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U.S. DISTRICT COURT
SOUTHERN DIST. OHIO
EAST. DIV. COLUMBUS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

RALPH NADER, PETER MIGUEL CAMEJO, HERMAN BLANKENSHIP, KIM BLANKENSHIP, JULIE COYLE, LOGAN MARTINEZ, and LARRY SNIDER,

Plaintiffs,

v.

J. KENNETH BLACKWELL, OHIO SECRETARY OF STATE,

Defendant.

Civil Action No. **C2 . 04 1052**

Judge **JUDGE SMITH**

Magistrate Judge **MAGISTRATE JUDGE ABEL**

MEMORANDUM IN SUPPORT OF TEMPORARY RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION

In order to win preliminary relief under Federal Rule of Civil Procedure 65, whether by way of a temporary restraining order or preliminary injunction, movants must establish (1) a substantial likelihood of success on the merits, (2) irreparable harm, (3) little to no harm is threatened others (including the non-moving party), and (4) the public interest will be served by the relief. *See Bonnell v. Lorenzo*, 341 F.3d 800, 826 (6th Cir. 2001). As explained below, Plaintiffs meet this standard.

INTRODUCTION

Plaintiffs challenge Defendant's refusal to count write-in votes for Ralph Nader and Peter Miguel Camejo under the First and Fourteenth Amendments to the United States Constitution, and 42 U.S.C. § 1983. The Plaintiffs include Ralph Nader and Peter Miguel Camejo, candidates for President and Vice-President, respectively, as well as five

individuals who either cast or intended to cast write-in votes for Nader and Camejo. Defendant is J. Kenneth Blackwell, Ohio Secretary of State, who has authority over all Ohio elections, and who is expressly empowered by Ohio law to accept and refuse declarations of intent to proceed as write-in candidates.

On September 28, 2004, Defendant ordered all Ohio local boards of elections to remove or redact Nader's and Camejo's names from their general election ballots. Defendant's decision was precipitated by a legal challenge filed by Ohio Democrats against Nader's[1] candidacy. Prior to this challenge, Nader was officially on Ohio's ballot.

Nader challenged the Defendant's decision in separate law suits filed in the first week of October 2004 in state and federal court. On Tuesday, October 12, 2004, the United States District Court for the Southern District of Ohio refused Nader's request for emergency relief, which would have (if granted) returned Nader to the ballot. This decision was upheld by the United States Court of Appeals for the Sixth Circuit on Monday, October 18, 2004, which refused to issue emergency relief and refused to expedite the appeal. On Friday, October, 22, 2004, the Ohio Supreme Court refused Nader's request for emergency relief, which would have (if granted) returned Nader to the ballot. On Tuesday, October 26, 2004, the United States Supreme Court denied emergency relief to Nader, which would have (if granted) returned Nader to the ballot.

Ohio law directs that write-in candidates for the Presidency must file with Defendant a "declaration of intent" at least fifty days before the general election in order for their votes to be counted. O.R.C. § 3513.041. Specifically, § 3513.041 of the Ohio Revised Code states:

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[1] For sake of brevity, Nader and Camejo will be described jointly as "Nader" or the "Nader campaign."

> A write-in space shall be provided on the ballot for every office, except in an election for which the board of elections has received no valid declarations of intent to be a write-in candidate under this section. Write-in votes shall not be counted for any candidate who has not filed a declaration of intent to be a write-in candidate pursuant to this section. A qualified person who has filed a declaration of intent may receive write-in votes at either a primary or general election. Any candidate, except one whose candidacy is to be submitted to electors throughout the entire state, shall file a declaration of intent to be a write-in candidate before four p.m. of the fiftieth day preceding the election at which such candidacy is to be considered. If the election is to be determined by electors of a county or a district or subdivision within the county, such declaration shall be filed with the board of elections of that county. If the election is to be determined by electors of a subdivision located in more than one county, such declaration shall be filed with the board of elections of the county in which the major portion of the population of such subdivision is located. If the election is to be determined by electors of a district comprised of more than one county but less than all of the counties of the state, such declaration shall be filed with the board of elections of the most populous county in such district. *Any candidate for an office to be voted upon by electors throughout the entire state shall file a declaration of intent to be a write-in candidate with the secretary of state before four p.m. of the fiftieth day preceding the election at which such candidacy is to be considered.* In addition, candidates for president and vice-president of the United States shall also file with the secretary of state by said fiftieth day a slate of presidential electors sufficient in number to satisfy the requirements of the United States constitution.

