

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

Case No. 06-4412

NORTHEAST OHIO COALITION FOR THE HOMELESS, *et al.*

Plaintiffs-Appellees,

v.

J. KENNETH BLACKWELL,

Defendant-Appellant.

**On Appeal from the United States District Court
for the Southern District of Ohio, Eastern Division
Case No. 2:06-cv-00896**

**OPPOSITION OF PLAINTIFFS-APPELLEES NORTHEAST OHIO COALITION FOR
THE HOMELESS AND SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL
1199 TO EMERGENCY MOTION OF DEFENDANT-APPELLANT OHIO SECRETARY
OF STATE TO STAY OR VACATE DISTRICT COURT'S ORDER**

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Plaintiffs-Appellees Northeast Ohio Coalition for the Homeless (“NEOCH”) and Service Employees International Union Local 1199 (“SEIU”) (collectively “the Voters’ Organizations”) respectfully oppose Defendant-Appellant Ohio Secretary of State J. Kenneth Blackwell’s (or rather, non-party Ohio Attorney General Jim Petro’s) motion¹ for an emergency stay or to vacate the U.S. District Court for the Northern District of Ohio’s temporary restraining orders enjoining Ohio’s voter-identification laws as applied to absentee ballots.

INTRODUCTION

A nonparty to this case, “the State of Ohio” a.k.a. the Ohio Attorney General, now seeks to appeal a district-court order that his client does not want to appeal. The order was issued only after a hearing on constitutionality that the Attorney General—then just counsel for the party—had the full opportunity in his capacity as counsel to contest and did hotly contest.

In its brief, the Attorney General fails to disclose to this Court any of the underlying facts that were the basis of the district court’s order. Those facts show that constitutional (namely due-process and equal-protection) violations were abounding with voting underway in Ohio’s fall 2006 elections. The violations arose as county boards of elections began applying Ohio’s muddled, vague, complex, and confusing new voter-identification scheme. As shown below, the only solution is the one the district court fashioned and appropriate fact-finding committed to his discretion: restrain elections officials from committing further constitutional violations by eliminating only the problematic provisions and restore democracy back to the form that had served the state well prior to the scheme being enacted. The district court did what district courts are supposed to do and appellate courts cannot—gather facts. The district court also did what the

¹ Although Blackwell is not really a litigant here, the Voters’ Organizations will nevertheless refer to him as “Blackwell” and Attorney General Petro’s motion as “Blackwell’s motion” for clarity’s sake.

appellate courts should defer to absent an abuse of discretion-absent here—balance the equities to reflect the realities on the ground. And the realities are a disaster.

This Court should let the district court do its work and not create an additional layer of chaos upon what the General Assembly and the Governor had created by enacting, the Secretary of State had created by failing to give guidance and then giving wrong guidance, and the county boards of elections had created by applying wrong and inconsistent interpretations of the voter-identification laws because of the other actors' failures.

Were this Court to stay the district court's order, the result would be further chaos and the almost certain disenfranchisement of voters who relied on what all the officials told them. The district court's order does nothing less than to ensure that that does not happen.

STATEMENT OF FACTS

The State of Ohio is not a party to this case. Yet the Attorney General's Office has purported to file this appeal in the name of the Appellant, Ohio Secretary of State J. Kenneth Blackwell, who is Ohio's chief election officer. Under Ohio law, Blackwell is the only state officer charged with the responsibility of administering the unfolding election.² Only he would have to deal with the chaos that would ensue were this Court to grant a stay. As the Attorney General admits,³ Blackwell's office stated in "news reports"⁴ that Blackwell does not wish to

² R.C. §§ 3501.04 (chief-election officer) and 3501.05 (charged with the responsibility of administering elections in the state of Ohio).

³ Blackwell's Emerg. Mot. To Stay or Vacate ("Blackwell's Mot.") at 1 n. 1.

⁴ See, e.g., *Canton Repository* Oct. 27, 2006 (available at <http://www.cantonrep.com/index.php?ID=315801&Category=13>, last accessed Oct. 28, 2006) ("Blackwell's office said Friday it did not want to get involved. Blackwell's office told Petro officials if they appealed they would not be representing the secretary of state, said Blackwell spokesman James Lee. 'We have an election to administer and have no interest in getting caught up in endless litigation,' Lee said Friday.")

appeal (and that anyone who filed it would not be “representing” him⁵) so that he can focus on administering the remaining days of the election. More tellingly, his separately retained special counsel—the only counsel who seem to be without conflicts in representing the chief-elections officer’s interests in administering the election—specifically reaffirmed Blackwell’s desire not to appeal in the district court.⁶ Nevertheless, the Attorney General’s office is off on its own filing this appeal for someone who says he does not want it and is not a party to it. The Attorney General’s office, in short, seeks relief that Secretary of State does not want and probably (as shown below) fears.

Although the Attorney General’s brief filed last night excuses its failure to discuss the district-court record by saying there is no transcript, in fact, early yesterday afternoon, the court reporter handed counsel a TRO-hearing transcript that reflects the facts supporting the district court’s finding. That transcript is submitted as Exhibit A. The declarations upon which the district court relies (in alphabetical order) are submitted as Exhibit B.

The transcript reflects the following fact-finding by the District Court.

I. SIX ASPECTS OF THE NEW VOTER-IDENTIFICATION LAWS ARE BEING APPLIED DIFFERENTLY TO ABSENTEE VOTERS.

A. Boards Of Elections Are Applying Different Interpretations Of The Phrase “Current Utility Bill, Bank Statement, Government Check, Paycheck, Or Other Government Document.”⁷

Voters may provide a “current utility bill, bank statement, government check, paycheck, or other government document.”⁸ The Ohio Election Code does not define the word “current” or specify whether one of these documents will be “current” and acceptable if (a) it is dated within

⁵ *Id.*

⁶ U.S. Dist. Ct. Hrng. on State of Ohio’s Mot. to Intervene (Oct. 27, 2006) (transcript not yet available).

⁷ TRO Hearing Tr. at 90:14-90:20 and 94:23-95:9.

