

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

CITIZENS ALLIANCE FOR  
SECURE ELECTIONS, et al., )  
Plaintiffs, )

-vs- )

MICHAEL VU, et al., )  
Defendants. )

FILED  
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1 : 04 CV 2147  
JUDGE MATIA

PLAINTIFFS' MEMORANDUM  
IN SUPPORT OF THEIR  
MOTION FOR A TEMPORARY  
RESTRAINING ORDER

I. INTRODUCTION

Without immediate intervention by this Court, the Cuyahoga County Board of Elections (hereinafter referred to as "defendant CCBOE") and Ohio Secretary of State Kenneth Blackwell will illegally disenfranchise thousands of individuals who timely registered to vote for the November 2, 2004 election.

Plaintiffs seek emergency relief because accompanying the verified complaint is irrefutable evidence that:

1. 240 voters, who timely filed registration applications or change of addresses, were not processed by defendant CCBOE; and,
2. 94 voters, who timely filed registration applications, were disenfranchised based on defendant CCBOE's clerical entry errors.

Scientific extrapolation by Dr. Norman Robbins of Case Western Reserve University, whose affidavit accompanies the Verified Complaint, concludes that roughly 10,720 Cuyahoga county voters, most of whom live in zip codes of low income minority areas will be disenfranchised unless immediate relief is granted. See, Affidavit Norman

Robbins attached hereto as Exhibit A. See also, Affidavits of Livingston, Gallo, McGraw, McCoy, Robinson, Coulton, Farmer, Dimmings, Smith, Marrero, Wieser, Price, Harwell, Oglesby, Meredith attached hereto as Exhibit B which are incorporated herein as if restated.

Plaintiffs timely registered to vote for the November 2, 2004 election by the October 4, 2004 deadline, and they bring this action for themselves and as representatives of classes of persons who also have applied but been similarly disenfranchised. Despite a legal duty to do so, defendant CCBOE failed, refused and neglected to (a) process the voter registration applications of plaintiffs and other classes of persons whom they represent; (b) inform plaintiffs and other classes of persons whom they represent of the disposition of their voter registration applications; and (c) allow plaintiffs and other classes of persons whom they represent an opportunity to cure any deficiency(ies) in their voter registration applications. Defendants' actions and omissions constitute separate violations under the the National Voter Registration Act of 1993 ("NVRA"), 42 U.S.C. §1973 *gg, et seq.*; Civil Rights Act of 1957 and 1960, 42 U.S.C. §1971(a)(1), (a)(2)(A) and §1971(a)(2)(B); and, 42 U.S.C. §1983.

## II. FACTUAL BACKGROUND

On or about September 14, 2004, defendant CCBOE published its "Fatal Pending List", which listed approximately 14,000 individuals identified as ineligible voters for the November 2, 2004 election. All individuals on the Fatal Pending List will not be allowed to vote by defendant CCBOE on November 2, 2004. See Verified Complaint.

The Greater Cleveland Voter Registration Coalition (hereinafter "Coalition") received a copy of the Fatal Pending List and provided it to Dr. Norman Robbins of Case

Western Reserve University for analysis. See Verified Complaint. Dr. Robbins sampled nearly 2,500 applications of deemed ineligible voters on the Fatal Pending List as well as the voter eligibility list and found that:

1. 240 voters, who timely filed registration applications or change of addresses, were not processed by defendant CCBOE; and,
2. 94 voters, who timely filed registration applications, were disenfranchised based on defendant CCBOE's clerical entry errors. See Robbins Affidavit.

Dr. Robbins estimates to a reasonable degree of statistical certainty that approximately 10,720 individuals will be wrongfully disenfranchised on November 2, 2004. See Robbins Affidavit.

On September 17, 2004, Dr. Robbins met with defendant Michael Vu, Director of CCBOE and notified him that defendant CCBOE was wrongfully disenfranchising individuals (a) listed on the Fatal Pending List; and, (b) not on either the eligible registered voters list or the Fatal Pending List. See Verified Complaint. Defendants Vu and CCBOE failed, refused and neglected to review the matter to identify persons who had legally registered by October 4, 2004 and who were determined to be ineligible voters. Id. Shortly thereafter, Members of the Coalition and defendant Vu met initially with the Cuyahoga County Commissioners (hereinafter "Commissioners") to discuss the Commissioners providing additional monies to defendant CCBOE to hire more employees to review the Fatal Pending List, identify legally eligible voters and take affirmative action to allow said persons to vote on November 2, 2004. Id.