(Emphasis added). A write-in candidate who does not file a timely declaration of intent has his write-in votes discarded (and not counted). When Defendant ceased accepting declarations of intent for write-in candidates on or about September 13, 2004, Plaintiffs, Ralph Nader and Peter Miguel Camejo, were qualified to appear by name on Ohio's election ballot and thus had no reason to declare as write-in candidates. Section 3513.041, moreover, prohibits the Defendant from accepting declarations of intent from write-in candidates who have already filed nomination papers.[2] Nader was thus legally

[2] Section 3513.041 states in this regard:

> The secretary of state shall not accept for filing the declaration of intent to be a write-in candidate of a person for ... the office of governor or lieutenant governor if that person, for the same election, has already filed a declaration of candidacy, a declaration of intent to be a write-in

precluded from filing a declaration of intent to run as a write-in candidate when the deadline passed. *See State ex rel. Lynch v. Cuyahoga Board of Elections*, 686 N.E.2d 498 (Ohio 1997) (declaration to be write-in candidate filed after deadline passed id untimely).

On Tuesday, November 2, 2004, the Nader campaign attempted to submit to Defendant a properly executed and official "declaration of intent" in order to have write-in votes for Nader officially counted by Ohio elections officials. Defendant refused to accept this proffer, and thus plans on discarding write-in votes for Nader. Because of Defendant's refusal, otherwise valid and legitimate write-in votes for Nader will not be counted in Ohio.

ARGUMENT

I. Plaintiffs Have a Substantial Likelihood of Success on the Merits.

A. Section 3513.041's Temporal Requirement is Not Necessary to Achieve a Significant State Interest and is Thus Unconstitutional.

The Supreme Court in cases like *Bullock v. Carter,* 405 U.S. 134 (1972), *Lubin v. Panish*, 415 U.S. 709 (1974), and *Anderson v. Celebrezze*, 460 U.S. 780 (1983), has concluded that ballot access restrictions deserve "close" judicial scrutiny. In *Bullock* and

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> candidate, or a nominating petition, or has become a candidate through party nomination at a primary election or by the filling of a vacancy ....for any other state office or any county office.

Although this language applies to gubernatorial elections, additional language in § 3513.041 makes it clear that this limitation applies to all elective offices in Ohio:

> A board of elections shall not accept for filing the declaration of intent to be a write-in candidate of a person seeking to become a candidate if that person, for the same election, has already filed a declaration of candidacy, a declaration of intent to be a write-in candidate, or a nominating petition, or has become a candidate through party nomination at a primary election or by the filling of a vacancy ... for any state or county office ....

Read together, these paragraphs prevent candidates from filing both as write-ins and as ballot-listed candidates.

Lubin, for example, the Court employed this "close" scrutiny, 405 U.S. at 144, to invalidate large filing fees for state and federal elective offices. A similar analysis was used in *Anderson* to strike down Ohio's application of its early filing requirement to independent presidential candidates. What is clear from cases like *Bullock, Lubin* and *Anderson* is that in order to survive constitutional scrutiny, restrictions on electoral ballots must prove necessary to the fulfillment of important state interests. *See* Brown, *Popularizing Ballot Access: The Front Door to Election Reform*, 58 Ohio St. L.J. 1281, 1291-92 (1997).

