

**In the United States District Court
For the Northern District of Ohio
Eastern Division**

Project Vote, et al.	:	
	:	
Plaintiffs,	:	
	:	
vs.	:	Civil Action No. 1:06-cv-01628
	:	
J. Kenneth Blackwell, et al.,	:	Judge Kathleen M. O'Malley
	:	
Defendants.	:	Magistrate Judge Perelman

**MOTION OF DEFENDANTS J. KENNETH BLACKWELL, JIM PETRO,
AND SHERRI BEVAN-WALSH TO DISMISS THE PLAINTIFFS'
COMPLAINT AND MEMORANDUM IN OPPOSITION TO
PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION**

Defendants J. Kenneth Blackwell, Jim Petro, and Sherri Bevan-Walsh move this Court for an order dismissing Plaintiffs' complaint pursuant to Fed. R. Civ. P. 12(b)(6). In the alternative, Defendants ask this court to deny Plaintiffs' Motion for a Preliminary Injunction. A memorandum in support is attached.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

As the State of Ohio became the ultimate swing state for the 2004 Presidential election, both major political parties, and their allies, concentrated on their get out the vote effort. A major portion of that included specific and focused voter registration drives. It has been estimated that 800,000 new voters registered in the State of Ohio for the 2004 election.

While the vast majority of these registrations were honest, eligible people choosing to exercise their rights, unfortunately, not every single registration was legitimate. According to reports, Jive Turkey Sr. had become a resident of Cuyahoga County and sought to vote in the 2004 election. *See* Scott Hiaasen, *Fowl play 'Jive Turkey Sr.' tops Cuyahoga's phony-voter list*, Cleveland Plain Dealer, October 22, 2004, attached hereto as Exhibit A. Likewise, Dick Track, Mary Poppins and Michael Jordan tried to make appearances on the voter roles in Defiance County. *See Id.* Registration fraud resulted in the Hamilton County Board of Elections investigating ACORN after 4,000 of their 63,000 new-voter cards could not be delivered. *See* Jim Siegel, *Thousands of new-voter cards in Ohio undeliverable*, The Cincinnati Enquirer, October 20, 2004, attached hereto as Exhibit B.

In other places in Ohio, new voter registrations were withheld by organizations and were submitted in bulk on the registration deadline, 30 days before the election. *See* Scott Hiaasen, *County voter total climbs; Cuyahoga rolls exceed 1 million*, The Cleveland Plain Dealer, October 13, 2004, attached hereto as Exhibit C; Alice Thomas and Catherine Candisky, *People Rush to Register; In Columbus, and across the nation, voters' ranks swelled by newcomers*, The Columbus Dispatch, October 5, 2004, attached hereto as Exhibit D. In addition, some groups failed to submit voter registration cards by the deadline. *See* Cindi Andrews, *Alleged fraudulent*

voter cards scrutinized, The Cincinnati Enquirer, October 8, 2004, attached hereto as Exhibit E; Mark Brunswick, *High-stakes registration efforts fuel an industry; Controversy can sometimes follow the groups helping the major parties*, The Star Tribune, October 18, 2004, attached hereto as Exhibit F. This led to difficulties for Ohio's boards of elections who were required to add these new names to the voter rolls, check the rolls, compile an accurate voter log for the 2004 general election, deal with challenges to some of these new voters, and prepare for the election itself.

The State of Ohio was not the only place in the country that saw issues arising from voter registration. Nationally, some voter registration firms had decided to simply destroy the registration cards of some of the new voters they solicited. See Stephanie Desmon, *For voters, officials, a season of anxiety; Area election boards swamped, fear problems; Election 2004*, The Baltimore Sun, October 29, 2004, attached hereto as Exhibit G; *Campaign Roundup*, The San Francisco Chronicle, October 23, 2004, attached hereto as Exhibit H; Jeremy Milarsky, *Democrats Gain Most New Voters In County; Investigation Under Way On Sign-Up Tactics*, Sun-Sentinel, October 22, 2004, attached hereto as Exhibit I; Jerry Seper, *Florida probes activists' voter-registration effort*, The Washington Times, October 23, 2004, attached hereto as Exhibit J. In Colorado, while being investigated for several hundred fraudulent voter registrations, an ACORN regional director attempted to justify fraudulent voter registration efforts by stating "Registration fraud is different than voter fraud. Just because you register someone 35 times doesn't mean they get to vote 35 times." See Valerie Richardson, *Colorado to tackle voter-fraud fears*, The Washington Times, October 14, 2004, attached hereto as Exhibit K. And in Michigan, Project Vote and another voter registration group were investigated for possible voter registration fraud. See Dawson Bell, *Campaign Workers Suspected of Fraud*;

Voter Registration Problems Probed, Detroit Free Press, September 23, 2004, attached hereto as Exhibit L.

Against that backdrop, the Ohio General Assembly enacted a comprehensive elections reform bill – House Bill 3. One of the provisions of House Bill 3 requires non-governmental entities who provide compensation to people that engage in voter registration activities to provide their names on each card they submit. The provisions also require each person who is registering voters for one of these organizations to complete an on-line training session. It also requires each of these employees to return those forms to the Secretary of State, the correct county board of elections, or the United States mail within 10 days of the form being completed. Despite the enactment of this legislation, voter-registration groups continue to be investigated for fraudulent registrations. See Aaron Marshall and Diane Suchetka, *Voter registrations examined for fakes*, The Cleveland Plain Dealer, August 11, 2006, attached hereto as Exhibit M; Robert Vitale and Mark Niquette, *500 new voters might not exist; State activists might be charged over questionable registrations*, The Columbus Dispatch, August 11, 2006, attached hereto as Exhibit N; Lisa Abraham, *Summit to look at voter cards; Registrations turned in by ACORN workers come under scrutiny*, Akron Beacon Journal, August 12, 2006, attached hereto as Exhibit O.

In an unusual lawsuit, the Plaintiffs in this case have claimed that clear and precise words are vague and that the State of Ohio must comport its laws to the private plaintiffs' business models. Since the Plaintiffs have failed to state any claim for relief under the constitution or any statute, this Court should dismiss their complaint.

II. STATEMENT OF FACTS

Registering to vote in Ohio is incredibly easy and can be accomplished at numerous governmental offices, libraries, deputy registrars of motor vehicles, and other offices throughout

the State. Organizations conducting “voter registration drives” are only a small fraction of the ways that a person could become a legally registered voter in the State of Ohio. House Bill 3, Ohio’s comprehensive elections reform bill, was written and enacted as a result of the experiences Ohio had during the 2004 general election. Some of the provisions of that bill seek to curb the illicit behavior of groups such as ACORN that submitted thousands of voter registration forms after the deadline had passed for registering voters for the general election. In order for the court, however, to understand the regulations at issue in the case, it is incumbent to first examine voter registration laws in Ohio both pre- and post- House Bill 3.

