

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

Summit County Democratic Central	:	
And Executive Committee, et al.,	:	
	:	
Plaintiffs,	:	Case No. 5:04-cv-2165
	:	
v.	:	Judge Adams
	:	
J. Kenneth Blackwell, et al.	:	
	:	
Defendants.	:	

MOTION TO INTERVENE OF CHALLENGERS

Pursuant to Rule 24(a) and (b) of the Federal Rules of Civil Procedure, Matthew Heirder, Sam Ewing, Elizabeth Coombe and David Timms, challengers from Allen, Franklin, Summit and Warren County, Ohio, individually and as representatives of all others similarly situated challengers from all of Ohio’s counties, except Hamilton County¹, for Election Day, November 2, 2004, (collectively, “Intervenors”), hereby move this Court for an order granting leave to intervene as Defendants in this proceeding. Intervenors have a vital interest in the subject matter of this proceeding and are so situated that the disposition of this action may, as a practical matter, impair or impede their ability to protect those interests.

Intervenors seek to intervene to protect their interests, which are similar to all individual voters in Ohio who have an interest in a fair and orderly election process that complies with both state and federal law.

As set forth more fully in the attached Memorandum in Support, Intervenors are entitled to intervene in this action as a matter of right under Fed. R. Civ. P. 24(a)(2). Alternatively,

¹ Three Hamilton County challengers have already intervened in an action styled *Marion Spencer, et al. v. J. Kenneth Blackwell, et al.*, Case No. 1:04-cv-00738 (S.D. Ohio) (J. Dlott).

Intervenors respectfully request that this Court permit them to intervene under Fed. R. Civ. P. 24(b)(2).

Respectfully submitted,

AMER CUNNINGHAM CO., L.P.A.

/S/ Tom Houlihan

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MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE

I. INTRODUCTION

Plaintiffs the Summit County Democratic Central and Executive Committee, Marco Sommerville, Karen Doty, Timothy Gorbach and James B. McCarthy (collectively, “Plaintiffs”) brought this suit against J. Kenneth Blackwell, Secretary of State, Patricia Wolfe, Director of Elections for the State of Ohio, the Summit County Board of Elections (“BOE”), Alex R. Arishnkoff, Director of the BOE, John N. Schmidt, Deputy Director of the BOE, Wayne M. Jones, Joseph R. Hutchinson, Jr., Russell M. Pry as individual members, in their official and individual capacities, of the BOE, and Unknown Challengers and Government Officials (collectively, “Defendants”) alleging violations of federal laws.

II. BACKGROUND

Plaintiffs bring claims under 42 U.S.C. §1983 and allege that the Defendants’ conduct violates the First and Fourteenth Amendment to the United States Constitution.

Plaintiffs seek to have this Court issue an order prohibiting the Defendants from permitting challengers in the polling places of Hamilton County during the November 2, 2004 election.

Ohio Revised Code § 3505.20(C), however, expressly provides that voters may be challenged on the basis that they do not reside in the precinct in which they vote. This a statutorily enumerated right that is a critical and fundamental step in the process aimed at preventing false registrations and fraud and completely within a state’s well-established authority to govern the electoral process. Ohio law further provides that these challenges may be performed at the polling site, O.R.C. §3505.20, and that a qualified challenger is “permitted to watch every proceeding of the judges and clerks of elections from the time of the opening until the close until the closing of the polls.” O.R.C §3505.21. Such is the law.

As the United States Supreme Court held, “[t]he states have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised.” *Mason v. Missouri*, 179 U.S. 328, 335 (1900). While the right of suffrage is established and guaranteed by the Constitution, it is subject to the imposition of nondiscriminatory state standards that do not contravene any restriction Congress has imposed. See *United States v. Classic*, 313 U.S. 299, 315 (1941) (*overruled on other grounds*). The Ohio General Assembly enacted those exacting standards in Title 35 of the Ohio Revised Code.