⁸ Ohio Rev. Code § 3505.18(A)(1).

the last thirty days, (b) it is dated within the last sixty days, (c) it is dated within the last ninety days, (d) it is dated within any fixed time period, or (e) it has any date so long as the address is current. Boards of Elections either are either applying differing interpretations of the word “current” or have not promulgated a standard at all:

- A Cuyahoga County Board of Elections representative says that a “current” a utility bill or similar form of identification should be this month’s bill to be acceptable, doesn’t “think” they’ll disenfranchise anyone over last month’s bill, but says the board will not honor older bills even with a current address.⁹
- The Mahoning and Franklin County Boards of Elections do not have policies regarding how “current” a utility bill or similar form of identification must be to be acceptable.¹⁰
- Sixty-three Ohio Boards of Elections maintain websites. Only four of them attempt to explain how current a utility bill or similar form of identification must be to be acceptable but even they offer only that the identification be valid.¹¹

B. Boards Of Elections Are Applying Different Interpretations Of The Phrase “Other Government Document.”¹²

Voters may provide an “other government document.”¹³ The Ohio Election Code does not define this phrase or specify whether the “government” must be the State of Ohio or the United States Government as is required for photo identifications to be acceptable,¹⁴ or whether it could be some other government. Boards of Elections are applying different standards when interpreting the phrase “other government document”:

⁹ Staib Decl. at ¶ 18.

¹⁰ Barga Decl., Ex. B (board representative only says bill should be “current” and offers only “[o]ne would suppose” in response to question about whether bill is acceptable no matter how old if address on bill is address where voter is currently registered”); Clayton Decl. at ¶ 20.

¹¹ Trevas Decl. at ¶ 3 and Ex. 1, Column C; Eldridge Decl. at ¶ 3 and Ex. 1, Column C.

¹² TRO Hearing Tr. at 90:23-91:3 and 94:23-95:9. *See also* Feldenkris Decl. at ¶ 7-8 (“Many college students cannot provide such identification. Students who live in dormitories or Greek housing do not have utility bills. Many students do not have a job. Many students do not switch their bank statements to a college address, especially a temporary address.”)

¹³ Ohio Rev. Code § 3505.18(A)(1).

¹⁴ *Id.* at § 3501.01(AA).

- The Cuyahoga County Board of Elections will accept any type of government document, U.S., city, state, or county government.¹⁵
- The Hamilton and Knox County Boards of Elections will only accept a document that was issued by the State of Ohio or the United States Government.¹⁶
- One representative of the Franklin County Board of Elections had “no idea” stating the term is “not defined” but would exclude board of elections documents. Another representative seemed to have a more expansive view.¹⁷
- Of the sixty-three Ohio Boards of Elections that maintain websites, only Knox and Hamilton Counties attempt to explain the meaning of this phrase.¹⁸

C. Boards Of Elections Are Applying Different Practices Regarding Whether The “Photograph Number” On Ohio Driver’s Licenses Will Be Accepted.¹⁹

When requesting or returning an absentee ballot, voters may provide a driver’s license number in lieu of one of the required forms of identification.²⁰ There are, however, two numbers on an Ohio driver’s license: (a) a small number buried along the center of the left-hand side of the driver’s license under the words “LICENSE NO” (License Number); and (b) a much larger and more prominent number that appears over the photograph (Photograph Number). The statute does not specify which of those two numbers is an acceptable form of identification. Boards of Elections are applying different standards, or no standards, to the issue of whether they will accept both the Photograph Number and the License Number:

¹⁵ Staib Decl. at ¶ 20.

¹⁶ Travas Decl. at Ex. 1, page 1, Column D, Row 32; Eldridge Decl. Ex. 1, page 1, Column D, Row 32.

¹⁷ Clayton Decl. at ¶ 24.

¹⁸ *Id.*

¹⁹ Tr. at 91:4-91:11 and 95:10-95:25.

²⁰ Ohio Rev. Code § 3509.03(E)(1), 3509.05(A).

- While the executive director of the Cuyahoga County Board of Elections said that the Board will count absentee ballots with the Photograph Number, two other staff persons reported that such ballots are being rejected.²¹
- The Mahoning County Board of Elections will not accept the Photograph Number.²²
- The Franklin County Board of Elections has made a formal inquiry to Defendant regarding whether it may accept the Photograph Number.²³
- The Trumbull County Board of Elections does not understand the issue.²⁴
- Of the sixty-three websites maintained by different Boards of Elections, none of them address this issue.²⁵

D. Boards Of Elections Are Applying Different Practices Regarding Whether Military-Identification Cards That Do Not Show Current Addresses Are Acceptable.²⁶

Voters may also provide “a military identification that shows the voter’s name and current address.”²⁷ On information and belief, however, military-identification cards issued by the Army, Air Force, and Navy to their military personnel do not show the holder’s current address. The impossibility of providing a military-identification card with a current address is causing and will cause significant confusion when people who are serving their country try to present military-identification cards while exercising their right to vote absentee, early, or on election day. Boards of Elections are applying different standards to the issue of whether military-identification cards that do not show a current address are acceptable:

²¹ Compare Griffin Decl. at ¶¶ 6, 7, 24-26 (Cuyahoga County Board of Elections executive director Vu claims both numbers will be honored; same board’s staff person Dreamer says ballots with photo numbers are being rejected) with Staib Decl. at ¶ 10 (same board’s staff person DeFranco says that photo number is not being accepted).

²² Barga Decl. at Ex. B, page 2, top half of page.

²³ Clayton Dec.. at ¶ 13.

²⁴ Barga Decl. at Ex. A, page 2, top half of page.

²⁵ Travas Decl. and Eldridge Decl.

²⁶ Tr. at 91:12-91:25 and 96:1-96:10.

²⁷ Ohio Rev. Code §3505.18(A)(1).

- The Mahoning and Trumbull County Boards of Elections refuse to accept military-identification cards that do not show an address.²⁸
- The Cuyahoga County Board of Elections will accept military-identification cards that do not include current addresses.²⁹
- Several of the sixty-three websites maintained by Boards of Elections repeat the statutory language requiring military-identification cards to show current addresses; three of them state that military-identification cards are acceptable without specifying whether they must show current addresses.³⁰

E. Some Boards Of Elections Are Wrongly Requiring Voters To Produce A Photo Identification With A Current Address.³¹

Voters may provide a “current and valid photo identification.”³² The phrase “current and valid photo identification” is not defined in the statute in which it appears. The term “photo identification” is however, defined in a different statute,³³ which explains that it must show the voter’s name and photograph, have an expiration date that has not passed, have been issued by either the U.S. Government or the State of Ohio, and have a current *or former* address.