On October 14, 2004 defendant CCBOE provided the Coalition and Dr. Robbins an Updated Fatal Pending List. Id. Dr. Robbins reviewed the Updated Fatal Pending List

and made a determination that (a) some clerical errors had been corrected; and, (b) the same percentage of errors existed. Id. See Robbins Affidavit. Defendant Vu was again offered monies when the Commissioners met on October 19, 2004 meeting to fund personnel to review the Fatal Pending List, identify legally eligible voters and take affirmative action to allow said persons to vote on November 2, 2004. See Verified Complaint. Defendant Vu refused. Id.

### III. LAW AND ARGUMENT

#### A. LEGAL STANDARD

The trial court, in its discretion, may grant a temporary restraining order to avoid irreparable injury. Gresham v. Windrush Partners, Ltd., 730 F.2d 1417, 1424 (11<sup>th</sup> Cir. 1984), cert. denied, 469 U.S. 892, 105 S.Ct. 249, 83 L.Ed 2d 187 (1984); Levine v. C&W Mining Co., 465 F. Supp. 690 (N.D. Ohio 1978), aff'd in relevant part, 610 F.2d 432, 435 (6<sup>th</sup> Cir. 1979). Merrill Lynch, Pierce, Penner & Smith v. Barnett, 1990 U.S. Dist. LEXIS 14081 (W.D. Mich. Oct. 23, 1990).

Verification of the complaint is the first prerequisite. Notice, where appropriate, should be provided to the adverse party and, in the instant case, said notice has been given to the defendants as attested to in the affidavit filed by Avery S. Friedman in accordance with Federal Rule of Civil Procedure 65. Marathon Oil Co. v. Mobil Corp., 530 F. Supp. 315 (N.D. Ohio 1981), aff'd 669 F.2d 378 (6<sup>th</sup> Cir. 1981). See, e.g., National City Bank v. Battisti, 581 F.2d 565 (6<sup>th</sup> Cir. 1977).

In determining whether to issue a temporary restraining order, the court must balance the following factors:

[1] Whether plaintiffs can show inadequacy of legal remedies or irreparable harm;

[2] Whether plaintiffs can show likelihood of future injury.

First, the court determines whether plaintiffs have proven that legal remedies are inadequate with the plaintiffs remaining in danger of sustaining substantial and immediate injury if the injunction does not issue. City of Los Angeles v. Lyons, 461 U.S. 95, 101-102, (1983); Allee v. Medrano 416 U.S. 802, 814 (1974). The first requirement has also been recognized by courts as the expressed need to demonstrate irreparable harm. Allee, supra, at 814.

In analyzing the second factor, plaintiffs need show that a “credible threat” exists and that the future injury is not merely “conjectural.” Kolender v. Lawson, 461 U.S. 352, 355 n.3 (1983). Further, the court can consider other factors including but not limited to “the likelihood of success on the merits, the harm to the non-moving party and the public interest.” Merrill Lynch, Pierce, Penner & Smith v. Barnett, 1990 U.S. Dist. LEXIS 14081 (W.D. Mich. Oct. 23, 1990).

As will be demonstrated herein, all temporary injunctive relief requirements have been met.

B. PLAINTIFFS AND THOSE SIMILARLY SITUATED HAVE SUFFERED AND WILL CONTINUE TO SUFFER IRREPARABLE HARM WITHOUT INTERVENTION BY THIS COURT.

As of today, October 25, 2004, plaintiffs and all other persons similarly situated (a) timely registered to vote in the November 2, 2004 election; and (b) have been placed on a Fatal Pending List as ineligible voters by defendants; or (c) have not been placed on the eligible voter list or Fatal Pending List by defendants apparently because their applications have been misplaced. See Verified Complaint. Defendants’ actions caused

plaintiffs and other persons similarly situated to be labeled ineligible to vote for the November 2, 2004 election. Id.

Courts recognize that denial of one's right to participate in an election constitutes irreparable injury. In Charles H. Wesley Educ. Foundation, Inc. v. Cox, 324 F.Supp.2d 1358 (N.D. Ga. 2004), the court stated "no monetary remedy can correct the fact that the [voter registration] applications submitted on June 12 were improperly rejected nor will a monetary remedy prevent the state from rejecting similar applications in the future." Similarly, in U.S. v. Berks County, Pennsylvania, 277 F.Supp.2d 570 (E.D. Pa. 2003) the court noted, "[t]he impact of the discouragement of equal participation in the democratic system cannot be redressed by money or any other remedy and constitutes irreparable harm."