The elimination of the ability to challenge a questionable voter registration would take away a powerful tool of elections officials to identify and remedy voter fraud and will create the opportunity for individuals to cast votes when not legally entitled to do so or allow individuals to cast multiple votes.

Further, Plaintiffs’ allegations and demand for relief are flawed, misrepresented, and unjustified as Plaintiffs will not suffer irreparable harm if the relief requested is not granted. Absent any action by this Court, the individual Plaintiffs if challenged, will still each be permitted to vote at a minimum a provisional ballot in the November 2, 2004 election, pursuant to the Help America Vote Act of 2002 (“HAVA”), codified at 42 U.S.C. §15482 *et seq.* Indeed, this was a purpose and intent of HAVA.

III. THE INTERVENORS

Mr. Matthew Heirder resides at 707 Raleigh Creek Dr., in Cridersville, Ohio, Allen County. Mr. Heirder is a duly registered voter who has regularly exercised his right to vote by appearing at his assigned precinct as required by Ohio law.

Mr. Sam Ewing resides at 495 Bobwhite Trail, Akron, Ohio, in Summit County. Mr. Ewing is also a registered voter who also regularly casts his ballot at the precinct in which he resides.

Ms. Elizabeth Coombe of 5827 Bethany Rd. in Mason, Ohio, Warren County, is also a duly registered voter. Like the other Intervenors and the majority of Ohio voters, Ms. Coombe votes on federal, state, and local issues at his assigned precinct.

Mr. David Timms resides at 5033 Marden Ct., in Gahanna, Ohio, Franklin County. Mr. Timms is a duly registered voter who has regularly exercised his right to vote by appearing at his assigned precinct as required by Ohio law.

IV. ARGUMENT

Congress created HAVA to specifically address state procedures for casting ballots. Among its many provisions, HAVA requires that state and local election officials permit any individual whose name does not appear on the official registration list for the polling place, or whose eligibility to vote is called into question, to vote a provisional ballot. 42 U.S.C. §15482.

If Plaintiffs are registered, as their Complaint alleges, but are challenged at the precinct, there is a remedy already in place. A remedy enumerated under HAVA, which grants each individual a right to cast—at a minimum—a provisional ballot. Since such remedy exists there is no reason to grant Plaintiffs the relief demanded and in turn create confusion and disorder in the administration of the election, and strip the BOE of an essential shield to protect against voter fraud. Intervenors, and all Ohio voters, have a significant interest in a smooth, orderly and legitimate election.

A. Intervenors are Entitled To Intervene as of Right.

Federal Rule of Civil Procedure 24(a)(2) provides that upon timely application, anyone shall be permitted to intervene in an action:

“...when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant’s ability to protect that interest, unless the applicant’s interest is adequately represented by existing parties.”

Rule 24 intervention is designed to balance the competing interests of “judicial economy resulting from the disposition of related issues in a single lawsuit and focused litigation resulting from the need to govern the complexity of a single lawsuit.” Jansen v. Cincinnati, 904 F.2d 336, 339-340 (6th Cir. 1990). For this reason, “Rule 24 is liberally construed and doubts are resolved in favor of the proposed intervenor.” Liberte Capital Group v. Capwill, 2002 U.S. Dist. LEXIS 25233 (D. Ohio, 2002); see also, Purnell v. City of Akron, 925 F.2d 941, 950 (6th Cir. 1991).

Rule 24(a)(2) establishes that, in order for intervention to be proper, four elements must be met:

- (1) the application must be timely;
- (2) the intervenor must have a *substantial* legal interest in the subject matter of the action;
- (3) the intervenor’s ability to protect that interest may be impaired in the absence of intervention; and
- (4) the parties already before the court may not adequately represent intervenor’s interest.

Grutter v. Bollinger, 188 F.3d 394, 397-98 (6th Cir. 1999) overruled on other grounds, 156 L. Ed. 2d 257, 123 S. Ct. 2411. See also, Grubbs v. Norris, 870 F.2d 343, 345 (6th Cir. 1989). In this case, Intervenors meet all four criteria.