Although states need not allow write-in votes at all in state and federal elections, *see Burdick v. Takushi*, 504 U.S. 428 (1992), "[h]aving once granted the right to vote on equal terms, the state may not, by later arbitrary and disparate treatment, value one person's vote over that of another." *Bush v. Gore*, 531 U.S. 98 (2000). Because Ohio authorizes write-in votes and counts them for some, it must treat all candidates in a constitutionally equal fashion. And in order to survive scrutiny under the Equal Protection Clause and First Amendment, states must justify their write-in restrictions in a convincing fashion.

Dixon v. Maryland State Board of Elections, 878 F 2d 776 (4th Cir. 1989), provides a useful example. There, local election officials in Baltimore charged write-in candidates a $150 fee in order to counts their votes. The Fourth Circuit, citing to *Bullock, Lubin* and *Anderson*, ruled this practice unconstitutional. Rejecting the District Court's application of simple rationality review, the Fourth Circuit instead concluded that the more searching analysis announced in *Anderson* must be applied. It thus weighed "the *character* and *magnitude* of the asserted injury to the rights protected by the First and

Fourteenth Amendments," *id.* at 780 (emphasis original), and "the precise interests put forward by the State as justifications for the burdens imposed." *Id.* at 783. The Fourth Circuit ruled under this balancing formula that Maryland's "filing fee [was] not a sufficiently narrowly drawn method of advancing the State's ... asserted interest in light of the burden ...." *Id.* at 784.[3]

Any question about the continuing vitality of *Dixon* was laid to rest in *Phillips v. Hechler*, 120 F. Supp.2d 587 (S.D. W.Va. 2000), which struck down West Virginia's filing fee requirement for write-in candidates. Numerous lower courts have followed suit, invalidating ballot restrictions that either unduly burdensome unnecessarily discriminatory. The Eleventh Circuit in *Fulani v. Krivanek,* 973 F.2d 1539 (11th Cir. 1992), applied *Anderson*'s balancing formula to strike down an indigence waiver allowed some, but not all, Presidential candidates. In order to access Florida's Presidential ballot, minor and independent candidates were required to collect signatures and pay verification fees. Independent candidates who were unable to pay were provided a waiver of the verification fee. Minor party candidates, in contrast, were not. Even though the minor party candidate in *Fulani* was able to pay the fee, *see id.* at 1544, the Eleventh Circuit struck down the disparate treatment.

The Second Circuit applied *Anderson*'s balancing test to restrictions placed on federal elections in *Rockefeller v. Powers*, 917 F. Supp. 155, 160 (E.D.N.Y.), *aff'd*, 78 F.3d 44 (2d Cir. 1996). There, Republican presidential candidates challenged a New York law that required them to "obtain signatures from 5% or 1250, whichever is less, of

[3] This approach was followed in *Socialist Workers Party v. Hechler,* 890 F.2d 1303, 1307 (4th Cir. 1989) (applying *Anderson* balancing formula to state filing fee waiver/signature collection alternative for ballot access).

the enrolled Republican voters" in a district in order to have their delegates' names placed on the ballot in that district. Because Republican support varied in New York's various congressional districts, the challengers argued, New York's floor figure had an uneven, unequal effect in violation of the Fourteenth Amendment. The District Court agreed. Applying *Anderson*'s balancing test, 917 F. Supp. at 159-60, the District Court concluded that New York's burden was not sufficiently supported by its interests in limiting ballot access. Because of the impending election, the Second Circuit's opinion affirming the District Court was brief. 78 F.3d at 45. Still, the Second Circuit clearly ratified the lower court's use of *Anderson*'s balancing formula and agreed that New York's "substantial burdens on candidates" were "unnecessary to satisfy" its interests. *Id.* at 45-46.

