

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

PROJECT VOTE, ASSOCIATION OF
COMMUNITY ORGANIZATIONS FOR
REFORM NOW, COMMON CAUSE OHIO,
PEOPLE FOR THE AMERICAN WAY
FOUNDATION, COMMUNITY OF FAITH
ASSEMBLIES CHURCH, AMERICAN
ASSOCIATION OF PEOPLE WITH
DISABILITIES, MARY KEITH, JOHN R. T.
MAY, and LINDA SCAMMICCA,

Plaintiffs,

v.

J. KENNETH BLACKWELL, individually and
in his official capacity as Secretary of State,
WILLIAM D. MASON, as Prosecuting
Attorney for **Cuyahoga** County, Ohio, and
SHERRI BEVAN WALSH, as Prosecuting
Attorney for **Summit** County, Ohio,

Defendants.

CIVIL ACTION NO. 1:06-CV-01628

Judge Kathleen M. O'Malley

Magistrate Judge Perelman

**PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO DISMISS THE
COMPLAINT AND MOTION TO VOLUNTARILY DISMISS CERTAIN CLAIMS
WITHOUT PREJUDICE**

I. INTRODUCTION

Plaintiffs respectfully submit this memorandum of law in response to Defendants' motion to dismiss the complaint. In granting Plaintiffs' motion for a preliminary injunction against the provisions of Ohio H.B. 3 that impede their voter registration activities, this Court has already determined that Plaintiffs are likely to succeed on the merits of a number of their claims. In addition to those claims Plaintiffs have already defended in their prior memoranda of law,

Defendants move to dismiss additional claims made in the complaint but not raised in the motion for a preliminary injunction. Defendants' motion is without merit.

First, Defendants seek to dismiss Plaintiffs' claims that the challenged provisions of H.B. 3 (other than the requirement that compensated registrars disclose their names, addresses, and employers on voter registration forms that they collect) abridge the right to vote of Plaintiffs' members and other individuals who would register to vote through Plaintiffs' voter registration drives were it not for the challenged restrictions. (Mot. of Defs. Blackwell, Petro, and Bevan-Walsh to Dismiss Pls.' Compl. and Mem Opp. Pls.' Mot. Prelim. Inj. [hereinafter Defs.' Mot.] 13-14.) In their one-paragraph argument, Defendants suggest that H.B. 3 does not interfere with the right to vote because any individual may still register to vote through the state's existing voter registration apparatus. But the right to vote is abridged not only when a state completely denies individuals *any* opportunity to register and vote, but also when a state *limits* opportunities to register and vote without sufficient justification. The Complaint adequately alleges that H.B. 3 limits the opportunities of Ohio citizens to register to vote.

Second, Defendants move to dismiss Plaintiffs' claims that the challenged provisions of H.B. 3 violate their First and Fourteenth Amendment rights to speech and association and the National Voter Registration Act, arguing that the challenged provisions are "rational." (Defs.' Mot. 8-13, 19-23.) But as this Court has already held, many of the provisions challenged by Plaintiffs cannot even meet that low bar and, in any event, a higher lever of scrutiny is warranted to assess the constitutionality of H.B. 3.

Third, Defendants move to dismiss Plaintiffs' claims under Section 2 of the Voting Rights Act (Count IV of the Complaint) and Plaintiffs' claims for nominal damages against

Defendants in their individual capacities. (Defs.' Mot. 24-27, 31-32.) To expedite resolution of this case, Plaintiffs move to voluntarily dismiss those claims without prejudice.

II. ARGUMENT

A. The Pre-Registration, Training, and Affirmation and Direct Return Requirements Violate the Right to Vote

Plaintiffs allege that the challenged provisions of H.B. 3 (other than the on-form disclosure requirement) infringe on their members' and other citizens' right to vote because those provisions make it more difficult for them to register to vote. Specifically, the Complaint alleges that the pre-registration, training, and affirmation requirements and the direct return requirements of H.B. 3 have the net effect of substantially reducing Plaintiffs' voter registration activity. (Compl. ¶¶ 5, 11, 15, 21, 26-28, 121-27.) It further alleges that there are many citizens, including members of Plaintiffs' organizations and communities, who would not be registered to vote absent Plaintiffs' voter registration drives. (Compl. ¶¶ 2, 9, 29, 37-45, 78, 126.) If those citizens are not registered, they may not vote. By restricting Plaintiffs' legitimate voter registration activities, therefore, the challenged provisions of H.B. 3 interfere with the fundamental right of these citizens to vote and to participate in the political process.