1. The Motion to Intervene is Timely Filed.

In considering whether a motion to intervene is timely, a court must consider five factors:

- (1) the point to which the lawsuit has progressed;
- (2) the purpose for which the intervention is sought;
- (3) the length of time preceding the application during which the proposed intervenor knew or reasonably should have known of the interest in the case;
- (4) the prejudice to the original parties due to the proposed intervenor's failure, after he or she knew or reasonably should have known of

his interest in the case, to apply promptly for intervention: and (5) the existence of unusual circumstances militating against or in favor of intervention.

Jordan v. Michigan Conf. of Teamsters Welfare Fund, 207 F.3d 854, 862 (6th Cir. 2000).

In this case, Plaintiffs filed their Complaint on Thursday, October 28, 2004. The Motion to Intervene has been filed very early in this litigation, just one day after Intervenors became aware of their interest in the instant case. As such, the Motion is timely.

2. Intervenors Have a Significant and Recognizable Interest In the Subject Matter of This Action.

While Rule 24(a) does not specify the nature of the interest required for intervention as a matter of right, the Supreme Court held that “what is obviously meant . . . is a significantly protectable interest.” Donaldson v. United States, 400 U.S. 517, 531 (1971). The Sixth Circuit applies “a rather expansive notion of the interest sufficient to invoke intervention of right.” Michigan State v. Miller, 103 F.3d 1240, 1245 (6th Cir. 1997). This Circuit rejects “the notion that Rule 24(a)(2) requires a specific legal or equitable interest.” Miller, 103 F.3d at 1245 (quoting Purnell v. City of Akron, 925 F.2d 941, 948 (6th Cir. 1991)).

Intervenors have a substantial interest in assuring the integrity of the Ohio election system. “[M]aintaining the election system that governed their exercise of political power” is a recognized basis for intervention as of right under Rule 24. Meek v. Metropolitan Dade County, 985 F.2d 1471, 1480 (11th Cir. 1993), cited with approval in Miller, 103 F.3d at 1246. As individual registered voters, Intervenors have a substantial interest in participating in a fair and orderly election system that operates in accordance with law.

Intervention is particularly appropriate in cases such as elections, which involve the public interest. For purposes of evaluating the right to intervene, “[t]he interest requirement may be judged by a more lenient standard if the case involves a public interest question” 6

Moore's Federal Practice § 24.03[2][c]. This is because, "[i]n such cases, the representation of divergent interests is extremely important." Id. Here, it is not enough to simply protect the interests of the officials overseeing the administration of elections. This Court must also consider the divergent interests of individual voters regardless of their political affiliation.

If Plaintiffs' demand is granted, anyone may be permitted to cast a ballot without being properly registered. This remedy would take away one of the lines of defense to the barrage of fraudulent voter registrations that have been received in Ohio.² Because Intervenors have a substantial interest in casting votes that will not be diluted by the fraudulent votes of others, Intervenors should be permitted to intervene as of right.

3. The Disposition of This Action May As a Practical Matter Impair or Impede Intervenors' Ability to Protect Their Interests.

"To satisfy this element of the intervention test, a would-be intervenor must show only that impairment of its substantial legal interest is possible if intervention is denied." Michigan State, 103 F.3d at 1247. In weighing this prong of the Rule 24 analysis, this Court may also consider the time-sensitive nature of a case. Americans United for Separation of Church and State v. City of Grand Rapids, 922 F.2d 303 (6th Cir. 1990); Miller, supra. Whereas, here, time does not permit an intervenor to bring a separate action to protect his rights, intervention as of right is particularly appropriate.