Section 3513.041's fifty-day advance filing requirement cannot withstand the scrutiny demanded by *Bullock*, *Lubin* and *Anderson.* It is not necessary to a significant or important state interest. Many states allow write-in candidates to declare their candidacies just before, during, or even after elections. Michigan, for example, allows write-in candidates to declare up until the Friday immediately preceding the election. *See* Mich. Comp. Laws Ann. § 168.737a. *See also* Minn. Stat. § 204B.09(3) (write-in declarations must be filed at least five days before election). West Virginia allows write-in candidates to file declarations of intent the day before the election. *See* Rev. Code W. Va. § 29A.24.311. Maine and the District of Columbia allow write-in candidates to declare after elections are complete. *See* Maine Rev. Stat., tit. 21-A, § 722-A (requiring that declaration of intent be served within three business days after election); D.C. Stat. § 1-1001.08(3) (requiring that declaration be filed either before or seven days after

election). Demanding that write-in candidates declare fifty days before the election serves no useful purpose.[4]

State courts, like the above-mentioned federal courts, have been suspicious of state laws that ignore write-in votes. In *Shambach v. Bickhart*, 845 A.2d 793 (Pa. 2004), for example, the Pennsylvania Supreme Court ordered that write-in votes for a candidate who was also listed by name on the ballot also be counted. No good reason justified their exclusion. Similarly, in *Kyle v. Daniels*, 9 P.3d 1043 (Ariz. 2000), the Arizona Supreme Court held that state law was not intended to prevent a candidate who unsuccessfully attempted to gain access to ballot from running as a write-in. And in *In re Gray-Sadler*, 753 A.2d 1101 (N.J. 2000), the New Jersey Supreme Court ordered that write-in votes not be excluded for trivial, technical reasons. As these cases make clear, once a state has decided to allow write-in votes, there is little (if any) reason for refusing to count them.

B. Defendant Caused Nader's Predicament and Thus Should be Constitutionally Estopped from Refusing His Declaration and Ignoring His Votes.

Nader was officially on Ohio's presidential ballot until September 28, 2004, well after the close of § 3513.041's deadline. In fact, Nader was kicked off the ballot so late that his name appeared on several counties' absentee ballots. Because of his belated action, the Defendant should now be estopped from enforcing § 3513.041 and ignoring the votes Nader received as a write-in candidate.

Constitutional estoppel prevents government from benefiting from misrepresentations, whether implicit or express. In *Cox v. Louisiana*, 379 U.S. 559 (1964), for example, protestors were told by local authorities that they could use the

[4] Ohio's fifty-day requirement is one of the longest temporal restrictions in the country. *See, e.g.*, Ky. Rev. Stat. § 117.265(2) (requiring filing of declaration of intent 10 days before election); Va. Code § 24.2-644.C (same); Wis. Stat. Ann. § 8.185(2) (requiring declaration of intent 2 weeks before election).

sidewalk across the street from the local courthouse. They were then arrested for picketing around that courthouse. Although it sustained the courthouse-protection statute, the Supreme Court reversed the conviction because of the official advice. *Id.* at 570-71. Allowing the state to benefit from its own misrepresentation would violate Due Process.

The *Cox* Court relied on *Raley v. Ohio*, 360 U.S. 423 (1959), which held that the Fourteenth Amendment's Due Process Clause prohibited Ohio from prosecuting persons for refusing to answer questions after being told by local officials that they had a state-law privilege. The Court explained why *Cox* was like *Raley*:

> the Due Process Clause prevent[s] conviction of persons for refusing to answer questions of a state investigating commission when they relied upon assurances of the commission, *either express or implied*, that they had a privilege under state law to refuse to answer, though in fact this privilege was not available to them. The situation presented here is analogous to that in *Raley*, which we deem to be controlling. As in *Raley*, under all the circumstances of this case, after the public officials acted as they did, to sustain appellant's later conviction for demonstrating where they told him he could 'would be to sanction an indefensible sort of entrapment by the State--convicting a citizen for exercising a privilege which the State had clearly told him was available to him.' The Due Process Clause does not permit convictions to be obtained under such circumstances.