In an attempt to avoid this conclusion, Defendants maintain that Plaintiffs' right to vote claims should fail because the state makes available alternative avenues to register to vote. (Defs.' Mot. 13-14.) But the governing standard is not whether the statute at issue "deprive[s] [Ohio citizens] of all opportunities" to exercise their rights, as Defendants suggest; rather, it is whether the law "constitute[s] a 'substantial restraint' and a 'significant interference' with the exercise of the constitutionally protected right[s]." *Kusper v. Pontikes*, 414 U.S. 51, 58 (1973) (footnote omitted).

The case law makes it clear that the right to vote may be unduly and unconstitutionally burdened without being absolutely denied and regardless of whether alternative avenues to voting are available. *See, e.g., Tashjian v. Rep. Party of Conn.*, 479 U.S. 208, 216 n.7 (1986) (rejecting argument that a statute requiring voters in a primary to be members of the party does not abridge First Amendment rights because any voter may vote by becoming a member of that political party); *Beare v. Briscoe*, 498 F.2d 244, 247-48 (5th Cir. 1974) (rejecting argument that a provision limiting voter registration to period between October 1 and January 31 does not violate constitutional rights because it provides a time frame in which all voters could register); *Common Cause/Ga. v. Billups*, 406 F. Supp. 2d 1326, 1361 (N.D. Ga. 2005) (rejecting argument that identification requirements applying to in-person voters do not abridge constitutional rights because all voters could vote absentee without being subjected to these requirements). Rather, as set forth below, the right to vote is infringed when a law or policy imposes burdens on voter registration that are not justified by sufficiently weighty state interests.

The First and Fourteenth Amendments protect the right to vote as a fundamental right. *See, e.g., Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (“It is beyond cavil that voting is of the most fundamental significance under our constitutional structure.” (internal quotation marks omitted)). As the Supreme Court has repeatedly made clear, “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.” *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). The right to vote extends to all phases of the voting process, from registering, through placing one’s vote in the ballot box, and to having that vote actually counted. *See Ex parte Yarbrough*, 110 U.S. 651 (1884); *Ass’n of Cmty. Orgs. For Reform Now v. Miller*, 129 F.3d 833, 834-35 (6th Cir. 1997) (unconstitutional

election regulations include “restrictive or prohibitively inconvenient voter registration requirements that discourage or prevent qualified voters from registering and participating in elections”); *Condon v. Reno*, 913 F. Supp. 946, 949 (D.S.C. 1995) (“[R]egistration, rather than being simply a mechanism to facilitate orderly elections, [may be] in fact a significant barrier to voting.”).

To assess restrictions on voter registration that affect the right to vote, courts apply the balancing test set forth in *Anderson v. Celebrezze*, 460 U.S. 780, 788-89 (1983). *See, e.g., Hernandez v. Woodard*, 714 F. Supp. 963 (N.D. Ill. 1989). Under that test, courts must weigh “the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments” against “the precise interests put forward by the State as justifications for the burden imposed by its rule,” considering “the extent to which those interests make it necessary to burden the plaintiff’s rights.” *Anderson*, 460 U.S. at 789. “Regulations imposing severe burden on plaintiffs’ rights” are subject to strict scrutiny, whereas “reasonable, nondiscriminatory restrictions” can be justified by “a State’s important regulatory interests.” *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) (internal quotation marks omitted).

The new requirements of H.B. 3 fail that test because they impose unjustifiable – and for many, severe – burdens on the ability of citizens to register and vote. Nonpartisan voter registration groups like Plaintiffs have assisted, and would like to continue to assist, hundreds of thousands of Ohio citizens to register to vote. But for the efforts of nonpartisan groups, many of those citizens would not be registered or able to vote. Indeed, third-party voter registration is a major avenue for voter registration in Ohio. (Compl. ¶¶ 37-45.) Plaintiffs themselves registered over 200,000 voters in Ohio in 2004. (Compl. ¶¶ 13, 39-40.) The challenged requirements,

which caused Plaintiffs to drastically reduce their voter registration activities, threaten to choke this important registration method sanctioned by Congress. *See* 42 U.S.C. § 1973gg-4(b) (chief State election official “shall make [voter registration] forms available for distribution through governmental and *private entities, with particular emphasis on making them available for voter registration programs*” (emphasis added)).