4. Intervenors' Interests Are Not Adequately Represented.

As to the fourth element of intervention as of right, the Sixth Circuit holds that "proposed Intervenors need only show that there is a *potential* for inadequate representation." Stupak-Thrall v. Glickman, 226 F.3d 467, 472 (6th Cir. 2000), quoting Grutter, 188 F.3d at 400

² There have been numerous reports of voter registration fraud in Ohio within the past weeks. For example, see the attached article from the Cleveland Plain Dealer regarding the charges and investigation in Defiance County where a

(emphasis in original). The moving party carries only a “minimal burden” of showing that their interests are inadequately represented by the existing parties. Trbovich v. United Mine Workers, 404 U.S. 528, 538 n.10, (1972).

Based on the foregoing, this Motion to Intervene clearly satisfies the “minimal” burden under Rule 24(a)(2) of showing that representation of Intervenors’ interests by the existing parties “may be” inadequate. Defendants Blackwell, the BOE, and the members of the BOE may represent the interests of the boards of elections in ensuring the enforcement of the election laws, but they cannot represent the unique circumstances of the Intervenors, with specific concerns of vote dilution and the irreversible damage to the integrity of the system from an individual voter’s perspective. As such, Intervenors should be permitted to intervene as a matter of right.

B. Alternatively, Intervenors Should be Permitted to Intervene Under Fed R. Civ. P. 24(b).

If intervention of right is not granted, Intervenors submit that they should be allowed to intervene permissively. With respect to permissive intervention, Rule 24 states:

(b) Permissive Intervention. Upon timely application, anyone may be permitted to intervene in an action...(2) when an applicant's claim or defense and the main action have a question of law or fact in common....In exercising its discretion, the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

Fed.R.Civ.P. 24(b).

“Permissive intervention under Rule 24(b) is to be liberally granted, so as to promote the convenient and prompt disposition of all claims in one litigation.” Morocco v. Nat'l Union Fire Ins. Co., 2003 U.S. Dist. LEXIS 17918 (S.D. Ohio, 2003), quoting Morelli v. Morelli, 2001 U.S. Dist. LEXIS 25457 (S.D. Ohio 2001). In this case, Intervenors intend to assert several defenses that are both legally and factually related to Plaintiffs' claims, including that Plaintiffs' requested

voter registration solicitor “made up” the 130 names and addresses that he included on voter registration cards

relief is inappropriate, unnecessary, and not required under state or federal law. These issues constitute common factual and legal questions sufficient to justify permissive intervention.

Furthermore, intervention in this action at this early stage would not unduly delay or prejudice the proper and just adjudication of the rights of the original parties in any way. Intervenors do not seek to expand the scope of this proceeding by incorporating new issues that are unrelated to Plaintiffs' allegations, but only to ensure that Intervenors' interests and those of millions of similarly situated voters throughout Ohio are adequately protected. Recently, the this Court allowed individual voters the right to intervene in an action alleging violations of state and federal election law to support the Secretary of State, alleging violations of state and federal election laws and an individuals rights of due process. Sandusky Democratic Party, et al. v. Blackwell, 3:04CV7582, affirmed in part and reversed in part, No. 04-4266, (6th Cir. 2004). Similarly, U.S. District Court for the Southern District of Ohio in an Order issued just two days ago allowed individual challengers the right to intervene in an action alleging violations of HAVA and NVRA. Miller, et al. v. Blackwell, et al., 1:04CV735, (S.D. Ohio filed October 27, 2004).

The participation of Intervenors would not result in an unmanageable number of parties and clearly would be compatible with efficiency and due process. If anything, intervention would promote judicial efficiency by diminishing the prospect of future litigation by Intervenors and would ensure the adequate representation of others who have similar interests. Consequently, Intervenors should be permitted to intervene under Rule 24(b) in order to facilitate the resolution of their common claims of law and fact in one proceeding consistent with the principles of judicial economy.

IV. CONCLUSION

(attached hereto as Exhibit A).

For the foregoing reasons, Intervenor respectfully urge the Court to issue an order permitting them and all similarly situated challengers to intervene in this action as party Defendants.