379 U.S. at 571 (emphasis added).

Cox establishes that in the First Amendment context, the state should not be allowed to benefit from express or implicit misrepresentations. Running for office is quintessential First Amendment activity. Up until September 28, 2004, Defendant represented to Nader that he was on the Ohio ballot. For this reason, Nader did not file a declaration of intent to run as a write-in. Had Nader known of his impending disqualification, he would have filed. The Defendant's action thus prejudiced Nader, and the Defendant should be estopped from now ignoring Nader's write-in votes.

II. Voters Will Suffer Irreparable Harm.

Should the Court not grant the requested relief, thousands of voters will have their votes ignored by elections officials in Ohio. The Supreme Court's stay in *Bush v. Gore*, 531 U.S. 1046 (2000), illustrates how important Presidential elections are. Just as the improper counting of votes can cause a Presidential candidate irreparable harm, ignoring a candidate's votes causes harm beyond repair. Even conceding that Nader will not win the Presidential election, he will suffer irreparable harm in other ways. Voters' rights are at stake. Voters who wished their vote to count for Nader will be forever denied that right. Current polls show that Nader enjoys the support of approximately 4% of the American electorate.[5] Before being kicked off Ohio's ballot, Nader's support in Ohio rose to 5%.[6] Nader has significant support in Ohio and throughout the United States. His voters should not be denied their rights.

III. The Defendant Will Suffer No Harm.

Issuing an injunction against the Defendant will cause no harm. It will simply require that local election boards count Nader's write-in votes, just as they must count other candidates' write-in votes. Ordering the counting of write-in votes at late dates, moreover, is by no means unprecedented. In *Socialist Labor Party v. Rhodes*, 290 F.Supp 983 (D.Ohio 1968), a three-judge District Court ordered the State of Ohio to provide space for and count write-in votes for George Wallace for President, even though it concluded he was not entitled to appear by name on Ohio's ballot. The court refused to order that Wallace's name appear on the ballot because of the doctrine of laches, but

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[5] *See* www.pollingreport.com/wh04gen.htm (reporting national polls as of October 7, 2004).

[6] *See* www.cnn.com/2004/ALLPOLITICS/08/18/ohio/index.htm (CNN/USA Today poll reports that on Aug.15, 2004, Nader's support was 5%).

found that write-in space was a sound compromise.[7] The present case involving Ralph Nader is quite similar and should be resolved in the same way.

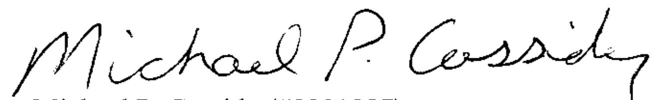
IV. The Public Will Benefit.

Counting all the votes cast will demonstrate Ohio's commitment to elections. It will thus inure to the public's benefit.

CONCLUSION

For the foregoing reasons, a Temporary Restraining Order should be issued directing the Defendant to not discard Nader's write-in votes until this Court can conduct a hearing on the merits of this Complaint. A preliminary and/or permanent injunction should then be issued to direct the Defendant to take all necessary steps to officially count Nader's write-in votes.

Respectfully submitted,



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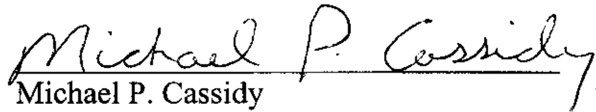
[7] The Supreme Court in *Williams v. Rhodes*, 393 U.S. 23 (1968), reversed in part and ordered that Wallace's name be included on Ohio's ballot. It did not upset, however, the District Court's conclusion that Wallace should at least be considered as a legitimate write-in candidate.

CERTIFICATE OF SERVICE

I hereby certify that copies of this Memorandum were e-mailed and faxed to the Ohio Attorney General's Office, c/o Arthur J. Marziale, Jr., Senior Deputy Attorney General (Trial Attorney) (amarziale@ag.state.oh.us), Richard N. Coglianese (rcoglianese@ag.state.oh.us) and Damian W. Sikora (dsikora@ag.state.oh.us), Assistant Attorneys General, 30 E. Broad Street, 17th Floor, Columbus, OH 43215-3428 (FAX (614) 728-7592), on this 2d day of November, 2004.



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