Accordingly, Ohio driver’s licenses or state-identification cards that show former addresses are acceptable forms of identification under the new voter-identification laws. Some Boards of Elections, however, are not accepting Ohio driver’s licenses or state-identification cards that show former addresses:

- The Trumbull County Board of Elections will deny to right to case a regular ballot to voters who present an unexpired Ohio driver’s license or state identification, but Mahoning County next door will permit the voter to vote.³⁴
- Cuyahoga County’s Board of Elections staff attempted to deny at least one voter the right vote a regular ballot who presented a driver’s license with his previous

²⁸ Barga Decl. at Exs. A & B, page 2, center of pages.

²⁹ Staib Decl. at ¶ 19.

³⁰ Travas Decl. at Ex. 1, page 2, Column E, Rows 56, 76, 79; Eldridge Decl., Ex. 1, page 2, Column E, Rows 56, 76, 79.

³¹ TRO Hearing Tr. at 96:11-97:7 and 97:23 and 97:24.

³² Ohio Rev. Code § 3505.18(A)(1).

³³ *Id.* at § 3501.01(AA).

³⁴ Compare Barga Decl. at Ex. A, page 2 (Trumbull County) with Barga Decl. at Ex. B, page 2 (Mahoning County).

address, despite the executive director's assurance that that was not the practice. The voter, a lawyer who knew the law, had to persist through a layer of supervision before the issue was resolved.³⁵

- Butler and Hamilton Counties will honor driver's licenses regardless of what address it shows.³⁶
- Belmont County's Board of Elections told one student voter that voters should not even provide their driver's license, and instead must provide an alternate form of identification.³⁷
- Conversations with four different Franklin County Board of Elections officials yielded at least three different answers on this issue.³⁸
- Sixty-three Ohio Boards of Elections maintain websites, and only four of them state that valid driver's licenses with former addresses will be accepted.³⁹

Moreover, Blackwell's office has itself provided the wrong advice on this issue:

The assistant to the Director of Elections at the Ohio Secretary of State's office told me that voters must also show other proof of residency if their driver's licenses show a former address, and that this other alternate proof could be a letter from The Ohio State University. Unfortunately, the Ohio Secretary of State's Office would not put this answer in writing. Nor would they agree to send out a directive or memorandum providing these instructions to Ohio's eighty-eight county Boards of Elections.⁴⁰

F. Some Boards of Elections are wrongly requiring absentee voters to produce one of the required forms of identification.⁴¹

³⁵ Griffin Decl. at ¶¶ 9-19.

³⁶ Feldenkris (Director of Government Relations for Ohio State University Undergraduate Student Government) Decl. at ¶ 13.

³⁷ *Id.* at ¶ 14.

³⁸ *Id.* at ¶ 15-19.

³⁹ Travas Decl. at Ex. 1, page 1, Column G, Rows 10, 26, 30, 32; Eldridge Decl., Ex. 1, page 2, Column G, Rows 10, 26, 30, 32.

⁴⁰ Feldenkris (Director of Government Relations for Ohio State University Undergraduate Student Government) Decl. at ¶ 5 (while the district court did not specifically reference the facts from this declaration in his opinion from the bench, they are a part of the court record. The declaration was filed shortly after the TRO motion was filed. Plaintiffs' counsel referenced the declaration in oral argument and Blackwell's counsel did not attempt to question it or offer alternative evidence).

⁴¹ TRO Hearing Tr. at 97:8-97.22.

Absentee voters who vote either by mail or in-person at their Boards of Elections are permitted to provide a Social Security number or driver's license number in lieu of the required identification.⁴² Nevertheless, contrary to law, some Boards of Elections are refusing to accept Social Security numbers from absentee voters who vote in person at the Board of Elections instead of by mail:

- The Lucas County Board of Elections is requiring early in-person voters to provide one of the required forms of identification and will not accept Social Security numbers.⁴³
- The Cuyahoga County Board of Elections is requiring early in-person voters to provide one of the required forms of identification and will not accept Social Security numbers—but will accept Social Security numbers from absentee voters who mail in their ballots.⁴⁴

II. BLACKWELL FAILS TO ISSUE HELPFUL DIRECTIVES BEFORE THE ELECTION AND THEN COMPOUNDS THE CHAOS WITH AN ELEVENTH-HOUR, MID-ELECTION DIRECTIVE WITH THE TRO HEARING PENDING.

As explained more fully in the Complaint (attached as Exhibit C and incorporated by reference) Blackwell never issued directives clarifying these issues.⁴⁵ Furthermore, during the contested TRO hearing, Blackwell's attorney from the Attorney General's Office presented no evidence to contradict the above evidence about gross disparities across counties and even within counties on these voter-identification rules, despite having had two-and-a-half days from the time of service to try to gather such evidence.

Instead, immediately before the TRO hearing, the assistant attorney general presented counsel with a directive that the Office of Secretary of State disseminated on the morning of the TRO hearing to Ohio's Boards of Elections to "cure" the chaos that is already unfolding in the election. That directive is attached as Exhibit D. So, with the TRO motion pending and with

⁴² Ohio Rev. Code §§ 3509.03, 3509.04, 3509.05(A).

⁴³ Burnard Decl. at ¶¶ 1-4; Hill Decl. at ¶¶ 1-5.

⁴⁴ Staib Decl. at ¶¶ 11.

⁴⁵ Compl. at ¶¶ 63-78.

thousands of people already having voted under less restrictive rules, Blackwell compounded the chaos by issuing a directive riddled with errors and further restrictions. This directive, if given force, would disenfranchise people who already voted under different rules in their counties.