Respectfully submitted,

AMER CUNNINGHAM CO., L.P.A.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing document, was served upon counsel participating in the Court's ECF/CM system this 29th day of October, 2004.

/S/ Tom Houlihan
Counsel for Intervenor-Defendants



THE PLAIN DEALER

Vote fraud & crack: a case for Dick Tracy?

Tuesday, October 19, 2004

John P. Coyne

Plain Dealer Reporter

When Defiance County election officials got a batch of voter registration cards for Dick Tracy, Mary Poppins, Michael Jordan and George Foreman, they might have wondered whether the person who gathered the cards was smoking crack.

Maybe not, but he was being paid for his trouble in crack cocaine, said Defiance County Sheriff David Westrick.

On Monday, sheriff's deputies arrested Chad Staton, 22, of Defiance, who admitted to investigators that he filled out about 130 registration cards, making up the names and addresses. He said he was hired by a Toledo woman to solicit voter registrations.

She gave him a choice of cash or drugs for his work, Westrick said. He chose crack cocaine.

Deputies from Defiance County in northwest Ohio and Toledo police searched the woman's Toledo house, confiscating drug paraphernalia and voter registration forms, Westrick said.

The occupant of the house, Georgianne Pitts, 41, told investigators that she was recruited for the voter registration drive by Thaddeus Jackson, Ohio director of the NAACP's National Voter Fund.

It was not the first time Jackson's name has come up in connection with election irregularities. Earlier this year, the Cuyahoga County Board of Elections questioned 17

registration cards that Jackson turned in because the signatures on all 17 cards appeared similar. He blamed the problem on subordinates.

In 1992, Jackson resigned as chairman of the Cuyahoga County Board of Elections and later pleaded guilty to accepting improper compensation while board chairman. Jackson could not be reached for comment Monday.

Phony voter registration cards are a problem for election boards across Ohio and the country, as both Republicans and Democrats try to sign up new voters for this election.

Gwen Dillingham, deputy director of the Cuyahoga County elections board, said the 130 registration cards under investigation in Defiance County were dropped off at the Cuyahoga County board by one of 10 groups that have collected many of the 160,000 registration cards submitted this year.

"We get them for all different counties," Dillingham said. She said cards from people in other counties are sent to election officials in those counties.

Dillingham said some groups are paying people \$1 to \$2 for each registration card.

If Staton is found guilty of falsifying the cards, he could be sentenced to up to 12 months in jail and fined up to \$2,500.

Laura Howell, deputy director of the Defiance County Board of Elections, said Staton may have been creative in filling out the cards, but he neglected one name.

"He is not registered to vote in Defiance County," she said.

Plain Dealer news researcher Cheryl Diamond contributed to this story.

To reach this Plain Dealer reporter:

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	:	
J. Kenneth Blackwell, et al.	:	
	:	
Defendants.	:	

**PROPOSED INTERVENORS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS'
MOTION FOR A TEMPORARY RESTRAINING ORDER**

I. Introduction

This matter is before the Court upon Plaintiffs Summit County Democratic Central and Executive Committee's, Marco Sommerville's, Karen Doty's, Timothy Gorbach's and James B. McCarthy's (collectively, "Plaintiffs") Motion for a Temporary Restraining Order and Preliminary Injunction Relief against J. Kenneth Blackwell, Secretary of State, Patricia Wolfe, Director of Elections for the State of Ohio, the Summit County Board of Elections ("BOE"), Alex R. Arishnkoff, Director of the BOE, John N. Schmidt, Deputy Director of the BOE, Wayne M. Jones, Joseph R. Hutchinson, Jr., Russell M. Pry as individual members, in their official and individual capacities, of the BOE, and Unknown Challengers and Government Officials (collectively, "Defendants"). In their Motion, Plaintiffs seek to have this Court issue an order prohibiting the Defendants from permitting challengers in the polling places of Summit County during the November 2, 2004 election.

