

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

**AMERICAN CIVIL LIBERTIES
UNION OF OHIO, INC., et al.**

Plaintiffs,

vs.

JENNIFER BRUNNER, et al.

Defendants.

) **JUDGE KATHLEEN M. O'MALLEY**
)
) **CASE NO. 1:08-CV-00145**
)
)
) **CLEVELAND BRANCH NAACP**
) **AMICUS CURIAE'S BRIEF IN**
) **OPPOSITION TO THE AMERICAN**
) **CIVIL LIBERTIES UNION OF OHIO,**
) **ET AL.'S MOTION FOR A**
) **PRELIMINARY INJUNCTION**
)

I. INTRODUCTION

The Cleveland Branch NAACP is a not-for-profit organization which is a subsidiary of the National NAACP, which was formed for the express purpose of advancing, protecting and providing support for all persons, particularly African Americans.

Indeed, the NAACP's mission statement specifically provides that:

"The mission of the National Association for the Advancement of Colored People is to ensure the political, educational and social and economic equality of rights of all persons and to eliminate racial hatred and racial discrimination".

(A copy of the NAACP's mission statement is attached hereto as Exhibit "A").

The objectives of the NAACP are as follows:

OBJECTIVES

The following statement of objectives is found on the first page of the NAACP Constitution - the principal objective of the Association shall be:

- To ensure the political, educational, social and economic equality of all citizens
- To achieve equality of rights and eliminate race prejudice among the citizens of the United States
- To remove all barriers of racial discrimination through democratic processes
- To seek enactment and enforcement of federal, state, and local laws securing civil rights
- To inform the public of the adverse effects of racial discrimination and to seek its elimination
- To educate persons as to their constitutional rights and to take all lawful action to secure the exercise thereof, and to take any other lawful action in furtherance if these objectives, consistent with the NAACP's Articles of Incorporation and this Constitution

(See Exhibit "A").

II. LAW AND ARGUMENT

A. NAACP's Litigation Participation.

Various local entities of the NAACP and the NAACP itself, have been Plaintiffs or one of the Plaintiffs, in different lawsuits attempting to enforce the rights of minorities. See i.e. City of Carrollton Branch of NAACP v. Stallings, 829 F.2d 1547 (11th Cir. 1987), cert den., 485 U.S. 936 (1988); (Issue as to whether the one person form of commission government resulted in the exclusion or dilution of African American voting strength, and lessened the opportunity of

African Americans to participate in the political process and have elected or appointed public officials of their choice); NAACP, Inc. v. City of Niagra Falls, 65 F.3d 1002 (2d. cir. 1995); (Challenge to municipality’s at-large method of electing members to its governing body); Milwaukee Branch of the NAACP v. Thompson, 116 F.3d 1194 (7th Cir. 1997); cert den., 118 S.Ct. 853; (Challenge to the election of judges pursuant to a county-wide election, rather than separate candidates in smaller districts); and NAACP v. Fordice, 252 F.3d 361 (5th Cir. 2001); (Challenge to the creation of voting districts that allegedly diluted the voting strength of African Americans in Mississippi).

In the present case, the position that the American Civil Liberties Union of Ohio (“ACLU”) is articulating is directly opposite to the actual facts before the Court. In contrast to the ACLU’s unsupported arguments, the central count optical scan voting system, (“CCOS”), which is to be utilized for the March 2008 preliminary election, will actually enhance minority voter participation, compared to the interference to voting rights that will occur if the ACLU prevails and the election cannot proceed as contemplated. As such, the ACLU’s argument that the use of a central count optical scan voting system will violate Section 2 of the Voting Rights Act of 1965, fails as a matter of law.

B. Plaintiffs Have Failed To Show That They Are Substantially Likely To Prevail On The Merits Of Their Voting Rights Act Claim.

Plaintiffs cannot succeed on a Voting Rights Act claim. The central purpose of Section 2 of the Voting Rights Act “was designated as a means of eradicating voting practices that ‘minimize or cancel out the voting strength and political effectiveness of minority groups’”. Reno v. Bossier Parish Sch. Bd., 520 U.S. 471, 479 (1979) (quoting S. Rep. No. 97-417, 2d Sess., p. 28 (1982)). Under Section 2, two (2) different types of discriminatory practices and procedures are prohibited: (1) those that lead to “vote denial” and 2) those that result in “vote

dilution”. Burton v. City of Belle Glade, 178 F.3d 1175, 1196 (11th Cir. 1999). Plaintiff Montgomery, an African American, cannot show that he has been denied the right to vote as he alleged in his Memorandum in Support of a Preliminary Injunction.

1. The Plaintiffs Have Failed To Allege A Valid Vote Denial Claim.

Although the Plaintiffs have alleged that they are bringing a “vote denial” claim under the Voting Rights Act, the fact is that Plaintiff Montgomery has not been denied the right to vote as that term is used in Voting Rights Act cases. Plaintiffs’ Motion at 24-25.

