331 and 1343(a)(3) and (4). Plaintiffs seek to preserve rights protected by, among other things, the First and Fourteenth Amendments of the United States Constitution, and 42 U.S.C. §1983. This Court has subject matter jurisdiction over this civil action under 28 U.S.C. §§1331 and 1343(a)(3) and (4). This Court also has subject matter jurisdiction over this action pursuant to 28 U.S.C. §1343 because plaintiffs have properly asserted a claim for relief under 42 U.S.C.

§1983 alleging a deprivation of individual rights under the color of state law. A request for declaratory judgment concerning an actual federal controversy within the Court's jurisdiction is proper under 28 U.S.C. §§2201 and 2202 and is being made pursuant to Rules 57 and 65 of the Federal Rules of Civil Procedure. This Court has supplemental jurisdiction to adjudicate state claims pursuant to 28 U.S.C. §1367(a) as they arise from the same nucleus of fact as the federal law claims. Venue is proper in this Court pursuant to 28 U.S.C. §1391 because defendant Board of Elections is located in this District.

### **PARTIES**

3. Plaintiff, Marco Sommerville, a resident of the address indicated above, is a United States citizen and resident of Summit County, Ohio.

4. Plaintiff, Karen Doty, a resident of the address indicated above, is a United States citizen and resident of Summit County, Ohio.

5. Plaintiff, Timothy Gorbach, a resident of the address indicated above, is a United States citizen and resident of Summit County, Ohio.

6. Plaintiff, James B. McCarthy, a resident of the address indicated above, is a United States citizen and resident of Summit County, Ohio.

7. Plaintiff Summit County Democratic Central and Executive Committee (hereinafter "SCDC") is a political association based in Summit County, Ohio, which consists of member individuals who reside in Summit County and who support, are affiliated with, or are otherwise members of the Ohio Democratic Party. The SCDC has an interest in having all votes cast by qualified voters properly counted in the November 2, 2004 election and all elections thereafter. The SCDC sues on its own behalf and on behalf of its members, as they individually and collectively face the very real, imminent threat of irreparable harm as a result of the

administration of O.R.C. §3505.20 . The principal address of SCDC is 438 Grant Street, Akron, Ohio 44311.

8. Plaintiffs JANE DOE NOS. 1-20, and Plaintiffs JOHN DOE NOS. 1-20, are all citizens of the United States and the State of Ohio and are all currently residents of Summit County Ohio.

9. Each of the plaintiffs Sommerville, Doty, Gorbach and McCarthy (the "Individual Plaintiffs") (a) have been residents of Summit County since at least October 3, 2004, (b) have attained the age of eighteen years, and (c) are not currently incarcerated. None of the Plaintiffs have been declared incompetent to vote. All of the Plaintiffs have registered to vote in Summit County Ohio, and currently intend to cast their votes in the general election for local, state and national offices, to be held in Summit County on November 2, 2004 ("Election Day"). Each of the Individual Plaintiffs all allege, on information and belief, that they are eligible to cast ballots in the general election to be held in Summit County on Election Day. The Individual Plaintiffs face the very real and imminent threat of irreparable harm as the result of the administration of O.R.C. §3505.20.

10. Defendant J. KENNETH 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. Defendant Blackwell has held this position at all times materially relevant to this Complaint. Defendant Blackwell is sued in his official and individual capacities and maintains his office for the performance of his official duties at the Borden Building, 180 East Broad Street, Columbus, Ohio 43215.

11. Defendant Patricia Wolfe is the Director of Elections for the State of Ohio, reporting to Defendant Secretary Blackwell. In the exercise of her official duties, Defendant Wolfe is responsible for issuing interpretive guidelines and procedures, on behalf of Defendant Blackwell, to be used at each Ohio polling place, with respect to O.R.C. §§3505.21 and 3506.13 (appointment of witnesses and challengers for polling places) and O.R.C. §3505.20 (polling place challenge of voter qualification). Defendant Wolfe has held this position at all times materially relevant to this Complaint. Defendant Wolfe is sued in her official and individual capacities and maintains her office for the performance of her official duties at the Borden Building, 180 East Broad Street, Columbus, Ohio 43215.