A. Ohio Has Historically Maintained Highly Liberal Voter Registration Laws That Allow Any Person To Register To Vote At Numerous Governmental Offices As Well As Through Private Voter Registration Drives.

Under Ohio law, in order to be eligible to register to vote, one must turn at least eighteen years old at the next ensuing November election, be a citizen of the United States, and will have resided in the county and precinct where the person is registered for at least thirty days at the time of the next election. R.C. § 3503.07. Ohio’s county boards of elections are legally required to supply a sufficient number of blank voter registration forms so that any eligible person in the State can register to vote. R.C. § 3503.08.

The State of Ohio has provided numerous ways for individuals to register to vote so that people can feel secure their registration will be made effective, instead of handing their forms to organizations such as ACORN that have a history of failing to deliver registration forms until after the registration deadline passed. R.C. § 3503.10(A). Ohio law, for example, requires that any designated agency have a person within that agency who coordinates the voter registration program. Furthermore, each designated agency, public high school and vocation school, public library, and county treasurer is required to provide voter registration applications and assistance.

R.C. § 3503.10(B). Each designated agency is required to have employees who are trained on voter registration issues. R.C. § 3503.10(E)(1). Those employees are responsible for accepting either new voter registration applications or changes of address forms. R.C. § 3503.10(E)(2). If the designated agency primarily helps the disabled with State funds at persons' homes, then the designated agency must offer voter registration services at the disabled person's home as well. R.C. § 3503.10(E)(3).

The Secretary of State is responsible for preparing and requiring the designated agency to display in a prominent location a notice that identifies the person designated to help with registrations, the person's duties, and when that person is available to assist with voter registration duties. R.C. § 3503.10(I). Furthermore, nothing in Ohio law would limit a local board of education, a school superintendent, or a school principal from promoting voter registration programs including the use of peer programs. R.C. § 3503.10(J).

Ohio law also requires that whenever a person applies for a drivers' license, commercial license, state identification card, motorcycle license or renewal, that the deputy registrar of motor vehicles offer that person the opportunity to either register to vote or to update his voter information. R.C. § 3503.11. In addition, the local county boards of elections are legally required to make sure that all of these previously mentioned places for voter registration be made free of barriers for handicapped access. R.C. § 3503.12.

The Plaintiffs have mentioned numerous times that they have a need to do quality control checks in order to make sure that they or their agents do not submit fraudulent voter registration cards. However, Ohio law has always made it clear that the legal responsibility for assuring the accuracy of all information on a voter registration card rests solely on the local county board of elections; it has never rested, even partially, on any private organization doing a voter

registration drive. R.C. § 3503.12. And both prior to and after the passage of House Bill 3, a private organization doing voter registration is legally obligated to turn over all voter registration forms, even if that private organization has irrefutable proof that the voter registration form is fraudulent. R.C. § 3599.11.

Finally, Ohio law has always recognized that any eligible person may register to vote or update their voter information at any designated office, deputy registrar of motor vehicles, public high school, vocational school, public library, office of the county treasurer, branch offices established by the local board of elections, as well as in person, through another person, or by mail at the office of the Secretary of State or local board of elections. R.C. § 3503.19(A). People can obtain voter registration forms in person, by mail, by telephone, or through another person by contacting either the Secretary of State or the Board of Elections. R.C. § 3503.19(B). As soon as the board of elections receives the voter application and is satisfied as to the truthfulness of the statements contained on that form, the board of elections is legally obligated to place that person on the voter rolls and to notify the applicant. R.C. § 3503.19(C).

B. House Bill 3 Enacted Certain Limited Provisions Meant To Cure Problems The State Of Ohio Encountered As A Result Of The Actions Of The Plaintiffs In This Case.

As demonstrated in the introduction to this motion, the Plaintiffs in general, and ACORN in particular, withheld more than 1,000 voter registration forms during the 2004 election. The people who filled those forms out, therefore, were unable to vote in the 2004 general election because ACORN decided not to timely submit them. Unfortunately, it appears that ACORN has continued to violate Ohio law by collecting and submitting voter registration forms that purport to register deceased people to vote. *See* Aaron Marshall and Diane Suchetka, *Voter registrations examined for fakes*, The Cleveland Plain Dealer, August 11, 2006, attached hereto as Exhibit M;

Robert Vitale and Mark Niquette, *500 new voters might not exist; State activists might be charged over questionable registrations*, The Columbus Dispatch, August 11, 2006, attached hereto as Exhibit N; Lisa Abraham, *Summit to look at voter cards; Registrations turned in by ACORN workers come under scrutiny*, Akron Beacon Journal, August 12, 2006, attached hereto as Exhibit O.

One of the new requirements of House Bill 3 was to require any person receiving compensation for registering voters to return any registration form entrusted to that person to the appropriate board of elections or to the Secretary of State. R.C. § 3503.19(B)(2)(c). However, in order to aid people who were receiving compensation for registering voters, the Secretary of State was obligated to develop and make available over the internet a registration form and a training program. R.C. § 3503.29(A). Each year, a person who expects to receive compensation for registering voters is obligated to register with the Secretary of State and is also obligated to complete the Secretary's training program and to sign an affidavit attesting to that fact. R.C. § 3503.29(C). House Bill 3 now requires the paid circulator to submit completed voter registration forms that were entrusted to him to the board of elections. He is also required to submit a copy of his affirmation attesting to completing the Secretary's training course. R.C. § 3503.29(D). He is allowed to send in one affirmation per bundle of registration forms.

Finally, House Bill 3 slightly modified the penalties for violations of Title 35. As noted above, it has always been a violation of Ohio law for a person who helps another register to knowingly destroy, or help another to knowingly destroy any completed registration form. R.C. § 3599.11(B). Likewise, it has always been a violation of Title 35 for any person to knowingly fail to return any registration form entrusted to that person to the board of elections on or before the thirtieth day before the election. *Id.*

Recognizing that several ACORN employees were violating this prohibition, House Bill 3 slightly modified these prohibitions. Pursuant to the new provisions of Ohio law, no person who helps another register outside of an official voter registration place shall knowingly fail to return any registration form entrusted to that person to any board of elections or the Secretary of State within 10 days after the form is completed. R.C. § 3599.11(B)(2)(a).

III. LAW AND ARGUMENT

A. The Recently Added Provisions Of House Bill 3 Are Rational And Do Not Interfere With The First Amendment Rights Of Any Of The Plaintiffs.

