

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

<p>Ohio Democratic Party,  Plaintiff,  v.  Cuyahoga County Board of Elections,  Defendant.</p>	<p>Case No. 1:06 CV 2692</p> <p><b>MEMORANDUM IN SUPPORT OF MOTION FOR TEMPORARY ORDER AND PRELIMINARY INJUNCTION</b></p>
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**INTRODUCTION**

Plaintiff respectfully submits this memorandum of law in support of its motion for a temporary order and preliminary injunction pursuant to Rule 65 of the Federal Rules of Civil Procedure.

**FACTS**

**A. The Parties**

Plaintiff is an organization operating under the laws of Ohio. Defendant Cuyahoga County Board of Elections, among other things, appoints voting officials within the county and investigates irregularities in the voting process within the county.

**B. Defendant's Wrongful Conduct**

The right to vote in an election is guaranteed by, *inter alia*, the First Amendment and Fourteenth Amendment of the United States Constitution and 42 U.S.C. § 1971. ORC § 3501.32

provides that on election day the polls shall be opened at 6:30 a.m. and shall be closed at 7:30 p.m. “unless there are voters waiting in line to cast their ballots, in which case the polls shall be kept open until such waiting voters have voted.” Ohio law thus requires that the polls be open for 11 hours, plus however much time is needed to accommodate voters waiting to vote at 7:30 p.m.

On November 7, 2006, 43 of the 573 voting places failed to open on time, or failed to have appropriate election materials and functioning voting machines available and operating as of 6:30 a.m., as required under state law. Voters were unable to cast ballots from beginning at 6:30 a.m. To provide voters at least the 13 hours of open polls required under ORC § 3501.32, it is necessary that the polls remain open after 7:30 p.m. for an hour and a half until 9:00 p.m. Defendant was asked to keep the polls open until 9:00 p.m. in order to comply with ORC § 3501.32, but the requested action was not taken. Defendant’s refusal violates the First and Fourteenth Amendments of the United States Constitution, 42 U.S.C. § 1971, 42 U.S.C. § 1983, and ORC § 3501.32. These violations have caused plaintiff irreparable harm and will continue to do so absent an injunction.

In addition, widespread problems with nonfunctioning and malfunctioning voting machines throughout Cuyahoga County necessitated the use of alternative optical scan voting ballots for the recording of regular votes. During the course of the handling of those alternative optical scan ballots to be recorded as regular votes, Defendant through poll workers wither treated them inappropriately as provisional ballots and/or failed to segregate the regular ballots from the provisional ballots as required by law. The attached declarations provide specific examples of this type of activity. These activities violates the First and Fourteenth Amendments of the United States Constitution, 42 U.S.C. § 1971, 42 U.S.C. § 1983, and ORC § 3501.32. These violations have caused Plaintiff irreparable harm and will continue to do so absent an injunction.

## ARGUMENT

### **I. A Temporary Order and/Or Preliminary Injunction Should Be Issued**

“The Sixth Circuit has held that the standards for issuing a temporary restraining order or preliminary injunction are: (1) the likelihood of success on the merits; (2) the irreparable harm that could result if the injunction is not issued; (3) the impact on the public interest; and (4) the possibility of substantial harm to others.” *Avery Dennison Corp. v. Kitsonas*, 118 F. Supp. 2d 848, 851 (S.D. Ohio 2000) (citing *Basicomputer Corp. v. Scott*, 973 F. 2d 507, 511 (6th Cir. 1992)).

The facts alleged in this action clearly establish that plaintiff is likely to succeed on the merits of this action. The United States Supreme Court has held that “[w]hen the legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental; and one source of its fundamental nature lies in the equal weight accorded to each vote and the equal dignity owed each voter.” *Bush v. Gore*, 531 U.S. 98, 104 (2000). Accordingly, “[h]aving once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person’s vote over another.” *Id.* at 104-05. By failing to comply with ORC §§ 3501.03(A) and 3505.17, Defendant clearly and impermissibly have infringed upon the constitutional rights of plaintiff and its members, including by interfering with the ability of plaintiffs’ members to vote on equal footing with voters in other Ohio precincts.