12. Defendants BRYAN C. WILLIAMS and JOHN M. SCHMIDT are the Director and Deputy Director, respectively, of the Summit County Board of Elections. Defendants Williams and Schmidt are sued in their official and individual capacities. Their office for the performance of official duties is 470 Grant Street, Akron, Ohio 44311.

13. Defendants WAYNE M. JONES, ALEX R. ARSHINKOFF, JOSEPH F. HUTCHINSON, JR., and RUSSELL M. PRY are members of the Summit County Board of Elections (collectively, "the Board"). The Summit County Board of Elections consists of four members, each appointed to a four-year term by the Secretary of State. Defendants Williams, Jones, Arshinkoff, Hutchinson, Pry and Schmidt are sued in their official and individual capacities. Their office for the performance of official duties is 470 Grant Street, Akron, Ohio 44311.

14. Defendants UNKNOWN GOVERNMENT OFFICIALS 1 THROUGH 20 are each individuals who are currently charged with enforcing, overseeing or otherwise administering the process of elections in Ohio.

15. Defendants UNKNOWN CHALLENGERS 1 THROUGH 20 are each individuals who have been, or intend to be, appointed as official "challengers" pursuant to Section 3505.21, and who intend to station themselves at polling places in Summit County on Election Day for the purpose of challenging voters pursuant to Section 3505.20.

16. At all times relevant to this lawsuit, each Defendant, and those acting in concert with them, were and are acting under color of state law.

### FACTS

17. Title XXXV of the Ohio Revised Code governs the conduct of all elections in the State of Ohio. Chapter 3505 of the Ohio Revised Code governs the form, casting and counting of general and special election ballots.

18. §3501.06 of the Ohio Revised Code (Board of Elections; Vacancies) provides that there shall be in each county, "a board of elections consisting of four qualified electors of the county, who shall be appointed by the secretary of state, as the secretary's representatives, to serve for the term of four years."

19. §3501.22 of the Ohio Revised Code (Precinct Election Officials) provides that, "...each year the board of elections by a majority vote shall, after a careful examination and investigation as to their qualifications, appoint for each election precinct four competent electors, residents of the county in which the precinct is located, as judges."

20. §3505.21 of the Ohio Revised Code (Challengers and Witnesses), provides that at any general election, any 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, who shall serve as challenger for such party or such candidates during the casting of the ballots."

21. §3505.20 of the Ohio Revised Code (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 then subjected to a test that consists of 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**" §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...."

22. The election challenge provisions of §3502.20 have been included in the Ohio Revised Code since no later than 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.

23. §3505.20 of the Ohio Revised Code 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.**" §3505.20 (emphasis added).

24. §3505.20 of the Ohio Revised Code further provides that such a "challenged" potential voter has no recourse, in the face of such a 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.**" §3505.20 (emphasis added).

25. Under the plain language of §3505.20 of the Ohio Revised Code, a potential voter may be refused a ballot following a challenge "**for any reason**" by a majority of the judges at such polling place. Once that decision has been made, the voter may not vote and has no right of appeal or other recourse to preserve his or her franchise.

26. The challenge provisions of §3502.20 of the Ohio Revised Code permits the potential voter to be denied his or her right to vote, without notice, 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.

27. §3505.20 makes no allowance for a provisional ballot, or for any other mechanism to record the challenged voter's intended preference pending further review of his or her eligibility.

28. 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") (copy attached as "Plaintiff's Exhibit 1" or "PX1"), which purported to set forth "guidelines" for the "challenge" process, and expressly recognized the lack of procedural safeguards in the Ohio election code:

*Because statu[t]es (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 (PX1) (emphasis added).

29. On October 22, 2004 the Board of Elections of Summit County was notified of the names and addresses of 475 electors designated as challengers for Election Day by the Republican Party of Summit County. On about October 22, 2004, Plaintiff SCDC also identified designated challengers, *See* Affidavit of SCDC Executive Director Andrew Padrutt (also verifying the within assertions), attached hereto as "Plaintiffs' Exhibit 2"; Affidavit of Plaintiff Marco Sommerville, attached hereto as "Plaintiffs' Exhibit 3."