The newly enacted provisions of House Bill 3, requiring circulators to complete a training course with the Secretary of State's office, to identify the applications that they have submitted, and to submit the voter registration forms they have obtained to the board of elections within 10 days are rational restrictions which preserve the integrity of Ohio's elections system. In general, States must, and the constitution permits them to enact "reasonable regulations [on] parties, elections, and ballots to reduce election and campaign-related disorder." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) *citing* *Burdick v. Takushi*, 504 U.S. 428, 433 (1992).

The regulations imposed upon paid voter registration employees are not subject to strict scrutiny. Only regulations that impose "severe burdens on plaintiffs' rights must be narrowly tailored and advance a compelling state interest." *Timmons*, 520 U.S. at 358. Regulations that impose a lesser burden on the plaintiffs' rights will "trigger less exacting review, and a State's 'important regulatory interests' will usually be enough to justify 'reasonable, nondiscriminatory restrictions.'" *Id. citing Burdick*, 504 U.S. at 434.

While examining any First Amendment challenge of this type, a court must "weigh 'the character and magnitude of the asserted injury to the [plaintiffs'] ... First and Fourteenth Amendment [rights] ... against 'the precise interests put forward by the State as justifications for

the burden imposed by its rule,' taking into consideration 'the extent to which those interests make it necessary to burden the plaintiff's rights.'" *Burdick*, 504 U.S. at 434 quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983). Furthermore, "the State's interest in protecting the integrity and fairness of the electoral process is paramount." *Blankenship v. Blackwell*, 341 F. Supp. 2d 911, 921 (S.D. Ohio 2004) *aff'd* 429 F.3d 254 (6th Cir 2005).

The Plaintiffs have failed to demonstrate, either in their complaint or their motion for a preliminary injunction, any severe burden upon their first amendment rights. Since they have failed to allege any severe burden on their core First Amendment rights, this case should be dismissed.

1. Ohio's laws requiring voter registration workers and volunteers to return voter registration forms only to a board of elections or to the Secretary of State's office do not severely impact the Plaintiffs' rights to free association or speech.

Ohio Rev. Code §§ 3503.19(B)(2)(c) and 3599.11 require voter registration workers and volunteers to return voter registration forms to a board of elections or the Secretary of State's office. These statutes assure accountability on the part of those who gather voter registrations and protect those who are attempting to register to vote by ensuring that their voter registration cards will be submitted to a board of elections or the Secretary of State in a timely manner. Contrary to the Plaintiffs' allegations, these provisions do not unduly burden any First Amendment right.

This statutory provision mandates responsibility in returning a voter registration form with the person who obtained the registration form. It only makes sense to mandate that the person who obtained the registration form in a drive be required to then submit that form to the government so that the person who filled the form out will be assured he will have his registration processed.

The Plaintiffs in this case cannot seriously maintain that they can ask people to fill out voter registration forms but would retain a First Amendment right to do with those forms whatever they choose, including holding the form so long that the person who filled out the form would be prohibited from voting in an election. House Bill 3 simply articulates the common sense proposition that whenever a person gets another person to fill out a voter registration form, that person has the legal responsibility to make sure the form is returned to the board of elections or Secretary of State's office so that the government can then process the voter registration information.

This regulation is a reasonable way to ensure that people who fill out voter registration cards will have those cards processed. As a result, it easily passes constitutional scrutiny.

2. Ohio's laws requiring compensated voter registration workers to pre-register with the State of Ohio do not unduly burden political speech or association and are proper State regulations that do not violate the First Amendment.

In *Buckley v. Am. Constitutional Law Foundation*, 525 U.S. 182, 198 (1999), the Supreme Court recognized that the State of Colorado had a substantial interest in identifying petition circulators and in making sure that such circulators would be subject to subpoena by the Secretary of State in case there were any problems with any petitions they circulated. Although the Court struck down a requirement that petition circulators be registered voters, it noted that the interest "in reaching law violators, however, is served by the requirement, upheld below, that each circulator submit an affidavit setting out, among several particulars, the 'address at which he or she resides, including the street name and number, the city or town, [and] the county.'" *Id.* quoting Colo. Rev. Stat. § 1-40-111(2) (1998).

Much like the situation in *Buckley*, Ohio's pre-registration, training, and affirmation program serves to make sure that an individual who helps a person register to vote understands

how to properly fill out a voter registration card, is known to the Secretary of State so that he can be subpoenaed if he registered people who, for example, are deceased or non-existent, and that he clearly identifies which forms he submitted.

As noted above, Ohio had a problem in 2004 with some private voter registration drives registering Mickey Mouse and Jive Turkey, Sr. *See* Scott Hiaasen, *Fowl play 'Jive Turkey Sr.' tops Cuyahoga's phony-voter list*, Cleveland Plain Dealer, October 22, 2004, attached hereto as Exhibit A; The reasonable regulations requiring people who work with private voter registration drives to register with the Secretary of State and take a training program will make sure that these individuals will realize that they are committing a criminal violation of Ohio law if they or others fill out a voter registration form as Mickey Mouse or Mary Poppins. It will also let the State of Ohio determine exactly who the person was who submitted the voter application for Mary Poppins so that criminal charges against that person will be easier to pursue. Under the prior system, these private voter registration drives could simply bury the Mary Poppins card and claim that they were unsure exactly who obtained the card. Such a situation would make it very difficult for a prosecutor to prove a violation of Ohio law. However, by requiring the person who obtained the card to sign an affidavit, it will make it easier for prosecutors to bring charges against a person who submitted a Mary Poppins type voter registration card. Since the Supreme Court has recognized that such a requirement and interest is legitimate, the Plaintiffs have failed to make out any First Amendment violation.

3. House Bill 3's requirement that paid voter registration workers provide the name of their employer do not violate any person's First Amendment rights.

Any requirement that a paid registration worker submit the name of his employer to the State of Ohio is a simple regulation meant to control the integrity of Ohio's voter registration

system and does not violate the First Amendment. While the right of free association may be protected by the First Amendment, “neither the right to associate nor the right to participate in political activities is absolute.” *Buckley v. Valeo*, 424 U.S. 1, 25 (1976) citing *CSC v. Letter Carriers*, 413 U.S. 548, 567 (1973). The State’s reasonable regulations requiring a paid circulator to list his employer on a voter registration form does not in any way interfere with that circulator’s first amendment rights.¹

Recently, the Sixth Circuit upheld a requirement that all campaign contributors to candidates in Akron, Ohio be required to report their home addresses. *Frank v. City of Akron*, 290 F.3d 813 (6th Cir. 2002). In dismissing a free association challenge, the court noted that the disclosure provisions “serve a significant governmental interest in providing an accountability mechanism to track campaign donors and safeguard against corruption.” *Id.* at 819. The court summarized their holding by noting that “[t]o require donors to provide their home address does not add any substantial burden that unduly burdens their right to association.” *Id.*

The same is true in requiring paid voter registration circulators to list their name and address on the form that they have circulated. It provides an accountability mechanism for each registration form circulated by a paid circulator.² It also safeguards against corruption because the State of Ohio is quickly able to determine the responsible party for any particular registration form. Disclosure of a registrar’s employer organization also furthers Ohio’s important interest in regulating those organizations to see if any of them have systemic problems with their registrars. It would allow the State to see both if certain organizations would be in need of additional training or if certain organizations have particular problems with registration fraud. There is no

¹ None of the plaintiffs have standing to argue the First Amendment rights of potential voters who might register through their drives. However, even if they had such standing, there would be no First Amendment violation.