The directive contains several incorrect statements of law and took the most restrictive approach on several of the issues thus effectively disenfranchising those who had already voted under more permissive boards of elections' practices:

- (1) **Incorrect definition.** The directive includes a slightly-revised summary of the acceptable identification that inexplicably leaves out "current and valid photo identification," contrary to the governing statute.⁴⁶
- (2) **"Current" defined restrictively.** With voting underway, Blackwell decided to arbitrarily say IDs had to be no older than six months prior to the election. He did not take into account the fact that water bills come out quarterly. Nor did he address what would happen to the votes of those who had submitted older bills than that.
- (3) **"Other government document" defined restrictively but still too vaguely.** Blackwell stated that local,- state,- or federal-government documents would be honored but said nothing about public-university documents, county documents, other government documents like those from transportation authorities and other special government entities.
- (4) **Use of drivers "license no." versus larger photograph number:** Blackwell took an approach that would disenfranchise thousands of people who have already voted, as shown above. The district court said, "well, now in light of this directive, your vote will not be counted because you used the numerals over the photograph? So we have a problem."⁴⁷
- (5) **Military I.D.s:** As the district court said, "the directive that was issued today repeats the same problem as the statute because the directive references a military I.D. with the address, and they don't have addresses. So the problem has been compounded."⁴⁸
- (6) **In-person absentee voters.** Blackwell, contrary to statute, directed that those absentee voters who vote in person should show identification rather than just

⁴⁶ R.C. § 3505.18(A)(1).

⁴⁷ Tr. at 92:15-92:18.

⁴⁸ TRO Hearing Tr. at 91:22-91:25.

provide their driver's license number or the last four digits of their social-security number like mail-in absentee voters.⁴⁹

The directive failed to address the concerns raised by the Voters' Organizations.

On October 26, 2006, the U.S. District Court for the Northern District of Ohio heard every argument Appellant Ohio Secretary of State Defendant J. Kenneth Blackwell's counsel makes here and rejected it. This Court should defer to the District Court and deny Blackwell's Emergency Motion to Stay or Vacate.

ARGUMENT

I. THE ABUSE OF DISCRETION STANDARD APPLIES TO THIS COURT'S REVIEW OF THE TEMPORARY RESTRAINING ORDER

"It is well settled that an appellate court reviews a trial court's issuance of a TRO, preliminary injunction, or a stay of such injunctive relief pending appeal, for an abuse of discretion."⁵⁰

II. THIS COURT LACKS JURISDICTION TO DECIDE THE EMERGENCY MOTION

The Voting Organizations incorporate by reference the arguments made in the separately filed motion to dismiss this appeal for lack of subject-matter jurisdiction.

III. THE ATTORNEY GENERAL IS NOT A PARTY TO THIS CASE AND MAY NOT HAVE STANDING TO BRING THIS APPEAL

The Attorney General has filed this brief against the wishes of his client, Secretary of State J. Kenneth Blackwell, claiming "separate litigation authority" to defend the State of Ohio and its officers.⁵¹ While this may be, the Attorney General did not file this appeal on behalf of the State of Ohio or its General Assembly but rather the Secretary of State in his official

⁴⁹ *Id.* at 92:20-93:5.

⁵⁰ *Summit County Democratic Central and Executive Committee v. Blackwell*, 388 F.3d 547, 553 (6th Cir. 2004) (Cole, J., dissenting).

⁵¹ Stay Mot. at 1 n. 1

capacity. In a separate motion to intervene the Attorney General filed after he had already defended the Secretary of State on the TRO, the Attorney General claimed that the interests of the State of Ohio (including the General Assembly which passed HB 3) differ from those of the Secretary of State. If that is true, then it makes little sense Attorney General to be filing a stay application *on behalf of the Secretary of State's office*, which has a contrary position. The Attorney General's office may have a conflict between representing the interests of the Secretary of State on the one hand and the General Assembly on the other. Although the stay motion asserts the Attorney General's authority to appeal the TRO "in the Secretary of State's name,"⁵² apparently even against his wishes, the Attorney General cites no authority for this proposition. There is insufficient time or space to brief this question here.

IV. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY ENTERING THE TEMPORARY RESTRAINING ORDER

The district court did not abuse its discretion in temporarily restraining, for six days until a preliminary injunction hearing and ruling, Blackwell and the counties he supervises from violating the Voting Organizations' right to equal protection and due process of their members' fundamental right to vote.

Federal Rule of Civil Procedure 65 governs the issuance of temporary restraining orders and preliminary injunctions. When ruling on a motion for temporary restraining order or preliminary injunction, a Court must balance four factors: (1) whether the movant has a strong or substantial likelihood of success on the merits, (2) whether the movant will suffer irreparable harm without the relief requested, (3) whether granting the relief requested will cause substantial harm to others, and (4) whether the public interest will be served by granting the relief

⁵² *Id.* at 9.

requested.⁵³ The Court should grant a temporary restraining order if “it clearly appears from specific facts shown by affidavit ... that immediate and irreparable injury, loss, or damage will result” to the applicant.⁵⁴

The Sixth Circuit has also held that “[i]n general, the likelihood of success that need be shown ... will vary inversely with the degree of injury the plaintiff will suffer absent an injunction.”⁵⁵

A. The Voter’s Organizations Have Shown A Strong Likelihood of Success on the Merits

The Voters’ Organizations have shown a strong or substantial likelihood of success on the merits of their claims. The new voter-identification laws are confusing, vague, or impossible to apply in at least six respects. Boards of Elections are in fact applying these aspects of the new laws differently to voters across the State of Ohio. Absentee voters who do not know what identification should be provided, or what identification will be deemed acceptable by their Boards of Elections after the ambiguities are finally resolved, will be deprived of their right to vote if they provide the wrong identification, and may be chilled from exercising their right to vote due to the possible criminal penalties that may be imposed for violating the Ohio Election Code. As shown above, the election is being conducted in a manner that is fundamentally unfair, and Boards of Elections are applying the laws unequally.⁵⁶

⁵³ *Memphis Planned Parenthood, Inc. v. Sundquist*, 175 F.3d 456, 460 (6th Cir. 1999).

⁵⁴ Fed. R. Civ. P. 65(b).

⁵⁵ *Friendship Materials, Inc. v. Michigan Brick, Inc.*, 679 F.2d 100, 105 (6th Cir. 1982) (internal quotation and citation omitted).

⁵⁶ See also *Common Cause of Georgia v. Billups*, 439 F. Supp. 1350-60 (N.D. Ga. 2006) (injunction granted to stop enforcement of Georgia voter-identification law because of risk to fundamental right to vote).