It is well settled that the loss of voting rights by plaintiff’s members and other similarly situated voters would itself constitute irreparable harm. *See, e.g., Elrod v. Burns*, 427 U.S. 347, 373 (1976). That makes perfect sense given that the Supreme Court has held that “[n]o 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 [and that o]ther rights, even the most basic, are illusory if the right to vote is undermined.” *Wesberry v. Sanders*, 376 U.S. 1, 17 (1965). For the same reasons, the public interest undoubtedly is served by issuing a temporary order to protect the public’s right to vote. Moreover, it clearly is in the public interest that – wherever possible – voting rights be enforced *before* the date of the election has passed. Nor will Defendant suffer harm by being ordered to comply with Ohio election law. Accordingly, plaintiff has met its burden for the issuance of a temporary order and preliminary injunction.

Plaintiff also has met its burden of demonstrating that the order should be issued *ex parte*. This Court may grant a temporary order without written or oral notice to the adverse party or his attorney if: 1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss or damage will result to the applicant before the adverse party or his attorney can be heard in opposition; and 2) the applicant’s attorney certifies to the Court in writing the efforts, if any, which have been made to give notice and the reasons supporting his claim that notice should not be required. Fed. R. Civ. Proc. 65(a). Plaintiff made reasonable efforts to notify Defendant and/or their attorneys of this motion. In addition, because the election and the ensuing violation of Ohio election law is ongoing, and the election is currently scheduled to end at 7:30 p.m. tonight, plaintiff and its members will be further irreparably harmed by any delay in the issuance of a temporary order while waiting for Defendant’s attorneys to appear in this Court.

## II. Plaintiff Has Standing to Bring the Claims Asserted in This Action

Plaintiff has standing to assert the voting rights of Democratic voters in the election. A plaintiff may assert the rights of third parties when the litigant has stated an injury in fact, the litigant has a close relation to the third party, and the third party's ability to assert his own interests is hindered. *See Powers v. Ohio*, 499 U.S. 400, 410-11 (1991); *United v. Ovalle*, 136 F.3d 1092, 1102 (6th Cir. 1998).

Plaintiff qualifies for third-party standing under the *Powers* test. First, interference with the voting rights of Democratic voters clearly harms plaintiff. Second, Democratic voters have chosen to associate themselves with plaintiff by voting in the Democratic primary elections or otherwise identifying themselves as Democratic voters. *See, e.g., Northampton County Democratic Party v. Hanover Township*, 2004 WL 887386, \*7-8 (E.D. Pa. Apr. 26, 2004). (holding that the Democratic Party had third-party standing to represent interests of the general electorate); *see also Pennsylvania Psychiatric Society v. Green Spring Health Services, Inc.*, 280 F.3d 278, 288 n. 10 (3d Cir. 2002) ("candidates for public office may be able to assert the rights of voters"); *Walgren v. Board of Selectmen of Amherst*, 519 F.2d 1364, 1365 n.1 (1st Cir. 1979) (same); *Mancuso v. Taft*, 476 F.2d 187, 190 (1st Cir. 1973) (same). Third, individual voters themselves are hindered from bringing a suit to enforce the rights asserted herein. These voters are attempting to vote *today*, and it is entirely appropriate to assume that most individual voters will not have the resources, preparedness, legal knowledge, or time to file suit *and also* vote today.

## CONCLUSION

For the reasons stated above, plaintiff is entitled to a temporary order directing the Defendant to keep the 43 polling places referenced in Exhibit A to the Complaint open until 9:00

p.m., and order the Defendant to secure and count those votes that were made upon alternative optical scan ballots to be counted at the same time, manner and place as all other regular ballots.

Respectfully submitted,

*s/Christopher P. Thorman*

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**CERTIFICATE OF SERVICE**

I hereby certify that on November 7, 2006, a copy of the foregoing was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system or hand delivery. Parties may access this filing through the Court's system.

*s/Christopher P. Thorman* \_\_\_\_\_

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