² Since many of these paid circulators may be paid on a per registration basis or receive a bonus for the number of registration forms they submit, they have a financial incentive to turn in false voter registration forms.

substantial burden whatsoever that would fall upon any organization in this case, or any organization in Ohio. The Plaintiffs have, therefore, failed to state a free association claim.

4. House Bill 3's requirements concerning paid registrars do not unduly interfere with the right to engage in the political process or place an undue burden upon the plaintiffs' right to vote.

In order to attempt to state a claim that the requirements of House Bill 3 somehow interfere with the rights of Ohioans to register to vote, the Plaintiffs apparently believe that were it not for their efforts, there would not be a registered voter in the State of Ohio. As has been previously demonstrated, Ohio has numerous agencies that register voters including various designated agencies, public high schools, vocational schools, agencies that provide services to the disabled, county treasurers, county boards of elections, the Secretary of State, and deputy registrars of motor vehicles. R.C. § 3503.19(A). Registration cards can be returned to these State sponsored registration entities in person or by mail. R.C. § 3503.19(B)(2).

As noted throughout this brief, these reasonable and common sense regulations on paid registrars serve an interest in making sure that the registrar and the organization he is working for are properly following Ohio law. These regulations also do not in any way limit voter registration efforts in Ohio. If the plaintiffs refuse to continue their private voter registration efforts, Ohioans can continue to register at any myriad of places including their local library, local government offices, local public high school, local vocational school, or their local deputy registrar of motor vehicles. They can also simply request a voter registration form from the Ohio Secretary of State or their local board of elections. Thus, any minor regulation on these paid organizations in no way interferes with the right to vote or the right to engage in the political process. Ohioans are still free to vote and to engage in the political process. The only difference

is that paid registrars must receive some training, and must turn their voter registration cards in to the board of elections in a timely manner.

As has been demonstrated, the Plaintiffs have failed to make any claim that the changes the State of Ohio enacted in House Bill 3 interfere with their First Amendment rights. Similarly, the Plaintiffs cannot state a claim that any of the changes made in House Bill 3 are void for vagueness.

B. The Changes Made By House Bill 3 Are Clear And Can Be Easily Understood By A Reasonable Person Of Average Intelligence As To What Conduct Is Prohibited So That The Plaintiffs Have Failed To State A Claim That Ohio's Statutes Are Void For Vagueness.

An examination of the statutes at issue in this case show that any reasonable person can quickly and easily determine what conduct is prohibited concerning voter registration applications. As a result, the Plaintiffs' allegations that R.C. §§ 3503.19(B)(c) and 3599.11 are unconstitutionally void for vagueness is incorrect and that claim should be dismissed. Any examination of these statutes reveals them to be unambiguous as their plain and obvious meaning are clear.

The classification of a statute as void for vagueness is a significant matter. *United States v. Caseer*, 399 F.3d 828, 838 (6th Cir. 2005). Federal courts have repeatedly held that courts must resort to every reasonable construction in order to declare a statute constitutional. *Columbia Natural Res. v. Tatum*, 58 F.3d 1101, 1105 (6th Cir. 1995) *cert. denied*, 516 U.S. 1158 (1996); *Screws v. United States*, 325 U.S. 91, 98 (1945).

A statute is unconstitutionally vague if it denies fair notice of the standard of conduct for which the citizen is to be accountable, or if it is an unrestricted delegation of power which leaves the definition of its terms to law enforcement officers. *Leonardson v. City of East Lansing*, 896 F.2d 190, 196 (6th Cir. 1990). "The standard for vagueness in a criminal statute is if it defines

an offense in such a way that ordinary people cannot understand what is prohibited or if it encourages arbitrary or discriminatory enforcement.” *United States v. Avant*, 907 F.2d 623, 625 (6th Cir. 1990).

It does not matter that the legislature could have chosen clearer or more precise language in its formulation. *United States v. Powell*, 423 U.S. 87, 94 (1975). “Condemned to the use of words, we can never expect mathematical certainty from our language.” *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972). Rather, the only constitutional requirement is that a person of ordinary intelligence can “steer between lawful and unlawful conduct.” *Id.* at 108. Thus, the law must be permitted to have “flexibility and reasonable breadth rather than meticulous specificity.” *Id.* at 110.

A reasonable person can examine the language of R.C. §§ 3503.19(B)(2)(b) and (c) and 3599.11(B)(2)(a) and determine what behavior is permitted. Since these statutes are unambiguous to any person of ordinary intelligence and their plain meaning is clear, the Plaintiffs have failed to plead a void for vagueness claim. Thus, this Court should dismiss those allegations and deny the Plaintiffs any emergency injunctive relief.

1. Since a person of ordinary intelligence knows the meaning of the word “return,” that statutory provision is not void for vagueness.

Throughout their motion for a preliminary injunction, the Plaintiffs have attempted to set up a false dichotomy of if they are not allowed to review voter registration forms, then they will return fraudulent voter registration forms to boards of elections. (Motion for PI at 12). They also make the blatantly false statement that when they review applications that is the best guarantee that no false registrations are returned to the board of elections. *Id.*

As has been noted above, prior to the passage of House Bill 3, Ohio law mandated that all completed voter registration forms be returned to the boards of elections. Ohio Rev. Code

3599.11 (2005). Thus, if the Plaintiffs actually failed to deliver any registration forms to the boards because they believed the forms to be fraudulent, then the Plaintiffs committed a blatant violation of Ohio criminal law. On the other hand, if the Plaintiffs followed their statutory duty and turned those fraudulent forms over to the boards of elections, it is the board and the county prosecutor, not the Plaintiffs, who have the legal duty to ascertain the truthfulness of the voter registration card. Thus, the Plaintiffs' review of those cards is simply a review for their own business purposes, not a review that is necessary or even beneficial under Ohio law.

R.C. § 3503.19(B)(2)(c) requires a person “who receives compensation for registering a voter ... [to] return any registration form entrusted to that person by an applicant to any board of elections or to the office of the secretary of state.” Additionally, R.C. §§ 3599.11(B) and (C) require an individual who helps another individual register to vote to return the voter registration applications to a county board of elections or the Secretary of State.