The Supreme Court recently held in *Purcell v. Gonzalez*⁵⁷ that, given “the plaintiffs’ strong interest in exercising ‘the fundamental political right to vote,’” “the possibility that qualified voters might be turned away from the polls would caution any district judge to give careful consideration to the plaintiffs’ challenges.” While Defendant may seek to mischaracterize *Purcell* to seek to avoid having to protect the right to vote here, the Court “underscore[d]” that its decision “express[ed] no opinion” on “the correct disposition” on the merits of voters’ challenge to Arizona’s voter-identification law. Rather, the *Purcell* Court’s decision to vacate and remand a Ninth Circuit injunction of Arizona’s voter-identification law was based on particular procedural matters (a court decision altering election procedures without a written opinion, oral argument, or a factual record), not any substantive disagreement with the Ninth Circuit’s decision to enjoin enforcement of Arizona’s voter-identification law.

Here, unlike the Ninth Circuit in *Purcell*, this Court already has and will have a factual record that shows that House Bill 3’s voter-identification changes and Defendant’s failure to provide guidance are an unmitigated disaster *right now*, with voting underway. As shown above, Boards of Elections are presently implementing the election code inconsistently across Ohio (and even inconsistently internally) in a manner fundamentally unfair to voters. Furthermore, Ohio’s election code now has factually impossible and legally unenforceable language, e.g., requiring military identifications to have addresses when they do not. The *Purcell* Court was concerned that it did not have underlying factual conclusions to evaluate. But this Court has such facts. And the Supreme Court in *Purcell* never suggested that we should wait to see democracy fail before fixing it.

⁵⁷ 590 U.S. ____ (2006).

For all of these reasons, The Voters' Organizations have shown a strong or substantial likelihood of success on the merits of their claims that the new voter-identification laws are vague, confusing, impossible to apply, and are being unequally applied, and therefore violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution.

1. The Confusion Surrounding The New Voter-Identification Laws Will Have A Chilling Effect On Voters, Including Absentee Voters, Who Face Potential Criminal Sanctions For Violating The Election Laws.

Voters who violate Ohio's election laws may be found guilty of a number of criminal offenses set forth in the Ohio Election Code. One offense is the crime of election falsification,⁵⁸ a fifth-degree felony punishable by a fine up to \$ 2,500 and a prison term of between six and twelve months.⁵⁹ Offenses that are not specifically described fall within the "general penalty" section,⁶⁰ which provides that *any* violation of the Ohio Election Code (including the laws that impose obligations on voters to provide specified forms of identification) is a first-degree misdemeanor punishable by a fine up to \$ 1,000 and a prison term of up to six months.⁶¹ Whether a violation is "knowing" is *not* an element of the first-degree misdemeanor offense.

The concern that voters will be chilled from exercising their right to vote because of these criminal penalties is not academic. Voters who submit absentee ballots or provisional ballots must acknowledge that they face possible criminal penalties.⁶² Both types of voters must affix a signature to their ballots on a line close to the following statement, in all capital letters:

⁵⁸ A voter who "knowingly" states a falsehood as to a material matter is guilty of the crime of election falsification. Ohio Rev. Code § 3399.36.

⁵⁹ Ohio Rev. Code §§ 2929.14, 2929.18.

⁶⁰ *Id.* § 3599.40.

⁶¹ *Id.* §§ 2929.24, 2929.28.

⁶² *Id.* §§ 3509.04, 3505.182.

“WHOEVER COMMITS ELECTION FALSIFICATION IS GUILTY OF A FELONY OF THE FIFTH DEGREE.”⁶³ Voters who cannot understand the new voter-identification laws—which are vague, confusing, and impossible to apply—may reasonably elect not to exercise their right to vote rather than face criminal prosecution for providing the wrong form of identification.

2. The New Voter-Identification Laws Violate The Fourteenth Amendment’s Due-Process And Equal-Protection Clauses.

The facts described above establish that some of Plaintiffs’ members, who are registered voters and who are following the language of the Ohio Election Code to the best of their ability, may be unable to interpret the new voter-identification laws in the same manner as their Board of Elections (who cannot agree themselves) and thus will be unfairly deprived of their right to vote. They also may be chilled from exercising their fundamental right to vote due to possible criminal penalties. Finally, it is clear that Boards of Elections are applying different standards to voters who are attempting to satisfy the new voter-identification laws. These facts constitute a denial of the right to vote of registered voters, including The Voters’ Organizations’ members, and violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution.

3. The New Voter-Identification Laws Violate The Due Process Clause Because The Uncertainty And Unequal Standards Faced By Absentee Voters Will Cause The Election To Be Fundamentally Unfair.

A number of courts have held that the right to substantive due process will be denied if an election “is conducted in a manner that is fundamentally unfair.”⁶⁴ The Due Process Clause is

⁶³ *Id.*

⁶⁴ *Bennett v. Yoshina*, 140 F.3d 1218, 1226 (9th Cir. 1998).

not violated by “garden[-]variety” election irregularities but is violated by pervasive errors that undermine the integrity of the vote.⁶⁵

After reviewing the relevant case law, the Ninth Circuit formulated this two-part test for determining whether an election is so fundamentally unfair that it violates the right to substantive due process:

A general pattern emerges from all of these cases taken together. Mere fraud or mistake will not render an election invalid. However, a court will strike down an election on substantive due process grounds if two elements are present: (1) likely reliance by voters on an established election procedure and/or official pronouncements about what the procedure will be in the coming election; and (2) significant disenfranchisement that results from a change in the election procedures.⁶⁶

The court further held that “[t]his is not an exhaustive description of electoral problems that might be fundamentally unfair.”⁶⁷ The Ninth Circuit later held that an election would alternatively be fundamentally unfair if the challenged action “so upsets the evenhandedness of the election that it works a patent and fundamental unfairness on the voters.”⁶⁸

Thus, this Court should find that the new voter-identification laws violate the right of Plaintiffs’ members to substantive due process if it finds that (1) the election is conducted in a manner that is fundamentally unfair, and (2) voters will likely rely upon a published or established election procedure that is changed and results in significant disenfranchisement, or if the Court finds that (3) the new laws so upset the evenhandedness of the election that they work a patent and fundamental unfairness on the voters.

⁶⁵ *Id.*

⁶⁶ *Bennett*, 140 F.3d at 1226-27.

⁶⁷ *Id.* at 1227 n.3.

⁶⁸ *Caruso v. Yamhill County*, 422 F.3d 848 (9th Cir. 2005).

All three tests are met here. First, it is fundamentally unfair to disenfranchise absentee voters, and possibly Election Day voters, by promulgating vague, confusing, and impossible-to-apply rules that are applied differently by different Boards of Elections, while also failing to provide any guidance about them (despite requests for such guidance) or ensure that they are uniformly applied.