The law’s restriction of third-party voter registration will hit hardest those citizens, served by plaintiffs, who are least able to register to vote through other means: low-income citizens who cannot access the internet or take time off work to visit a government office during business hours; senior citizens and disabled individuals who have mobility difficulties; citizens with limited English proficiency; and citizens who may be disengaged from the political process absent an affirmative message about the benefits of voting from others in their community. (Compl. ¶¶ 41-43.) Third-party voter registration groups “help ease the[] burdens” of voter registration by making registration easier and more accessible. *Hernandez*, 714 F. Supp. at 972.

Limitations on voter registration groups “stand as obstacles to the ability of eligible voters to participate in the political process” and can withstand constitutional scrutiny only if outweighed by sufficiently important government interests. *Id.* at 972-73 (holding that group seeking to register Hispanic citizens could maintain claim that law limiting number of deputy registrars violated rights of Hispanic voters). As this Court has already found, there is no legitimate, let alone compelling, state interest served by the challenged provisions.¹ Plaintiffs therefore state a claim that the challenged provisions of H.B. 3 violate the right to vote.

¹ Although the application of strict scrutiny is not necessary for Plaintiffs to prevail, strict scrutiny is the appropriate standard for assessing Plaintiffs’ right to vote claims, because the challenged regulations impose severe burdens on the ability of many citizens – especially those targeted by Plaintiffs – to register and vote. *See Burdick*, 504 U.S. at 434. As this Court has

B. The Challenged Voter Registration Restrictions Violate Plaintiffs' First Amendment Rights to Free Speech and Association

This Court recognized in issuing its preliminary injunction that Plaintiffs have a strong likelihood of succeeding on the merits of their claims that the pre-registration, training, and affirmation, direct return, and on-form disclosure requirements of H.B. 3 violate the Constitution. Necessarily, Plaintiffs have alleged sufficient facts to state a claim under the Constitution that these three requirements unduly burden their voter registration efforts. Plaintiffs rely on their earlier briefing on these issues to oppose Defendants' Motion to Dismiss. Plaintiffs will discuss these claims more thoroughly in their forthcoming Motion for Summary Judgment.²

Plaintiffs argued in those earlier briefs that their voter registration drives encompass speech and association protected by the First Amendment. (*See* Pls.' Appl. Prelim. Inj. 16 [hereinafter Pls.' Appl.]; Pls.' Reply Defs.' Opp'n Pls.' Appl. Prelim. Inj. 2-5 [hereinafter Pls.' Reply].) In *Meyer v. Grant*, 486 U.S. 414, 421-22 (1988), the Supreme Court recognized that the analogous activity of gathering signatures on initiative petitions is "core political speech," because asking someone for their signature necessarily involves "interactive communication

already found, no legitimate state interests are served by these requirements. Moreover, the challenged provisions are not narrowly tailored to any interests, let alone compelling ones. Even if the restrictions on third-party voter registration create lesser burdens on the right to vote, they still fail under the *Anderson* balancing test because the Defendants cannot meet their burden of showing "important regulatory interests" that make the burdens on the right to vote necessary. 460 U.S. at 788.

² Defendants also suggest in their Motion that "[n]one of the plaintiffs have standing to argue the First Amendment rights of potential voters" with respect to the on-form disclosure provision. (Defs.' Mot. at 12.) In fact, plaintiffs have alleged that the voters registered by Plaintiffs include members of the Plaintiff groups, including. (Compl. ¶ 9.) Plaintiffs thus have organizational standing to bring this claim on behalf of potential voters. *See Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977). Plaintiffs also have third-party standing even as to those registrants who are not members, as Plaintiffs will argue at greater length in their