The plain language in these statutes is perfectly clear and understandable to a person of average intelligence. House Bill 3 requires the person who receives compensation to register voters to return that registration form to the board of elections or the Secretary of State. The dictionary defines “return” as “to put, bring, take, give, or send back to the original place, position, etc.” Random House Webster's Unabridged Dictionary 1645 (2001).

There is no prohibition in the statute for the paid registrar from first giving the completed voter registration form to his employer for the employer to review the form for internal quality control. The employer, however, is prohibited from returning the card. Rather, that responsibility rests squarely where it should – with the paid employee who actually received the voter registration card in the first place.

As further evidence of the clarity of this statute, the Secretary of State has promulgated rules as required by House Bill 3. The Secretary has defined the word “returning” as “delivering a voter registration form to an Ohio county board of elections, the Ohio secretary of state or the United States postal service.” O.A.C. § 111-12-02(C). Neither the statute itself, nor the administrative code promulgated under the authority of the statute, are vague.

The Plaintiffs’ argument that these statutory provisions are unconstitutionally vague because they do not specify whether an organization can mail forms to the Secretary of State or board of elections on behalf of their employees attempts to create a statutory issue that simply does not exist. The statute itself requires the employee who obtained the voter registration form to return it to the board of elections. He can mail it or drop it off in person. However, it is his legal responsibility to return the form. Just because the Plaintiffs seem to not like the plain reading of a statute is no reason to find that statute void. Because it is clear what House Bill 3 means when it says the paid employee must return the completed voter registration form, it is not void for vagueness. Thus, this claim should be dismissed.

2. Any reasonable person can understand what “compensated” means in House Bill 3 so the Plaintiffs have failed to state a void for vagueness claim.

Compensation, in an employment or even a principal/subcontractor relationship, is a simple term whose meaning has been clear for a long time. The Federal Fair Labor Standards Act (“FLSA”) requires any covered person who works more than forty hours in a week to be “compensated” at one and one-half times his regular rate. 29 U.S.C. § 207(a)(1). Michigan’s overtime statute repeats the federal formula. Mich. Stat. § 408.384a. Ohio’s minimum wage statute defines a “wage” simply as “compensation due to an employee by reason of employment, payable in legal tender of the United States or checks on banks convertible into cash on demand

at full face value, subject to the deductions, charges, or allowances permitted by the rules of the director of commerce under section 4111.05 of the Revised Code.” R.C. § 4111.01(A). Thus, it is clear that when dealing with an employment-type situation, compensation is remuneration due for rendering a service to an employer or principal.

Likewise, the federal income tax code defines “gross income” to include “compensation for services, including fees, commissions, fringe benefits, and similar items.” 28 U.S.C. § 61(a)(1). Similarly, Ohio’s personal income tax law defines “compensation” to mean “any form of remuneration paid to an employee for personal services.” R.C. § 5747.01(D).

When looking at employment or tax statutes the word “compensation” is not generally defined. Rather, other words are defined to mean compensation. As such, a person of reasonable intelligence, when examining the amendments of House Bill 3 should be able to determine that when the statute speaks about people being “compensated” for registering voters, it simply means people who have been paid. This is obvious upon any examination of the statute.

House Bill 3 mandates the Secretary of State to develop a “training program for any person who receives or expects to receive compensation for registering a voter.” R.C. § 3503.29(A). Likewise, except for public officials or employees who are specifically exempted, any person who “receives or expects to receive compensation for registering a voter” shall register with the Secretary of State; complete the training program; sign an affirmation stating the registrar’s name, address, employer, birthday; and affirm that the person has followed Ohio’s voter registration laws. R.C. § 3503.29(C).

The dictionary definition of “compensation” further enforces this point. “Compensation” is “something given or received as an equivalent for services, debt, loss, injury, suffering, lack,

etc....” Random House Webster’s Unabridged Dictionary 417 (2001). Thus, the easiest way for the Plaintiffs to determine whether they have received “compensation” for their activities is to ask themselves whether they would owe federal or state tax on the item they have received. If they do, then they are registering voters in return for “compensation” and are obligated to follow those provisions. If they do not owe federal or state tax on what they have received, then they are not receiving “compensation.”

Since the meaning of “compensation” is abundantly clear to persons of average intelligence, it is not void for vagueness. Thus, the Plaintiffs have failed to properly state a claim and that claim should be dismissed. Likewise, the Plaintiffs have failed to state any cause of action under the National Voter Registration Act.

C. House Bill 3’s Requirements Do Not Violate The National Voter Registration Act And, Therefore, The Plaintiffs Have Failed To Plead Any Violation Of That Act.

Because the State of Ohio has not violated the requirements of the National Voter Registration Act, the Plaintiffs have failed to state a claim under the NVRA and their claim should be dismissed. The purpose of the NVRA is fourfold:

- To establish procedures that will increase the number of eligible citizens who register to vote in elections for Federal office;
- To make it possible for Federal, State, and local governments to implement the Act in a manner that enhances the participation of eligible citizens as voters in elections for Federal office;
- To protect the integrity of the electoral process; and
- To ensure that accurate and current voter registration rolls are maintained.

42 U.S.C. § 1973gg(b).

Because none of the requirements of House Bill 3 interfere or violate any of these purposes or any of the requirements of the NVRA, the Plaintiffs have not stated a claim.

1. House Bill 3 does not impede voter registration so it does not violate the National Voter Registration Act.

The National Voter Registration Act “requires the states to accept voter registration forms in three ways beyond those through which the states voluntarily elect to accept them: registration by mail, registration in person at various official locations (so-called “registration places”), and registration in conjunction with driver licensing.” *Wesley Education Foundation, Inc. v. Cox*, 408 F.3d 1349, 1353 (11th Cir. 2005) *citing* 42 U.S.C. § 1973gg(b). Thus, the NVRA sets a floor on acceptable *methods* for voting registration. *Id.* “[T]he use of a private registration drive is not a mode of registration at all. Rather, it is a method by which private parties may facilitate the use of the mode of registration by mail, for which the Act *does* provide.” *Id.* (emphasis in original).

Furthermore, when dealing with a voter registration form, the NVRA “details what the form *may* contain, what the form *must* contain, as well as what the form *must not* contain.” *Gonzalez v. State of Arizona*, 2006 U.S. Dist. LEXIS 42309 at * 12 (D. Ariz. June 19, 2006) (attached). As the district court in *Gonzalez* correctly recognized, “there is no indication in the language of the NVRA itself that states are prohibited from requiring additional information, such as proof of citizenship, when processing voter registration information.” *Id.* at *14. The plaintiffs in *Gonzalez* sought a temporary restraining order claiming that the State of Arizona was violating the NVRA when it started requiring all voter registration forms to include proof of citizenship in order to process the application. In rejecting the request for emergency injunctive relief, the district court noted that the NVRA “does not act as a ceiling preventing states from enforcing their own laws regarding voter qualifications.” *Id.* at 19.