Defendants' act to disenfranchise plaintiffs' right to vote constitutes irreparable harm and serves as a basis for injunctive relief under Fed. R. Civ. Pro. 65(b).

C. PLAINTIFFS' STAND TO SUFFER A LIKELIHOOD OF FUTURE INJURY.

Plaintiffs and all others similarly situated stand to be disenfranchised on November 2, 2004. See Verified Complaint. As verified by Dr. Robbins, despite having received plaintiffs' timely and properly registrations for the November 2, 2004 election, defendants either designated plaintiffs and the class of persons they represent ineligible or failed to place them on either the eligibility list or the Fatal Pending List. See Robbins Affidavit. As a direct and proximate consequence of defendants' actions, all plaintiffs and the class of persons they represent cannot cast valid votes on November 2, 2004 and will be disenfranchised. See Verified Complaint. As the right to participate in an

election through voting constitutes irreparable injury and all plaintiffs and the class they represent cannot so participate, this case presents a future injury that is a concrete and credible threat, not baseless conjecture. Consequently, temporary injunctive relief is proper.

D. PLAINTIFFS LIKELIHOOD TO SUCCEED ON THE MERITS SERVES AS AN ADDITIONAL BASIS FOR THE ISSUANCE OF TEMPORARY INJUNCTIVE RELIEF.

1. Plaintiffs have standing under the National Voters Registration Act of 1993, 42 U.S.C. §1973, et seq. and as a derivative 42 U.S.C. §1983 action under the Voting Rights Act of 1957 and 1960.

The plaintiffs have standing to bring this action under the NVRA pursuant to 42 U.S.C. §1973 gg-9(b), which allows a private action to redress a NVRA violation. If a violation occurs within 30 days of an election, there is no need under the statute to notify the Secretary of State of Ohio in writing before commencing the action. 42 U.S.C. §1973 gg-9. This grant of a private right to sue is contained within Subchapter I-H of Chapter 146 of Title 42 of the United States Code. In addition, 42 U.S.C. §1973 gg-6(b)(1), also found within Subchapter I-H of Chapter 146 of Title 42 of the United States Code, requires that state voter registration rolls shall be “uniform, nondiscriminatory and in compliance with the Voting Rights Act of 1965 (42 U.S.C. §1973, et seq.)” As a result, all of the requirements of 42 U.S.C. §1973 are subject to a private right of action under 42 U.S.C. §1973 gg-9(B), even if there are no direct private rights of action under 42 U.S.C. §1973. However, it is clear that implied private rights of action are available under all of the federal statutes identified in this motion under 42 U.S.C. §1983, for deprivation of rights secured by the Constitution and laws of the United States of America, under color of state law.

2. Defendants violated the National Voter Registration Act of 1993, 42 U.S.C. §1973 et seq. by failing, neglecting and refusing (a) to properly process registration applications of plaintiffs and the class of persons they represent; and, (b) to notify plaintiffs and the class of persons they represent of the disposition of their voter registration applications.

As the Sixth Circuit recognized in Community Organizations for Reform Now v. Miller, 129 F.3d 833 (6<sup>th</sup> Cir. 1997), “the right to vote has long been recognized as central to the protection and exercise of the other rights guaranteed in our society. *Id.* at 835. In Bell v. Marinko, 367 F.3d 588 (6<sup>th</sup> Cir. 2004), the court stated in pertinent part, that,

The National Voter Registration Act protects only “eligible” voters from unauthorized removal. Eligible voters, at a minimum, are those who qualify as bona fide residents of the precinct in which they are registered or wish to register to vote. [citations omitted] *Id.* at 592.

This lawsuit seeks to prevent the disenfranchisement of “eligible” voters who timely submitted their voter registration applications.

Congress enacted the NVRA “to establish procedures that will increase the number of eligible citizens who register to vote in elections for Federal office.” 42 U.S.C. §1973 gg(b)(1). The NVRA constitutes a valid exercise of Congress’ power to regulate federal elections. Ass’n of Cmty Orgs. For Reform Now v. Miller, 129 F.3d 833, 836-37 (6<sup>th</sup> Cir. 1997).

Pursuant to the National Voter Registration Act of 1993, 42 U.S.C. §1973gg(6) (hereinafter “NVRA”), a state must:

- ensure that any eligible applicant is registered to vote in an election; [42 U.S.C. §1973 gg-6(a)(1)]
- provide that the name of a registrant may not be removed from the official list of eligible voters [except at the registrant’s request or as provided by

State law, by reason of criminal conviction or mental incapacity or as prescribed under a program removing ineligible voters by reason of death or change in the registrant's residence in accordance with §1973 gg-6(b)(c)&(d); [42 U.S.C. §1973gg-6(a)(3)].