#### COUNT 1

##### **§1983 Claim for Violation of Right to Due Process Under the First and Fourteenth Amendments**

30. The allegations made in ¶¶1 through 30 of this Complaint are incorporated as if restated, in full, herein.

31. §3505.20 of the Ohio Revised Code, by its specific terms, denies Plaintiffs the due process and equal protection rights guaranteed by the First and Fourteenth Amendments, by authorizing unlimited interrogation by election "judges," for the stated purpose of allowing the "judges" to determine whether or not the potential voter is eligible to vote.

32. §3505.20 of the Ohio Revised Code, by its specific terms, denies Plaintiffs the freedom of speech and association and the due process and equal protection rights guaranteed by the First and Fourteenth Amendments, by granting unlimited discretion to election "judges" to deny ballots to potential voters if "for any other reason" the judges "believe the person is not entitled to vote...."

33. §3505.20 of the Ohio Revised Code, by its terms, denies Plaintiffs the due process and equal protection rights guaranteed by the First and Fourteenth Amendments, by denying potential voters any procedural safeguards, such as the right to a hearing, the right to counsel, the right to introduce evidence, or the right to offer or cross-examine witnesses prior to a final decision to deny such voter a ballot.

34. §3505.20 of the Ohio Revised Code, by its terms, denies Plaintiffs the due process and equal protection rights guaranteed by the First and Fourteenth Amendments, by denying potential voters any right to appeal a decision of disenfranchisement in light of the statutory mandate of §3505.20 that "[t]he decision of said judges shall be final as to the right of the person challenged to vote at such election."

35. Through the application and enforcement of §3505.20, and by permitting, participating, encouraging, or utilizing the "challenge" process set forth in that provision, Defendants can and will directly violate Plaintiffs' due process and equal protection rights guaranteed to them by the Fourteenth Amendment.

36. Plaintiffs have no plain, adequate or complete remedy at law to correct the Defendants' unlawful conduct while acting under color of state law, and the injunctive, declaratory and other equitable relief they seek constitute their only means of securing full relief.

36. An actual controversy exists with regard to the enforcement of the challenge provisions of Chapter 3505 of the Ohio Revised Code. The Plaintiffs will suffer irreparable injury from the Defendants' unlawful policies and practices, as set forth above, unless such policies and practices are enjoined and the rights of the parties are declared.

## **PRAYER FOR RELIEF**

WHEREFORE, Plaintiffs respectfully pray that the Court will:

(a) Declare that the provisions of §3505.20 of the Ohio Revised Code and establishing a scheme through which potential voters may be challenged and denied a ballot by action of election "judges" violates the rights of citizens rights of the citizens of Ohio under the First and Fourteenth Amendments to the Constitution and shall be void and unenforceable.

(b) Declare the instructions of the October 20 Memorandum, providing for the appointment and authority of challengers to challenge potential voters to be void and unenforceable, as such instructions violate the rights of citizens of Ohio under the First and Fourteenth Amendments to the Constitution.

(c) Preliminarily and permanently enjoin the Defendants, 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 §3505.20 of the Ohio Revised Code;

(d) Award reasonable costs and attorney's fees pursuant to 42 U.S.C. §1983 and/or the Civil Rights Attorneys Fees Award Act of 1976, as amended, 42 U.S.C §1988; and

(e) Order such other relief as the Court may deem necessary and appropriate.

Respectfully submitted,

A large, stylized handwritten signature in black ink, appearing to be 'N. Myers', is written over the first two lines of the typed text.

Nancy Holland Myers #0037964

John F. Myers #0032779

Holland Myers & Myers

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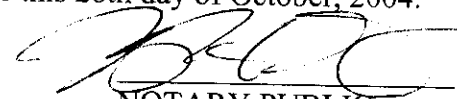
Attorney for Plaintiff

**VERIFICATION**

In accordance with Rule 56 of the Federal Rules of Civil Procedure, I, ANDREW PADRUTT, EXECUTIVE DIRECTOR OF THE SUMMIT COUNTY DEMOCRATIC CENTRAL AND EXECUTIVE COMMITTEE, hereby verify that the foregoing allegations are true to the best of my knowledge.

  
ANDREW PADRUTT

SWORN TO and subscribed in my presence this 28th day of October, 2004.

  
NOTARY PUBLIC  
ATTORNEY AT LAW -  
NO EXPIRATION