II. Law and Analysis

Under Rule 65 of the Federal Rules of Civil Procedure, the district court may issue a temporary restraining order upon a movant's showing of irreparable injury in the event that an activity is not enjoined. *In re King World Productions, Inc.*, 898 F.2d 56, 59 (6th Cir. 1990). The Sixth Circuit's standard governing the issuance of a temporary restraining order or preliminary injunction is well established. In order to grant injunctive relief, the court must consider four factors: (1) the movant's likelihood of success on the merits in the action; (2) the extent to which the movant is being irreparably harmed by the conduct complained of; (3) the extent to which the defendant will suffer irreparable harm if the temporary restraining order is issued; and (4) whether the public interest would be served by the issuance of injunctive relief. *See ACLU v. McCreary County*, 354 F.3d 438, 445 (6th Cir. 2003); *Shepard's Co. v. The Thomson Corp.*, 1999 U.S. Dist. LEXIS 21051, at *10-11 (S. D. Ohio July 15, 1999) (stating that the Sixth Circuit applies the same four-part test for motions for preliminary injunction and in determining whether to grant a temporary restraining order).

On review of the factors, it becomes evident that this Court's issuance of a TRO and enjoining the Defendants from performing their duties under Ohio law is unnecessary and not appropriate under the circumstances presented here.

A. Plaintiffs Will Not Likely Succeed on the Merits.

Plaintiffs have not shown a likelihood of success on the merits. Ohio Revised Code §3505.20(C) expressly provides that voters may be challenged on the basis that they do not reside in the precinct in which they vote. This is a statutorily enumerated right that is a critical and fundamental step in the process aimed at preventing false registrations and fraud and completely within a state's well-established authority to govern the electoral process. Ohio law

further provides that these challenges may be performed at the polling site, O.R.C. §3505.20, and that a qualified challenger is “permitted to watch every proceeding of the judges and clerks of elections from the time of the opening until the close until the closing of the polls.” O.R.C. §3505.21.

Before performing these duties, all challengers are administered an oath by one of the judges of the elections. The oath states:

You do solemnly swear that you will faithfully and impartially discharge the duties as an official challenger and witness, assigned by law; that you will not cause any delay to persons offering to vote, further than is necessary to procure satisfactory information of their qualification as electors; and that you will not disclose or communicate to any person how any elector has voted at such election.

O.R.C. §3505.21.

Barring any deviation from this oath, the challenger will effectively administer their duties assigned by law. The mere fact that a challenger is present is not a violation of an individual’s rights to due process. Similarly, the fact that challenger questions the qualification of an elector is also not a violation of individual’s rights to due process. Indeed, challenging the qualifications of an elector to vote is not only a right of a qualified challenger but a duty they swore to uphold. Any argument, which calls to question one who furthers this statutory duty, must fail.

In Storer v. Brown, 415 U.S. 724, 94 S.Ct. 1274, 39 L.Ed.2d 714 (1974), the United States Supreme Court confirmed the authority of a state to conduct elections and determine voter eligibility:

. . . there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes. In any event, the States have evolved comprehensive, and in many respects complex, election codes regulating in most substantial ways, with respect to both federal and state elections, the time, place, and manner of

holding primary and general elections, the registration and qualifications of voters, and the selection and qualifications of candidates. Id. at 730.

One specific reason to challenge an individual's registration is to confirm the individual's residency in a particular precinct. In Bell v. Marenko, this Court concluded that the determining factor in establishing voter eligibility is whether that voter has established residency in a particular precinct: "[r]esidency within a precinct is a *crucial* qualification." 235 F.Supp.2d 772, at 776 (N.D. Ohio 2002), *aff'd*, 367 F.3d 588 (6th Cir. 2004) (emphasis added). The law of Ohio then, is that a person is not a qualified elector unless he resides in the precinct where he seeks to vote:

As the Ohio Supreme Court made that clear in *In re Protest* one simply cannot be an "elector," much less a "qualified elector" entitled to vote, unless one resides in the precinct where he or she seeks to cast a ballot. And, if one never lived within a precinct, one is not, and cannot be, an "eligible voter," even if listed on the Board's rolls as such.