Second, voters will reasonably rely on the notice that the Code required be mailed to each voter listing the acceptable identification requirements and containing the following text:

Voters must bring identification to the polls in order to verify identity. Identification may include a current and valid photo identification, a military identification that shows the voter's name and current address, or a copy of a current utility bill, bank statement, government check, paycheck, or other government document, other than this reminder or a voter registration notification, that shows the voter's name and current address.⁶⁹

Boards of Elections that change these procedures or apply different interpretations of them will cause significant disenfranchisement of voters. This is particularly true of absentee voters who will not be notified of the need to provide additional documentation, or given any opportunity to provide it, so that their absentee ballots may be counted.

Finally, given the confusion and disparate application of the new voter-identification laws to date, these laws have *already* so upset the evenhandedness of the election that they will work a patent and fundamental unfairness on the voters, and will immediately work such unfairness on absentee voters who vote prior to Election Day.

4. The New Voter-Identification Laws Impose An Undue Burden On And Threaten To Deprive Voters Of Their Right To Vote— Including Absentee Voters Who Vote Prior To The Election

⁶⁹ Ohio Rev. Code § 3501.19.

“No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.”⁷⁰ While Supreme Court has observed that state voting regulations are “constitutionally suspect” if they are “reasonable and nondiscriminatory,”⁷¹ the Court requires the following approach when determining whether a State’s election laws unduly burden the right to vote in violation of the Fourteenth Amendment:

a court ... must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests, it also must consider the extent to which those interests make it necessary to burden the plaintiff’s rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.⁷²

Here, the character and magnitude of the asserted injury from the State’s botched effort to supposedly prevent fraud is palpable and severe. Voters who are confused by the vague voter-identification requirements or given incorrect information by their Board of Elections may provide the wrong form of identification. Absentee voters who provide the wrong identification when they return their absentee ballots will be deprived of the right to vote with no due process, i.e., no notice or an opportunity for a hearing. Other voters who are confused by these vague laws may be deterred from exercising their right to vote after learning of the possible criminal penalties that will apply if they violate Ohio’s election laws. The deprivation of these voters’ right to vote constitutes a severe injury.

⁷⁰ *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964).

⁷¹ *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983) (citations omitted).

⁷² *Id.* at 780, 789 (citations omitted)

Defendant will likely argue that states have a compelling interest in preserving the integrity of its election process, including an interest in ensuring that the right to vote is not undermined by election fraud.⁷³ While this is true, it is not dispositive. “The Court thus has ‘upheld generally applicable and evenhanded restrictions that protect the integrity and reliability of the electoral process itself.’”⁷⁴ But the voter-identification laws are not “generally applicable and evenhanded,” nor do they protect the integrity and reliability of the electoral process. If anything, they are causing massive confusion that is *undermining* the integrity and reliability of the electoral process. They therefore cannot survive any scrutiny by this Court.

5. Boards of Elections are applying the new voter-identification laws in a manner that violates the equal-protection clause.

The Supreme Court has held that “once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment.”⁷⁵ The lines drawn by the new voter-identifications are so confusing, vague, and impossible to apply that they inevitably violate the Equal Protection Clause because Boards of Elections cannot apply, and are not applying, them uniformly to voters across the State of Ohio.

The Supreme Court recently addressed a similar problem when it held that Florida committed a constitutional violation by failing to apply uniform standards to the counting of votes in a Presidential election.⁷⁶ While the underlying principle applied by Florida courts—the command to consider the intent of the voter—was itself not objectionable, the Court found that “[t]he problem inheres in the absence of specific standards to ensure its equal application. The

⁷³ *Burson v. Freeman*, 504 U.S. 191, 199, 112 S. Ct. 1846 (1992).

⁷⁴ *Id.* (quoting *Anderson*, 460 U.S. at 788 n.9).

⁷⁵ *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 665, 86 S. Ct. 1079 (1966)

⁷⁶ *Bush v. Gore*, 531 U.S. 98, 105-06, 121 S. Ct. 525 (2000).

formulation of uniform rules ... is practicable and, we conclude, necessary.”⁷⁷ A constitutional violation arises when states “accord[] arbitrary and disparate treatment to voters in its different counties.”⁷⁸ Boards of Elections that apply different and sometimes wholly contradictory interpretations of the voter-identification laws are in fact “accord[ing] arbitrary and disparate treatment to voters in ... different counties.” The Supreme Court even noted with disapproval “standards for accepting or rejecting contested ballots” that “vary not only from county to county but indeed within a single county....”⁷⁹

Similarly here, the Equal Protection Clause is violated by the absence of specific and uniform standards for Boards of Election to follow when applying the new voter-identification laws. The muddled statutory scheme and Defendant’s failure to guidance on the issue have led to Boards of Elections applying different interpretations of the laws to absentee voters who are casting their votes before Election Day. Indeed, as shown in the Cuyahoga County examples, above, they have led to the same Board of Elections applying and stating different rules to different voters within the county.

For all of these reasons, the voter-identification laws violate the Equal Protection Clause.

The Attorney General’s brief relies heavily on the Supreme Court’s statement in *Purcell v. Gonzalez* that pre-election court orders “can result in voter confusion and consequent incentive to stay away from the polls.” No one disputes the Court’s statement that pre-election court orders can result in confusion. The Court did not, however, say that such orders *always* create more confusion than they dispel. In this case, the Voters’ organization have shown that the new ID rules in Ohio have themselves generated considerable confusion, and that the Secretary of

⁷⁷ *Id.*

⁷⁸ *Id.* at 107 (citing *Gray v. Sanders*, 372 U.S. 368, 83 S. Ct. 801 (1963)).

⁷⁹ *Id.* at 106.

State has not only failed to alleviate this confusion, he keeps adding to it. This has resulted in different standards being applied from county to county and within counties

The Attorney General also relies heavily on a directive that the Secretary of State issued on October 26, 2006 saying that the smaller Driver's license number is the only proper number. This claim might plausibly address the equal-protection concerns, *if* Blackwell had provided his guidance in advance of any voters applying for or casting absentee ballots. Under those circumstances, both counties and voters could have been informed of the rules sufficiently in advance of the election. But in reality, many voters already cast absentee ballots before this directive was issued. The Secretary of State's late-issued guidance doesn't help those voters; it only makes things worse for them. If this Court now stays the district court's order, Blackwell's belated mid-election directive will disenfranchise those who voted under the more permissive interpretations. And in any case, it still does not satisfy due-process concerns given how easy it is, even with guidance from on high, to confuse the two numbers on the license when mailing in their ballots. According to election officials, hundreds in Franklin County—and thus perhaps thousands across the state have. Most absentee voters probably are not following this litigation closely enough to be clear on which number to include, even after the issue is finally resolved.