In Charles H. Wesley Educ. Foundation, Inc. v. Cox, 324 F.Supp.2d 1358 (N.D. Ga. 2004), the court noted that the broad language of §1973 gg-6(a)(1)(D) "would have required the state to process the [voter registration] applications." The court held,

The court finds that plaintiffs have a substantial likelihood of prevailing on the merits of their claim that the applications sent by the Wesley Foundation and received by the Georgia Secretary of state on June 14, 2004 were improperly rejected in violation of the NVRA. Id. at 1368.

The case at bar presents two main classes of disenfranchised eligible voters: (a) those never processed by defendant CCBOE; and, (b) those improperly processed as ineligible by defendant CCBOE due to clerical errors by defendant CCBOE. See, Robbins Affidavit. According to the irrefutable testimony of Dr. Robbins, 334 voters (from his sample of 2,500) who timely registered with defendant CCBOE were either not processed by defendant CCBOE or were placed on defendant CCBOE's Fatal Pending List as ineligible voters due to clerical errors by defendant CCBOE. Id. Based upon Dr. Robbins scientific statistical analysis, plaintiffs represent a class of approximately 10,720 eligible voters who defendants have disenfranchised. Id.

Given that courts have issued injunctive relief to enforce state and local election officials to satisfy their NAVA obligation to process voter applications that had been timely received, plaintiffs have a substantial likelihood of prevailing on the merits in this case. Charles H. Wesley Educ. Foundation, Inc. v. Cox, 324 F.Supp.2d 1358 (N.D. Ga. 2004).

3. Defendants violated 42 U.S.C. §1983 by depriving plaintiffs and the class of persons they represent their right to have their voter registration applications processed under Voting Rights Act of 1957 and 1960, 42 U.S.C. §1971 (a)(2)(B) so as to allow them the right to vote on November 2, 2004.

In Maine v. Thiboutot, 448 U.S. 1, 100 S.Ct. 2502, 65 L.Ed.2d 555 (1980), the Supreme Court held that §1983 was available to enforce violations of federal statutes by agents of a state. However, a §1983 claim will not arise if Congress foreclosed such enforcement within the statute upon which the violation rests or in the event the statute did not create enforceable rights within the meaning of §1983<sup>1</sup>. Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 101 S.Ct. 1531, 67 L.Ed.2d 694 (1981). A private right of action under 42 U.S.C. §1983 can be asserted under the Voting Rights Act of 1957 and 1960, 42 U.S.C. §1971 *et seq.*. See, e.g., Allen v. State Board of Elections, 393 U.S. 544, 89 S.Ct. 817, 22 L.Ed.2d 1 (1969); Morse v. Republican Party of Virginia, 517 U.S. 186, 116 S.Ct. 1186, 134 L.Ed.2d 347 (1996); Schwier v. Cox, 340 F.3d 1284 (11<sup>th</sup> Cir. 2003); Sandusky County Democratic Party v. Blackwell, \_\_\_ F.Supp. \_\_\_, 2004 WL 2308862, rev'd on other grounds, \_\_\_ F.3d \_\_\_, \_\_\_ WL \_\_\_ (2004) (holding an individual has standing under 42 U.S.C. §1983 to state a private action for violations under the Help America Vote Act, 42 U.S.C. §15301 *et seq.*).

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<sup>1</sup> In McKay v. Thompson, 226 F.3d 752 (6<sup>th</sup> Cir. 2000) the Court decided that there is no private right of action under 42 U.S.C. §1971, but did not reach the issue as to whether a derivative 42 U.S.C. §1983 action can be made for a violation of the Voting Rights Act, 42 U.S.C. §1971.

Under 42 U.S.C. §1971(a)(2)(B) of the VRA,

No person acting under color of law shall –

(B) deny the right of any individual to vote in any election because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election.

Defendant CCBOE and Defendant Vu placed plaintiffs and the class of persons they represent on a Fatal Pending List as “ineligible” voters or did not place them on either the eligible voting list or Fatal Pending List. See, Robbins Affidavit. Said action constitutes disenfranchisement of plaintiffs and the class of persons they represent for the November 2, 2004 election. Id. Notably, defendant CCBOE’s disenfranchisement of plaintiffs was based solely upon defendant CCBOE’s actions and/or omissions and is not based upon plaintiffs having not provided necessary information on their voter registration cards. Id.