The *Gonzalez* case is illustrative when addressing Question 15 of Ohio’s voter registration application. Question 15 does not attempt to alter any of the registration methods

required as a result of federal law. It does not attempt to lower the floor set by the NVRA. Instead, it merely serves to find out the identity of the paid circulator and requires that paid circulator to attest to the fact that he circulated the form and that he has followed Ohio's reasonable governmental regulations when he did so. Nothing in the NVRA prohibits such behavior.

2. Ohio's voter registration laws do not impede voter registration and are not violative of the NVRA.

As noted above, the purpose of the NVRA is to set specific methods that States must follow in registering voters for federal elections. Nothing in House Bill 3 violates these requirements. House Bill 3 correctly requires that completed voter registration forms be returned to the county boards of elections within 10 days of being completed. Such a requirement helps voter registration efforts because it assures that voter registration forms will be processed in a timely manner and that all eligible registrants will be entered into the State's voter rolls.

Plaintiffs' reliance on *Wesley* is misplaced in their effort to show House Bill 3 violates the NVRA. In *Wesley*, the Court upheld the district court's grant of a preliminary injunction requiring the State of Georgia to accept sixty-four "bundled" voter registration applications which were collected and timely mailed into the Secretary of State from a private organization's voter registration drive. The court found that, under §§ 1973gg-2(a)(2) and gg-6(a)(1)(D), the NVRA required that "valid registration forms delivered *by mail* and *post-marked* in time to be processed" and that the bundled applications at issue met this requirement. 408 F.3d at 1354 (emphasis added).

Unlike *Cox*, Ohio's challenged legislation has not established an "anti-bundling" policy. Ohio's disputed legislation merely requires that an applicant, a person submitting a form on behalf of the applicant, or a compensated voter registrar return a registration form to the

appropriate location within the appropriate time. O.R.C. §§ 3503.19(B)(1)-(2)(c) and 3599.11(B) and (C)(2). Additionally, unlike the Georgia Secretary of State in *Cox*, the Ohio Secretary of State would never refuse to accept a legitimate voter registration form on the basis of a failure on the part of a compensated registrar failing to register with the Secretary of State, complete the mandated training or sign the affirmation at the bottom of the voter registration form.

Additionally, Ohio's voter regulations do not impede or diminish the use of postcard registration, they merely require that voter registration forms be returned to the proper location within a certain time period. These regulations allow for a compensated registrar to personally send a bundle of collected voter registration forms to either a board of election or the secretary of state.

The return of collected voter registration forms to the organizations of compensated registrars prior to their return to either a board of elections or the secretary of state would violate the plain language of the challenged statutes. NVRA subsections 6(a)(1)(B) and (D) mandate that a state "shall ensure that any eligible applicant is registered to vote***if the valid voter registration form of the applicant is postmarked" and "received by the appropriate State election official" by the appropriate date. 42 U.S.C. §1973gg-6. Accordingly, Ohio has regulated the time and location of return of voter registration applications.

3. House Bill 3 does not limit the ability of private organizations to conduct voter registration drives and does not violate the NVRA.

Nothing in House Bill 3 limits the ability of private organizations to conduct voter registration drives. The only thing that it requires is that paid registrars undergo training, return the registration forms in a timely manner, and finally, that they specifically identify which applications they submitted. Plaintiffs fail to explain how Ohio's voter registration laws limit the ability of private organizations to conduct voter registration drives. Nothing in the challenged

statutes limits the ability of the organizational Plaintiffs to conduct voter registration drives. Ohio Rev. Code §3503.29 simply requires compensated voter registrars to: (1) complete an online training program; (2) register with the Secretary of State; and (3) sign an affirmation with identifying information and confirmation that they have registered, completed the training program and will comply with all applicable voter registration laws.

These requirements do not frustrate the ability of organizations to conduct voter registration drives, especially since these organizations already require all employees to complete mandatory training prior to registering voters. Complaint at ¶ 53. It can be argued, that by providing this training to compensated voter registrars, the State is actually eliminating a step that these voter registration organizations would otherwise perform.

Ohio's voter registration laws simply ensure that that the compensated individuals who help citizens register to vote are qualified to do so. This protects Ohio voters from potentially incompetent actions of unqualified voter registrars.

4. The NVRA does not prohibit the State of Ohio from requiring paid circulators to undergo training.

As mentioned earlier, the NVRA sets a floor on the manner in which registrations can be returned to the States. Nothing in the NVRA itself prohibits a State from requiring a paid circulator to undergo training before circulating, however. The plaintiffs incorrectly allege that Ohio's laws diminish any right to self-register. Application for Preliminary Injunction at 34. Instead, the requirements of House Bill 3 have no bearing on self-registering. They only are applicable to paid circulators. Thus, the Plaintiffs have failed to allege any claim or any need for emergency injunctive relief on this basis.

D. House Bill 3 Does Not Violate Section 2 of the Voting Rights Act and This Claim Should be Dismissed.

In order to remedy the historical disenfranchisement of certain minority groups, Congress passed the Voting Rights Act, 42 U.S.C. § 1973. This Act prohibits any voting practice or procedure that results in “a denial or abridgement of the right of any citizen of the United States to vote on account of race or color....” 42 U.S.C. § 1973(a). In order to show a violation of this Act, a minority group must demonstrate that as a result of the challenged practice or procedure:

“[B]ased on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.”

42 U.S.C. §1973(b). The protections provided for by this Act, as well as the Equal Protection Clause and the Fifteenth Amendment “are aimed only at ensuring equal political opportunity: that every person’s chance to form a majority is the same, regardless of race or ethnic origin.” *Nixon v. Kent County*, 76 F.3d 1381, 1392 (6th Cir. 1996) (*en banc*). The essence of a claim under § 2 of this Act is that the “electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters” to elect representatives of their own choice. *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986). The Supreme Court has held that a court must assess the impact of the contested practice or procedure on minority electoral opportunities “on the basis of objective factors.”³ *Id.* at 44-

³ These factors include the: (1) history of voting-related discrimination in the State, (2) extent to which voting in the State is racially polarized, (3) extent to which the State has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group, such as unusually large election districts, majority vote requirements, and prohibitions against bullet voting, (4) exclusion of members of the minority group from candidate slating processes, (5) extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health, (6) use of overt or subtle racial appeals in political campaigns, and (7) extent to which members of the minority group have been elected to public office in the jurisdiction. *Gingles*, 478 U.S. at 44-45. In addition, evidence that the elected officials are unresponsive to the needs of the minority group and the policy underlying the State’s use of the practice or procedure may have probative value. *Id.*