In order to state a “vote denial” claim, the Plaintiffs must prove that they will be denied the right to vote on the basis of race. 42 U.S.C. §1973(a). The basic, underlying flaw in the Plaintiffs’ argument is that Plaintiffs, specifically including African Americans, will not be denied the right to vote. African Americans in Cuyahoga County will be given the right to vote on CCOS ballots in the March 2008 primary election the same as every other voter in the county and every absentee voter in the State of Ohio. Furthermore, race has no demonstrated correlation to Plaintiffs’ ability to cast a vote. Plaintiffs’ own expert notes that “while the significant relationship between race and unrecorded votes is strongest in counties with poorly designed ballots...the relationship between race and unrecorded votes is statistically insignificant in counties with [properly designed ballots]. This result is consistent with other studies that indicate that voting procedures designed to help voters tend to minimize the relationship between race and unrecorded votes”. David C. Kimball and Martha Kropf, *Ballot Design and Unrecorded Votes on Paper-Based Ballots*, PUBLIC OPINION QUARTERLY, Vol. 69., No. 4, Winter 2005, 508, attached as Exh. G, to Defendant Ohio Secretary of State Jennifer Brunner’s Memorandum Contra to Plaintiffs’ Motion for Preliminary Injunction. Based upon that finding by the Plaintiffs’ own expert, there is simply no prohibited vote denial claim as a result of using CCOS

ballots. The balloting system itself does not deny African Americans the opportunity to vote on an equal basis with other citizens. Rather, an election jurisdiction must pay particular attention to ballot design and provide educational opportunities to its citizens about the proper way to use the system. Fortunately, Cuyahoga County has planned an extensive voter education program with community outreach, mailings to all registered voters, handouts at every polling location, instructions in each voting booth, and even a final warning on the ballot box before the ballot is submitted.

The Plaintiffs have also incorrectly identified Thornburg v. Gingles, 478 U.S. 30 (1986), as a vote denial case. See Plaintiffs Motion at 24-25. Although the quote that they list from Gingles does not occur on page 45 of the opinion, Gingles itself is a vote dilution case. See e.g., Gingles, 478 U.S. at 42 (reviewing “Section 2 and Vote Dilution through use of multimember districts”); Id. at 46 (“Vote dilution through the use of multimember districts”); Id. at 77 (“Ultimate determination of vote dilution”). Based upon this, the Plaintiffs have failed to establish a legal theory sufficient to support their vote denial claim.

2. The Plaintiffs Cannot Prove The Necessary Prerequisites For A Vote Dilution Claim.

In order to properly state a vote dilution claim under Section 2 of the Voting Rights Act, the Plaintiffs must establish certain facts about the minority group at issue, including:

- (1) It is sufficiently large and geographically compact to constitute a majority in a single-member district [in the case of Presidential elections, this would be the entire State];
- (2) It is politically cohesive; and
- (3) The white majority votes sufficiently as a bloc to enable it usually to defeat the minority’s preferred candidate.

Gingles, 478 U.S. at 50-51. After successfully establishing these elements, the Plaintiffs must then go on to show that, under the totality of circumstances, the challenged electoral scheme deprives them of “an equal measure of political and electoral opportunity” to participate in the political process and to elect representatives of their choosing. Johnson v. De Grandy, 512 U.S. 997, 1013 (1994).

The glaring problem that the Plaintiffs have in this case is that African Americans in Cuyahoga County are *not* a sufficiently large population in order to constitute a majority necessary to elect a President or the State’s Presidential electors. Plaintiffs have also failed to produce evidence of any of the other prerequisites. The Plaintiffs in this case have not demonstrated whether the African American Voters in Ohio are politically cohesive, whether the white community in Ohio votes sufficiently as a block in order to be able to defeat the African Americans’ preferred candidate, or whether the use of CCOS in Cuyahoga County deprives African Americans of an equal opportunity to participate in Ohio’s political process. Thus, the Plaintiffs have failed to produce any evidence of a vote dilution case and are not entitled to a preliminary injunction.

3. Under Either Theory, The Plaintiffs Have Failed To Prove A Section 2 Claim Because They Failed To Provide Evidence Under The “Totality Of Circumstances” Test.

A plaintiff asserting a Voting Rights Act violation based on a vote denial claim must demonstrate that he or she was denied the right to vote based on the totality of the circumstances.¹ See e.g. Johnson v. Governor of Florida, 353 F.3d 1287, 1304 n.22 (11th Cir. 2003) (citing Farrakhan v. Washington, 338 F.3d 1009, 1015 n.11 (9th Cir. 2003) (applying the totality of circumstances to a vote denial claim for felon disenfranchisement)) and Mississippi

¹ “Typical factors” for such a claim are as outlined in the Senate Report accompanying the 1982 Amendments to the Voting Rights Act. See S. Rep. 97-417, *supra* at 28-29.

