

**In The United States District Court
For The Southern District of Ohio
Eastern Division**

Northeast Ohio Coalition for the Homeless, et al.,

Plaintiffs,

vs.

Case No. 2:06-cv-896

J. Kenneth Blackwell,

Judge Frost

Defendant.

Defendant's Statement on Plaintiffs' Motion For A Temporary Restraining Order

On January 31, 2006, the Ohio General Assembly passed House Bill 3, Ohio's comprehensive election reform bill. The bill was signed by Ohio Governor Bob Taft on the same day. Numerous provisions of H.B. 3 became effective on May 2, 2006. The effective date for a provision of the bill requiring Ohio's voters to produce some type of identification or to sign an affidavit swearing to their identity was delayed until June 1, 2006. However, in spite of the fact that this bill had been signed into law almost nine months ago and in spite of the fact that the identification provision became effective over four and a half months ago, the Plaintiffs simply sat on their hands and waited until fourteen days before an election to file a request for a temporary restraining order. In fact, the plaintiffs simply ignored the fact that this provision was effective for elections held in the State of Ohio on August 8, as well as September 14 and 15, 2006.

- A. Courts should not grant last minute injunctions that change the rules of the election because these decisions tend to undermine the confidence of the electorate.**

The United States Supreme Court was faced with an identical situation arising out of Arizona where voters in that State passed a constitutional amendment requiring people to prove

their identity on election day. *Purcell v. Gonzalez*, 2006 U.S. LEXIS 8000 (Oct. 20, 2006). The Court vacated a decision from the Ninth Circuit Court of Appeals enjoining the use of the identification provisions. “A state indisputably has a compelling interest in preserving the integrity of its election process.” *Id.* at *5 quoting *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 231 (1989). One of the many reasons that the State has such an interest in having its voter identification requirements enforced is that voter fraud drives honest citizens out of the elections process and breeds distrust in our government. *Id.* Thus, “[v]oters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised.” *Id.*

The Supreme Court unanimously recognized that when courts are faced with a barrage of last minute attacks on established state elections procedures, the court actions and conflicting court rulings “can themselves result in voter confusion and consequent incentive to remain away from the polls.” *Id.* at 6. As Justice Stevens noted in concurrence, “[a]llowing the election to proceed without enjoining statutory provisions at issue will provide the courts with a better record on which to judge their constitutionality.” *Id.* at *8 (Stevens, J., concurring).

B. Ohio’s identification requirements are equivalent to the federal identification requirements in the Help America Vote Act.

Under the Help America Vote Act, a person who registers to vote by mail but does not provide proof of identity is obligated to provide current and valid photo identification; a current utility bill, bank statement, government check, paycheck, or other government document showing the voter’s name and address. 42 U.S.C. § 15483(b)(2). Ohio’s enforcement of that provision was upheld under constitutional attack. *League of Women Voters v. Blackwell*, 340 F. Supp. 2d 823 (N.D. Ohio 2004). Ohio’s voter identification provisions require a voter to provide a current and valid photo identification, a military identification, a copy of a current utility bill

showing the voter's name and address, a bank statement, government check, paycheck, or other government document. R.C. § 3505.18(A)(1). If the voter does not have any of these documents, the voter may vote by provisional ballot if he provides the last four digits of his social security number. R.C. § 3505.18(A)(2). The provisional ballot will be counted if the board of elections verifies those last four digits. Finally, the elector shall be permitted to cast a provisional ballot if he simply signs an affirmation under penalty of election falsification that he is who he purports to be. R.C. § 3505.18(A)(4).

The Ohio statute is more liberal than its counterpart under the Help America Vote Act. Under Ohio law, an elector may simply fill out an affidavit under penalty of election falsification that he is who he purports to be. He will be permitted to cast a provisional ballot. There is no such similar provision under the Help America Vote Act's identification provision, already upheld by a federal court.

C. The Plaintiffs' allegations of harm are speculative and are insufficient to support emergency injunctive relief.

The Plaintiffs' claims of harm are purely speculative and are insufficient to support emergency injunctive relief. The Sixth Circuit has already overturned district court injunctions against Ohio's former statute allowing challengers of voters on election day on the basis, in part, of the "strong public interest in smooth and effective administration of the voting laws that militates against changing the rules in the hours immediately preceding the election." *Summit County Democratic Central and Executive Committee v. Blackwell*, 388 F.3d 547, 551 (6th Cir. 2004). In concurrence, one judge found that the Plaintiffs in the *Summit County* case pled "and the district courts have found a possible chamber of horrors in voting places throughout the state of Ohio based on no evidence whatsoever, save unsubstantiated predictions and speculations." *Id.* at 552 (Ryan, J., concurring).

In a similar case challenging Indiana's new voter identification requirements, the district court initially found that various public interest groups lacked standing to challenge the statute. *Indiana Democratic Party v. Rokita*, 2006 U.S. Dist. LEXIS 20321 at **81-114 (S.D. Ind. Apr. 14, 2006). First, the district court refused to grant standing based upon the personal offense some plaintiffs claimed they felt if they had to present any identification prior to voting. *Id.* at *85. Second, since organizational members actually had sufficient identification as required under the Indiana statute, the organizations should not establish standing based upon alleged injuries to their members. *Id.* at *86. Since several of the named individuals in the *Rokita* case also had the specific identification forms required to vote, the district court determined that they could not suffer any injury in fact and thus, lacked standing to challenge the Indiana law. *Id.* at *91-92. Finally, the district court found that there was no evidence presented which would demonstrate any identifiable person would be disenfranchised as a result of the Indiana statute. *Id.* at *121-127.

In our case, the Plaintiffs have been unable to identify specific voters who lack identification and would be unable to sign an affidavit attesting to his identity. The Plaintiffs are simply speculating about harm that they might face. Yet, the Sixth Circuit in *Summit County* and the district court in *Rokita* have specifically rejected the concept of speculative harm as being sufficient for an injunction in an elections case. Thus, this Court should follow those cases and find that the Plaintiffs have failed to establish harm in support of their emergency injunction request.

Conclusion

For these reasons, and others which will be outlined in a future memorandum contra, this Court should reject the Plaintiffs' motion for a temporary restraining order.

Respectfully submitted,

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Certificate of Service

This is to certify a copy of the foregoing was served upon all counsel of record by means of the Court's electronic filing system on this 25th day of October, 2006.

/s Richard N. Coglianese