45. There are two types of Voting Rights Act claims – vote denial and vote dilution claims. 42 U.S.C. § 1973(a).

1. The Plaintiffs have failed to allege any vote denial claim.

Vote denial is a state practice or procedure that results in actual denial of the right to vote on account of race. *See id.* In Count IV of the Complaint, Plaintiffs’ claim that House Bill 3 is in violation of the VRA because its effect is to “hamper paid voter registration efforts which target racial minority communities.” Complaint, ¶ 45. They conclude that “the result of H.B. 3 is the denial or abridgment of the right to vote of racial minorities.” Complaint, ¶ 147. The Plaintiffs have failed to allege or plead the challenged statutes actually interfere with a minority’s ability to register to vote and, therefore, to elect representatives of their choice. The challenged regulations apply uniformly to all types of voter registration efforts and do not affect the registration of racial minorities any more than other voters. The challenged regulations do not restrict or deny an individual’s right to vote. Any eligible citizen can register to vote at public libraries, post offices, and boards of elections. Further, any inconvenience the restriction may impose on voter registration organizations is not an actual denial of the individual registrant’s right to vote.

2. Plaintiffs have failed to state a vote dilution claim.

Vote dilution occurs if: (1) the minority group is sufficiently large and geographically compact to constitute a majority in a single-member district; (2) the minority group is politically cohesive, and (3) the white majority votes sufficiently as a bloc to enable it to defeat the minority’s preferred candidate. *Gingles*, 478 U.S. at 50-51. The minority group must establish all of these factors to prevail on a vote dilution claim. *Id.* at 50. Upon successfully establishing these prerequisites, the plaintiffs must also show that, under the totality of the circumstances, the challenged regulation deprives a minority group of “an equal measure of political and electoral

opportunity” to participate in the political process and elect the representatives of their choice. *Johnson v. De Grandy*, 512 U.S. 997, 1013 (1994).

Here, in Count IV of the Complaint, Plaintiffs’ conclude that “the result of H.B. 3 is the denial *or abridgment* of the right to vote of racial minorities.” Complaint, ¶ 147 (emphasis added). Plaintiffs have failed to allege or plead any facts that would support a claim of vote dilution. There is no indication that the challenged regulation would deprive any minority group of an “equal measure of political and electoral opportunity” or dilute the minority vote. Therefore, Plaintiffs’ have failed to establish a violation of Section 2 of the Voting Rights Act and Count IV of their Complaint should be dismissed.

E. The Attorney General And Secretary Of State Are Entitled To Qualified Immunity.

Qualified immunity shields government officials from liability in their individual capacities and for money damages.⁴ It is an “immunity from suit rather than a mere defense to liability; and ... it is effectively lost if a case is erroneously permitted to go to trial.” *Saucier v. Katz*, 533 U.S. 194, 200-201 (2001). Qualified immunity not only shields governmental officials from trials, it also serves as a shield prohibiting any discovery until such time as a court first rules on the issue. *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985); *Kennedy v. City of Cleveland*, 797 F.2d 297, 299 (6th Cir. 1986).

Courts engage in a three-step process when faced with a claim of qualified immunity. First, based upon the applicable law, do the facts as alleged by the plaintiff show a constitutional or statutory violation has occurred? Second, did the violation involve a clearly established

⁴ Based upon the terms of the complaint, it does not appear that the Plaintiffs have brought suit against Prosecutor Bevan-Walsh in her individual capacity. As a result, she has not invoked the concept of qualified immunity. She does, however, join in the arguments about whether or not the Plaintiffs have alleged any violation of their federal constitutional or statutory rights in order to demonstrate that the Plaintiffs have failed to allege any cause of action against her.

constitutional right of which a reasonable person would have been aware? Finally, did the plaintiff offer evidence that shows the government official's conduct was objectively unreasonable in light of clearly established constitutional rights? *Barnes v. Wright*, 449 F.3d 709, 715 (6th Cir. 2006) citing *Sample v. Bailey*, 409 F.3d 689, 695-96 (6th Cir. 2005). As has been demonstrated, the Plaintiffs have failed to allege that Defendants Blackwell and Petro have engaged in objectively unreasonable conduct that violated the clearly established federal constitutional or statutory rights of the Plaintiffs. Furthermore, a reasonable government official in the position of either the Secretary of State or the Attorney General would not realize that any actions taken as a result of House Bill 3 violated the Plaintiffs' constitutional rights. Thus, both of these Defendants are entitled to qualified immunity and the Plaintiffs' claims for monetary damages should be dismissed.

F. The Plaintiffs' Application For A Preliminary Injunction Should Be Denied Because The Plaintiffs Have Not Demonstrated That They Are Entitled To Emergency Injunctive Relief.

The Plaintiffs have failed to either demonstrate or articulate how they are entitled to emergency injunctive relief and this court should deny that request. Before a Court can grant a preliminary injunction, it must examine four separate factors: (1) whether the movant has a "strong" likelihood of success on the merits; (2) whether the movant would otherwise suffer irreparable injury; (3) whether issuance of a preliminary injunction would cause harm to others; and (4) whether the public interest would be served by the issuance of a preliminary injunction. *McPherson v. Michigan High Sch. Athletic Ass'n*, 119 F.3d 453, 459 (6th Cir. 1997) (en banc). These four factors are not prerequisites for issuance of a preliminary injunction, but they must be balanced and, accordingly, the first factor the "likelihood of success" may depend on the strength of the other factors. *Dayton Area Visually Impaired Persons v. Fisher*, 70 F.3d 1474, 1480 (6th

Cir. 1995). Often, this first factor is dispositive in the First Amendment context. *Capobianco v. Summers*, 377 F.3d 559, 561 (6th Cir. 2004).

Furthermore, the standard for granting a preliminary injunction is more “stringent” than that required for summary judgment. *Leary v. Daeschner*, 228 F.3d 729, 739 (6th Cir. 2000). This is because “the preliminary injunction is an ‘extraordinary remedy involving the exercise of a very far-reaching power, which is to be applied ‘only in [the] limited circumstances’ which clearly demand it.” *Id. quoting Direx Israel, Ltd. v. Breakthrough Med. Corp.*, 952 F.2d 802, 811 (4th Cir. 1991) (internal quotations omitted). The Plaintiffs have failed to articulate in their motion any legitimate basis upon which they are entitled to a court order preventing the Defendants from enforcing the challenged legislation.

1. The Plaintiffs have failed to show a strong likelihood of success on the merits.

As has been previously demonstrated, the Plaintiffs have failed to state a claim under either their constitutional or statutory theories. Since the Plaintiffs have failed to state a cognizable claim, they have not shown a strong likelihood of success on the merits. Thus, their request for preliminary injunctive relief should be denied.