B. The Voters' Organizations Would Face Irreparable Harm Without the Temporary Restraining Order

Absentee voting began in early October, is occurring at the present time across the State of Ohio, and will continue up to Election Day. The harm caused to absentee voters by the uncertainty and confusion surrounding the voter-identification laws is immediate and irreparable.

Absentee voters who provide a copy of what they believe to be the proper identification (e.g., a six-month-old utility bill that shows the current address, a document issued by their local government, a military-identification card that does not show a current address, the Photograph

Number from a driver's license, a driver's license that contains a former address, or a Social Security Number rather than one of the required forms of identification), will be deprived of their right to vote if their Board of Elections later determines that this identification is not acceptable. These absentee voters will also be irreparably harmed because they will not be given notice of the need to provide a different form of identification, or the opportunity to provide it. They will also be irreparably harmed because they, unlike provisional voters,⁸⁰ cannot ever find out if their ballots were rejected and not counted.

The inability of these absentee voters to know what identification they must provide, to provide a different form of identification if the document that they provided is later deemed not to be acceptable, or even to find out if their absentee ballots were rejected or accepted, has caused and will cause immediate and irreparable harm to absentee voters who will be deprived of their fundamental right to vote as a result of this uncertainty and confusion.

C. No Party Will Suffer Substantial Harm Due to the Temporary Restraining Order

The relief requested – simply going back to the world without voter IDs that was the basis for Ohio democracy for decades – would not cause “substantial harm” to others. The Attorney General's brief disregards *Purcell's* emphasis on deference to the discretion of the district court in weighing such competing harms. Even though the district court in *Purcell* did not make factual findings until a month after its ruling, the Supreme Court still concluded: “It was still necessary, as a procedural matter, for the Court of Appeals to give deference to the discretion of the District Court.” What the Attorney General does not explain is why this Court does not owe such deference here, both on the equities and on the merits, especially given the fact-specific nature of the Voters' organizations claims.

⁸⁰ See Ohio Rev. Code § 3505.181(B)(5)(b).

The Attorney General also refers to the competing harms from the implementation (or non-implementation) of the ID requirements “at the polls.”⁸¹ But the ID requirements for voting at the polls on Election Day are not affected by the TRO, which is limited to the ID requirements for absentee voting. The court will address the polling-places at the preliminary injunction hearing set for November 1. The Attorney General cannot pre-emptively appeal a ruling on polling-place ID that the district court has not made. This would deny the district court the discretion to weigh the evidence, including the competing harms that would arise from granting or denying an injunction—which the *Purcell* Court thought to be essential.

The professed willingness of the Attorney General to “work[] with the court toward a consent TRO” is essentially an admission that there are some serious problems—particularly for absentee voters who have already sent in their absentee ballots, for whom provisional voting probably will do no good because they will not likely know that their votes have been rejected by Election Day.

Any reversal of the TRO is almost certain to exacerbate the confusion, by requiring that different rules be applied to different absentee ballots, depending on when they were mailed. So no alternative TRO would have a lesser disruptive effect than the one the district court issued. And this remedy simply returns us to the world as it was known in Ohio voting for decades. The remedy is not an abuse of discretion.

D. The Public Interest Will be Served by the Temporary Restraining Order

The public interest would be served by the district court’s relief because enforcing equal protection and due process on the fundamental right to vote is in the public interest in this democracy – particularly when evidence shows rights are being violated. “No right is more precious in a free country than that of having a voice in the election of those who make the laws

⁸¹ Stay Mot. at 15.

.... Other rights, even the most basic, are illusory if the right to vote is undermined.”⁸² Because the voter-identification laws are being applied in manner that is depriving absentee voters of their right to vote as protected by the Fourteenth Amendment, the public interest will be well-served by granting the requested relief.

V. THE VOTING ORGANIZATIONS HAVE STANDING

The Court should affirm the District Court’s holding regarding standing under a *de novo* standard of review.⁸³ An association has standing to bring suit “when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization’s purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.”⁸⁴

The Court need only find that one of the Voters’ Organizations has standing to bring this lawsuit.⁸⁵

The Voters’ Organizations have made the following allegations regarding standing, which are taken as true for purposes of this appeal⁸⁶:

7. Plaintiff NEOCH is a non-profit charitable organization operating in the City of Cleveland that provides services to approximately 25,000 homeless people each year. Approximately ten percent of its members are homeless. Over the last year Plaintiff NEOCH has helped hundreds of homeless people register to vote. Plaintiff NEOCH also helps homeless people obtain birth certificates, as between 20 and 30 percent of that population does not have any form of identification. Plaintiff NEOCH has standing to enforce the rights asserted here on behalf of itself and its members.

⁸² *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964).

⁸³ *Sandusky County Democratic Party v. Blackwell*, 387 F.3d 565, 573 (6th Cir. 2004).

⁸⁴ *Sandusky County*, 387 F.3d at 573.

⁸⁵ *Miller v. Blackwell*, 348 F. Supp. 2d 916, 920 (S.D. Ohio 2004).

⁸⁶ *Id.* at 918 n.2.

8. Plaintiff SEIU, located in Columbus, Ohio, is the local affiliate of a national union with more than 1.8 million members and 50,000 retirees. It engages in voter-registration activities and other election-related efforts on behalf of its members. Plaintiff SEIU has standing to enforce the rights asserted here on behalf of itself and its members.⁸⁷

Blackwell's brief fails to disclose this Court about these allegations. Instead, he described allegations that do not relate to standing and then argued that the Voters' Organizations have not established standing.⁸⁸ As shown below, the allegations and evidence that Blackwell did not cite in his brief show that the Voters' Organizations do have standing.