Based on plaintiffs strong likelihood of success under this 42 U.S.C. §1983 action for violation of the Voting Rights Act, 42 U.S.C. §1971(a), injunctive relief must issue.

E. DEFENDANTS DO NOT STAND TO BE SIGNIFICANTLY HARMED BY THE ISSUANCE OF A TEMPORARY RESTRAINING ORDER.

Courts have continuously recognized that issuance of injunctive relief to ensure a citizen’s right to vote does not significantly harm named defendants in a federal voting rights action. As the Court in U.S. v. Berks County, Pennsylvania, 277 F.Supp.2d 570 (E.D. Pa. 2003) noted,

[a]ny small additional monetary expense to defendants to conduct the election in compliance with the Voting Rights Act is far outweighed by the important fundamental right involved in this case....[o]rdering defendants to conduct elections in compliance with the Voting Rights Act so that all citizens may participate equally in the electoral process serves the public interest by reinforcing the core principles of our democracy..... (internal citations omitted).

Similarly, in Johnson v. Halifax County, 594 F.Supp. 161, 171 (E.D.N.C. 1984) the Court found that the administrative and financial burdens on defendant were not undue in light of the irreparable harm caused by unequal opportunity to participate in an election.

The District Court in Bishop v. Lomenzo, 350 F.Supp. 576, 587-88 (D.C.N.Y. 1972) observed that,

[w]ithout minimizing the administrative burden upon the Boards of Elections, we must not lose sight of the fact that we are here dealing with a most fundamental aspect of our free and democratic society – the citizen’s right to vote.....[w]hen that is weighed in the balance against clerical inconvenience, the latter must give way.....[t]he state may not deny a voter the right to register [and hence to vote] because of clerical deficiencies.....[t]he remedy lies in providing more clerks rather than in registering fewer voters (internal citation omitted).

Based on the common recognition that issuance of injunctive relief to preserve federal voting rights does not cause significant harm to nullify the injunctive order, a temporary restraining order must issue to ensure that plaintiffs and the class of persons they represent in this action are not disenfranchised November 2, 2004.

F. THE PUBLIC INTEREST WOULD BE SERVED BY GRANTING THE INJUNCTIVE RELIEF SOUGHT BY PLAINTIFFS.

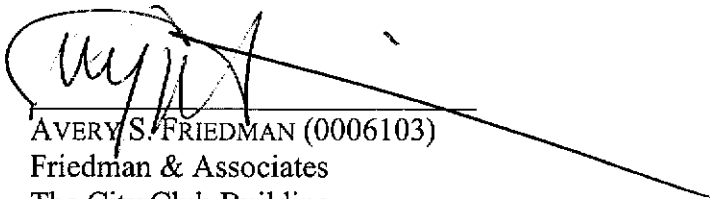
Courts recognize the strong public interest that attaches to ensuring that states comply with federal voting laws to safeguard fundamental voting rights, and routinely declare that this interest greatly outweighs the public interest in minimizing administrative expenses. See Shapiro v. Thompson, 394 U.S. 618, 633, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969); Charles H. Wesley Educ. Foundation Inc. v. Cox, 324 F.Supp.2d 1358, 1368-9 (N.D. Ga. 2004) (observing that “the court easily concludes that an injunction would not be contrary to the public interest” because “[t]he public has an interest in seeing that the State of Georgia complies with federal law, especially in the

important area of voter registration,” because “[o]rdering the state to comply with a valid federal statute is most assuredly in the public interest.”). Clearly, it is in the public interest to issue temporary injunctive relief to the plaintiffs and the class they represent to allow them to vote on November 2, 2004.

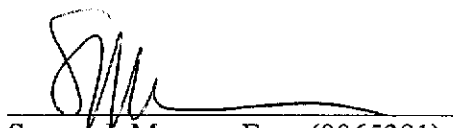
IV. CONCLUSION

For all of the foregoing reasons, plaintiffs respectfully request that this Court issue the following immediate temporary injunctive relief in the form identified in plaintiffs’ motion for temporary restraining order.

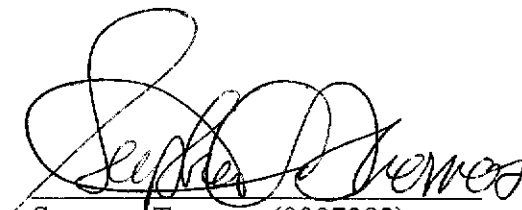
Respectfully submitted,



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