2. Plaintiffs have failed to show irreparable harm.

The Plaintiffs have failed to demonstrate that they will suffer an irreparable injury if the Court does not issue a preliminary injunction, and the fact that they have suffered no injury warrants a dismissal of their complaint. The Plaintiffs offer only speculation on future injuries that may occur and generally allege that because of Ohio’s voter registrar registration and training programs “Plaintiffs [sic] been forced to drastically cut back on its [sic] voter registration activities in Ohio and to divert substantial resources from its [sic] speech and associational activities to comply with the new, onerous restrictions.” Application for

Preliminary Injunction at 39. Plaintiffs offer no explanation for the alleged diversion of their resources as the modest training program is free and readily available to Plaintiff organizations and all paid voter registrars via the Internet. Even if some of the individuals or organizations do not have direct access to the Internet within their organizations, public libraries offer public access to the Internet and registrars could easily visit a local library and complete the online registration. The challenged legislation serves Ohio's important regulatory interests of preventing election fraud and ensuring the integrity of the State's election process.

Plaintiffs are also incorrect in arguing that the direct return provisions found in Ohio's laws "prevents Plaintiffs from conducting their voter registration drives in an effective and efficient manner." *Id.* As explained above, Ohio's direct return provisions simply require compensated registrars to return the voter registration forms they gather to a county board of elections or the secretary of state, in person or via the U.S. mail in the statutorily mandated allotted time period. Ohio Rev. Code §3503.19(B)(c); Ohio Rev Code §3599.11(C); Ohio Admin. Code 111-12-02(c). It seems counterintuitive that a law that requires the individual who gathers the voter registration card to return it himself or herself could possibly have any impact on the efficiency or effectiveness of any organization. If anything, having those who gather the registration cards return the voter registration cards themselves streamlines the process and limits.

Further, the registration and training of compensated voter registrars does not burden political speech. Individuals have the right to be politically active, but Ohio may still implement regulations that serve the important regulatory interests of policing lawbreaking compensated voter registrars and preventing election fraud. Similarly, the voter registration form's request for the disclosure of the registrar's personal information does not injure the Plaintiffs. Ohio needs

this information to prevent election fraud and prove the identity of wrong doers if fraud does occur. As long as the Plaintiffs comply with requirements of the new legislation, they will suffer no injury. The Plaintiffs claims of harm in this case are speculative and they have failed to prove they will suffer an “irreparable injury” if a preliminary injunction is not issued.

3. The State and the people of Ohio will suffer substantial harm if this Court were to enter emergency injunctive relief.

As has been demonstrated earlier in this brief, the Plaintiffs, and particularly ACORN, has engaged in behavior detrimental to the fair and efficient operation of elections. ACORN has withheld numerous voter registration forms for so long that people they registered were not allowed to vote in the 2004 election. Any injunction that prevented the State to enforce this 10 day rule would allow the Plaintiffs to continue to deny the right to vote to people who believe they were registered.

Likewise, any prohibition against the requirement that paid circulators identify which forms they helped complete would harm the State and its people because it would make it more difficult to find paid registrars who commit election fraud by submitting registrations for Mary Poppins or Jive Turkey. Registering only actual living, qualified human beings is a compelling State interest and any injunction that would limit the State’s ability to determine who is committing these violations of State law would harm the general public.

4. The doctrine of unclean hands bars the plaintiffs from obtaining emergency injunctive relief in this case.

As noted above, the Plaintiffs in this case have acted in ways that have prevented thousands of Ohioans from being properly registered to vote. “The concept of unclean hands may be employed by a court to deny injunctive relief where the party applying for such relief is guilty of conduct involving fraud, deceit, unconscionability, or bad faith related to the matter at

issue to the detriment of the other party.’” *Performance Unlimited, Inc. v. Questar Publishers, Inc.*, 52 F.3d 1373, 1383 (6th Cir. 1995) quoting *Novus Franchising, Inc. v. Taylor*, 795 F. Supp. 122, 126 (M.D. Pa. 1992). Courts have applied the doctrine of unclean hands to petition circulators for candidates. *Blankenship v. Blackwell*, 341 F.Supp. 2d 911, 924 (S.D. Ohio, 2004); see *Keystone Driller Co. v. General Excavator Co.*, 290 U.S. 240 (1933).

In Ohio, the nefarious conduct of a circulator is imputed upon the committee that sponsors a petition. *State ex rel. Committee for the Referendum of City of Lorain Ordinance No. 77-01 v. Lorain County Board of Elections*, 96 Ohio St. 3d 308, 316 n.1 (2002). Thus, because some of the Plaintiffs in this case failed to timely file voter registration forms for the 2004 election, the doctrine of unclean hands would prohibit them from seeking emergency injunctive relief relative to the time limits required by House Bill 3. Similarly, if it is found that any of the organizations that are plaintiffs in this case engaged in any type of fraudulent activity concerning voter registration forms, unclean hands would bar injunctive relief. Thus, this Court should deny the Plaintiffs any relief in this case.

G. Prosecutor Bevan-Walsh And Attorney General Petro Are Entitled To Absolute Immunity.

In this case, Plaintiffs sued Defendants in their official capacities as Ohio Attorney General and the Summit County Prosecutor. Their alleged cause of action arises from allegations that Defendants may investigate and enforce the law in a criminal matter.

Prosecutorial immunity is absolute so long as the prosecutors’ activities are intimately associated with the judicial phase of the criminal process. See *Woodley v. Anderson* (6th Dist. 2000), 2000 WL 426190, at 3; *Carlton v. Davisson* (6th Dist. 1995), 104 Ohio App.3d 636, 650; *Imbler v. Pachtman* (1976), 424 U.S. 409, 428. “Absolute immunity is extended to the prosecutor’s functions in initiating a prosecution and presenting the state’s case.” *Carlton*, 104

Ohio App.3d at 650. The critical inquiry to determine whether or not a prosecutor's conduct is intimately associated with the judicial phase of the criminal process is whether the prosecutor's challenged activity is closely related to his or her role as an advocate. *Lesinski v. City of Steubenville* (S.D. Ohio 2005), 2005 WL 1651737, at 9. A prosecutor definitely has prosecutorial immunity in regards to prosecution of a criminal suspect. *Imbler*, 424 U.S. at 431. Thus, Defendants Petro and Bevan-Walsh clearly have absolute immunity in regards to prosecuting criminal conduct and they should be dismissed from Plaintiff's Complaint.

IV. CONCLUSION

For the foregoing reasons, this Court should dismiss the Plaintiffs' claims and deny their request for emergency injunctive relief.

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 14th day of August, 2006.

/s Richard N. Coglianese _____