concerning political change.” Similarly, when Plaintiffs encourage Ohio citizens to register and vote, they necessarily engage those citizens in conversations about the importance of voting and civic engagement and the need for political reform. The *Meyer* Court used “exacting scrutiny,” *id.* at 420, in striking down Colorado’s blanket ban on paid petition circulation. Plaintiffs argue that this exacting scrutiny is appropriate here to judge the constitutionality of H.B. 3’s effects on their core political speech, under both *Meyer* and the balancing test articulated in cases like *Burdick*, 504 U.S. at 434, which requires strict or exacting scrutiny where election regulations impose severe burdens on First Amendment activity. Indeed, Justice Thomas explained in *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182 (1999), “when regulations of core political speech are at issue it makes little difference whether we determine burden first because restrictions on core political speech so plainly impose a ‘severe burden.’” *Id.* at 208 (Thomas, J., concurring). The majority agreed. *Id.* at 192 n.12 (suggesting that decision to apply exacting scrutiny to law regulating core political speech and associational activities is consistent with framework of strictly scrutinizing laws imposing severe burdens on speech or association).

Plaintiffs further argued that, regardless of the level of scrutiny applied, the particular restrictions imposed by the challenged provisions of H.B. 3 on Plaintiffs’ First Amendment activity are not justified. (Pls.’ Appl. 16-20; 25-26; Pls.’ Reply 3-11; 16-20.) Plaintiffs have therefore adequately pleaded their First Amendment claims, especially in light of the fact that the burden of justifying the restrictions rests on Defendants.

C. The Pre-Registration, Training, and Affirmation and On-Form Disclosure Requirements Violate the NVRA

This Court’s issuance of an injunction in part on the basis of the NVRA claims makes clear that Plaintiffs have sufficiently alleged that the direct return and the pre-registration,

forthcoming Motion for Summary Judgment. *See Powers v. Ohio*, 499 U.S. 400, 410-11 (1991).

training, and affirmation requirements of H.B. 3 are inconsistent with the NVRA. Defendants' motion to dismiss those claims should therefore be denied.

IV. MOTION TO VOLUNTARILY DISMISS WITHOUT PREJUDICE

Plaintiffs hereby move to dismiss without prejudice: (1) their claims under Section 2 of the Voting Rights Act (Count IV of the Complaint); and (2) their claims for nominal damages against Defendants in their individual capacities. Given the current procedural posture of the case, and in light of the relief Plaintiffs have already received, it would expedite the case to dismiss these claims without prejudice. Also, Plaintiffs do not in this suit challenge the ten-day deadline in O.R.C. § 3599.11; to the extent that Defendants seek to dismiss a challenge to the ten-day deadline, it should be denied.³

Respectfully Submitted,

/s/ Donald J. McTigue

Donald J. McTigue (OH 0022849)
Trial Counsel
Mark A. McGinnis (OH 0076275)
MCTIGUE LAW GROUP
886 North High Street
Columbus, OH 43214
Tel: (614) 263-7000
Fax: (614) 263-7078
mctiguelaw@rrohio.com

Counsel for Plaintiffs

Karl J. Sandstrom*
Ezra W. Reese*
PERKINS COIE LLP
607 14th Street NW

³ Moreover, if the Complaint is read as encompassing such a challenge, Plaintiffs would also move to voluntarily dismiss that claim without prejudice.

Suite 800
Washington, DC 20005
Tel: (202) 628-6600
Fax: (202) 434-1690
ksandstrom@perkinscoie.com

*Counsel for Association of Community
Organizations for Reform Now, Project Vote,
Common Cause and American Association of
People with Disabilities*

Wendy R. Weiser*
Renée Paradis
BRENNAN CENTER FOR JUSTICE AT NYU
SCHOOL OF LAW
161 Avenue of the Americas, 12th Fl.
New York, NY 10013
Tel: (212) 998-6130
Fax: (212) 995-4550
wendy.weiser@nyu.edu

Of Counsel

Elliot M. Mincberg*
Devin Willis*
PEOPLE FOR THE AMERICAN WAY
FOUNDATION
2000 M Street N.W. #400
Washington, D.C. 20036
Tel: (202) 467-4999
emincberg@pfaw.org

*Counsel for People For the American Way
Foundation & Community of Faith Assemblies
Church*

Brian Mellor (MA 43072)*
1486 Dorchester Avenue
Dorchester, Ma, 02122
TEL: (617) 282-3666
FAX: (617) 436-4878
electionscounsel1@projectvote.org

Counsel for Project Vote

** Pro Hac Vice Motions Submitted*

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was electronically filed this 1st day of November, 2006. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this through the Court's system.

/s/ Donald J. McTigue

Donald J. McTigue, Attorney at Law