State Chapter, Operation PUSH v. Allain, 674 F.Supp. 1245, 1263 (N.D. Miss. 1987) (applying the totality of the circumstances test to vote denial claim for dual registration for voting that had been specifically designed to disenfranchise African Americans). However, Plaintiffs failed to demonstrate that their claim meets the totality of the circumstances indicative of a violation of Section 2. Instead, they merely claim that African Americans in Cuyahoga County do not have access to error notification and as a result, the current voting technology violates the Voting Rights Act.

The central issue in the totality of the circumstances surrounding any §2 claim is that “a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives”. Gingles, 478 U.S. at 47 (1986) (citing S. Rep. 97-417 at 28-29) (noting that the first of the “typical factors” in the totality of the circumstances is a historical pattern of discrimination). However, Plaintiffs have failed to demonstrate that a recent history of racial discrimination exists. In fact, Plaintiffs failed to even allege a recent history of racial discrimination in elections and prior Voting Rights Act litigation against the State of Ohio.

In the past, Section 2 Voting Rights Act cases against the State of Ohio have been unsuccessful because there is no recent history of racial discrimination. For example, in Mallory v. Ohio, 38 F.Supp.2d 525 (S.D. Ohio 1997), aff’d 173 F.3d 377 (6th Cir. 1999), the Plaintiffs claimed that Ohio’s system of “at large” elections for judicial candidates diluted African American voting strength in violation of Section 2 of the Voting Rights Act. In its opinion, the Sixth Circuit adopted the District Court’s “carefully written, solidly reasoned, and extremely comprehensive opinion” as its own. Mallory, 173 F.3d at 380.

The District Court noted that the Mallory Plaintiffs failed to allege any recent history of voting-related discrimination in Ohio and that “there was, in fact, no such recent history of voting-related discrimination.” Mallory, 38 F.Supp.2d at 541. Further, the State of Ohio prevailed in litigation over its 1990 redistricting plan, in part, because “*the United States Supreme Court found no legally significant racial bloc voting in Ohio legislative elections and therefore, no Voting Rights Act violation in the reapportionment of Ohio’s legislative districts*”. Id. (citing Voinovich v. Quilter, 507 U.S. 146 (1993)) (emphasis added). Moreover, the City of Cincinnati did not violate the Voting Rights Act by electing its City Council members in at-large elections. Id. (citing Clarke v. City of Cincinnati, 40 F.3d 807 (6th Cir. 1994), cert. denied, 514 U.S. 1109 (1995)). And finally, the Ohio Supreme Court rejected a Voting Rights Act and Fifteenth Amendment claim to the at-large election of judges and county commissioners in Mahoning County. Id. (citing State, ex rel. Rogers v. Taft, 64 Ohio St.3d 193 (1992)). This Court, like numerous others before it, should reject the notion that the State of Ohio has violated Section 2 of the Voting Rights Act in the manner in which it conducts elections.

Furthermore, Plaintiffs offer no evidence to show that African American voters in Ohio have not been able to elect their chosen candidate in the past. As noted above, Section 2 of the Voting Rights Act requires a covered minority to demonstrate that the State has enacted a voting practice or procedure that results in a denial or abridgement of the right to vote because its members “have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice”.

Plaintiffs have not shown how their votes will be denied under the required standard - the totality of the circumstances. The result is that the Plaintiffs cannot prove the necessary elements of a vote denial case. This failure begins with their inability to show they will actually be denied

the ability to vote and continues with their failure to show factors under the totality of the circumstances that are to be examined in a Section 2 Voting Rights Act case. Because of these failures, Plaintiff cannot successfully bring a Section 2 Voting Rights Act claim.

As has been previously demonstrated, the Plaintiffs bear the burden of proving, through statistical evidence, that they have been denied the right to vote by the State and its political subdivisions. They cannot succeed in this endeavor and this Court should deny their request for extraordinary relief.

III. CONCLUSION

The NAACP has long championed the rights of African American voters to fully and equally participate in our cherished electoral process. The NAACP will not hesitate to become involved as a plaintiff concerning those issues that in any way impair the right of African Americans to vote.

In this case, the NAACP fully supports the State of Ohio and Cuyahoga County Defendants because this is not one of these situations. The central count optical scan voting system does not interfere with African American voter participation in any way. To the contrary, the granting of ACLU's injunction request, will likely result in a Voting Right Act violation because it will disenfranchise Cuyahoga County African American voters who may then have absolutely no opportunity to vote, if the election is not held as anticipated.

For all of these aforementioned reasons contained herein, Plaintiffs' Motion for Preliminary Injunction must be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing Cleveland Branch NAACP Amicus Curiae’s Brief in Opposition to the American Civil Liberties Union of Ohio, et al.’s Motion for a Preliminary Injunction was filed electronically with service to the other parties, via the Court System on this 4th day of February, 2008 and to the following:

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