The district court quoted from *Sandusky County*⁸⁹ and then explained its conclusion:

By the same token in this case, the issues that the defendants [sic] raise are not speculative or remote, but they are imminent.... If these plaintiffs are not allowed to pursue this litigation, the inquiry of whether this litigation ever can be pursued because there is no remedy once a person is deprived of his or her right to vote, we have the Bush versus Gore issue redux. So the Court finds based on *Sandusky County*⁹⁰ and ... *Miller v. Blackwell*⁹¹ ... I find those cases controlling and that there is standing.⁹²

Blackwell did not inform the Court about this holding, or cite and address either of these cases.

⁸⁷ Compl. at ¶¶ 7-8.

⁸⁸ Stay Mot. at 11 ("According to the Complaint, Plaintiff SEIU is a local affiliate of a national employees' union, Compl. Para. 7, and plaintiff NEOCH alleges that it is a 'non-profit charitable organization operating in the City of Cleveland that provides services to' homeless people, Compl. Para. 7 [sic]. Those allegations fall far short of showing that the voting laws plaintiffs challenge cause injury in fact to the plaintiffs, or indeed to any of their members.").

⁸⁹ 387 F.3d at 574 ("Appellees have not identified specific voters who will seek to vote at a polling place that will be deemed wrong by election workers, but this is understandable; by their nature, mistakes cannot be specifically identified in advance.... It is inevitable, however, that there will be such mistakes. The issues Appellees raise are not speculative or remote; they are real and imminent.").

⁹⁰ *Id.*

⁹¹ See *Miller*, 348 F. Supp. 2d at 920-21.

⁹² TRO Hearing Tr. at 86-88.

The allegations made by the Voters' Organizations satisfy the three-prong test that *Sandusky County* provides. The first prong is met because the evidence attached to the TRO motion—which has not been denied or contradicted by Blackwell—shows that there are current and ongoing violations of the Due Process and Equal Protection Clauses due to disparate applications of the voter-identification laws by Boards of Elections across the State of Ohio. Registered voters, including members of the Voters' Organizations, are being and will be harmed by these violations. There is nothing speculative or remote about this injury.

The second prong of the *Sandusky County* test is met because the Voters' Organizations have a demonstrated interest in protecting their members' right to vote. The Northeast Ohio Coalition for the Homeless conducts voter-registration drives among homeless people and assists them in obtaining birth certificates, which are required to obtain identification necessary to vote.⁹³ Blackwell ignores the fact that NEOCH has homeless *members* as well. The Service Employees International Union, Local 1199 conducts voter-registration drives among other election-related activities.⁹⁴ The interests at stake—protection of the right to vote—are germane to the purposes of these organizations.

Finally, the third prong of the *Sandusky County* test is met because “[t]he individual participation of an organization’s members is ‘not normally necessary when an association seeks prospective or injunctive relief for its members.’”⁹⁵

For all of these reasons, the District Court correctly held that the Voters' Organizations have standing. Blackwell's arguments do not refute that conclusion.

⁹³ Compl. at ¶ 7.

⁹⁴ *Id.* at ¶ 8.

⁹⁵ *Sandusky County*, 387 F.3d at 574 (citations omitted).

VI. BLACKWELL'S LACHES DEFENSE MUST FAIL

Blackwell contends in his motion that the Voters' Organizations' action fails because it was filed months after the challenged legislation, House Bill 3, was passed and became effective. While his motion echoes with claims of tardiness, Blackwell does not make a laches argument before this Court because he cannot. Accordingly, this Court should disregard Blackwell's claim of tardiness.

A laches defense would have required Blackwell to show: (1) the Voters' Organizations delayed unreasonably in asserting their rights; and (2) Blackwell was prejudiced by this delay.⁹⁶ Blackwell cannot establish either factor.

First, the Voters' Organizations have not delayed unreasonably in asserting their rights because it was not until recent absentee and early voting began on October 3, 2006 that it became apparent how the new requirements under the law infringed on voters' constitutional rights of equal protection and due process.⁹⁷ Second, Blackwell has not shown that he was prejudiced the only prejudiced claimed is that "it is unfair to disrupt Ohio's machinery in this way."⁹⁸ This claim ignores completely the reality of the situation, as presented by the Voters' Organizations and as found by Judge Marbley in the October 26, 2006 TRO hearing. No one is seeking to "disrupt Ohio's machinery." All the Voters' Organizations have requested – and all the district court has granted – is a return to Ohio's voter identification statutory scheme that existed for years prior to the enactment of House Bill 3.

⁹⁶ *American Civil Liberties Union of Ohio, Inc. v. Taft*, 385 F.3d 641 (6th Cir. 2004), citing *Brown-Graves Co. v. Central States, Southeast and Southwest Areas Pension Fund*, 206 F.3d 680, 684 (6th Cir. 2000)

⁹⁷ *Heitmanis v. Austin*, 899 F.2d 521 (6th Cir. 1990) (even though an election law had been in effect for years, until it is enforced plaintiffs could not have known it would operate to violate constitutional rights)

⁹⁸ Stay Mot. at 14.

Moreover, even if undue delay or prejudice due to the timing of the suit in relation to the election existed, it is overcome by the significant constitutional rights at issue before this Court.⁹⁹

Given Blackwell's failure to address the merits of a laches claim, any claims of tardiness should be disregarded.

CONCLUSION

For the reasons stated, Blackwell's Emergency Motion To Stay Or Vacate should be denied.

Respectfully submitted,

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⁹⁹ *Dickinson v. Indiana State Election Bd.*, 933 F.2d 497 (7th Cir. 1991) (right to hearing on constitutional violation of voters' rights outweighs any claim of laches); *Nader 2000 Primary Committee, Inc. v. Hechler*, 112 F. Supp. 2d 575, n. 2 (S.D. W. Va. 2000) ("Ordinary citizens should not be forced to anticipate and predict possible constitutional violations and be burdened with protecting against them, on pain of losing their rights. Registered voters in West Virginia should not have to sacrifice First Amendment rights because the State interposed unconstitutional requirements on individuals seeking ballot access, even when such individuals may have failed to act with dispatch to challenge the law.").

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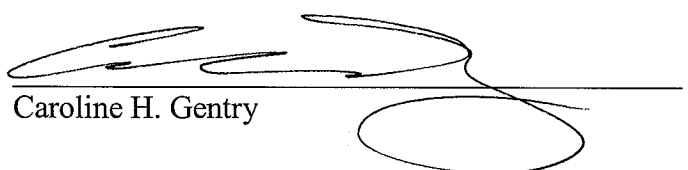
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