Bell, Id. at 776 (emphasis added), citing In re Protest Filed with Franklin County Bd. of Elections etc., (1990), 49 Ohio St. 3d 102, 551 N.E.2d 150.

This Sixth Circuit affirmed the conclusions reached in Bell, holding that "Ohio is free to take reasonable steps, as have other states, to see that all applicants for registration to vote actually fulfill the requirement of bona fide residence." (citations omitted). Bell, 367 F.3d at 592. This is precisely what Ohio Revised Code § 3505.20 is: a reasonable step to see that all applicants for registration to vote actually fulfill the requirement of bona fide residence.

As such, enjoining the Defendants from performing their statutory duties in furtherance of ensuring an accurate and proper election is not a proper remedy and Plaintiffs will not succeed on the merits.

B. The Plaintiffs Will Not be Irreparably Harmed if Challengers Are Present at the Polling Sites As Permitted by Law.

As required under Rule 65, Plaintiffs are required to establish that irreparable harm will occur if the injunction is not granted. Plaintiffs cannot carry this burden. There is no direct harm to the Plaintiffs and they are not entitled to the extraordinary relief of an injunction.

If the Plaintiffs are challenged at the polling station they will still each be permitted to vote, at a minimum, a provisional ballot in the November 2, 2004 election. There is an adequate remedy at law. This was established by the Help America Vote Act of 2002 (“HAVA”), codified at 42 U.S.C. §15482 *et seq.* As such, there is no irreparable harm.

Congress created HAVA to specifically address state procedures for casting ballots. Among its many provisions, HAVA requires that state and local election officials permit any individual whose name does not appear on the official registration list for the polling place, or whose eligibility to vote is called into question, to vote a provisional ballot. 42 U.S.C. §15482.

If Plaintiffs are registered, as their Complaint alleges, and are challenged at the polling site, there is a remedy already in place. A remedy enumerated under HAVA, which grants each individual a right to cast—at a minimum—a provisional ballot. Since such remedy exists there is no reason to grant Plaintiffs the relief demanded and in turn strip the BOE of an essential shield to protect against voter fraud in the administration of the election.

C. Intervenors and the Public Will Likely Suffer Irreparable Harm If the Boards of Election are Enjoined From Permitting Challengers at the Polling Sites.

Finally, the public interest will not be served by the injunction. The purpose of the challengers is to identify those names from the official voter roll that appear as a result of fraudulent registrations or residency outside of a particular precinct. The challengers will quash

the opportunity of individuals to cast duplicate votes, provide a safeguard against vote dilution, and ensure the legitimacy of the election process.

The voting public has a substantial interest in casting votes that will not be diluted by the fraudulent votes of others and will be irreparably harmed if individuals are allowed to cast duplicate votes or votes as a result of a fraudulent registration.

Moreover, The Ohio Constitution authorizes Ohio's legislature to establish the laws related to running elections. Ohio's elected officials deliberately established a procedure that allowed for challengers to be present at the polling place, which does not violate an individual's rights to due process. In doing so the legislature accounted for challenges, and made certain that all qualified voters who were at their polling place would be permitted to cast a ballot, and to have that ballot count. Plaintiffs seek to end run the clear and considered structure of elections by using this Court to overrule Ohio's Statutes. Clearly, the public is greater served by respecting the authority granted to the legislature and protecting the administration of an election that is not clouded under the cloak of fraud or illegitimacy.

III. CONCLUSION

For the foregoing reasons, Intervenors respectfully urge the Court to deny Plaintiffs' Motion for a Temporary Restraining Order and Preliminary Injunction.

Respectfully submitted,
AMER CUNNINGHAM CO., L.P.A.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing document, was served upon counsel participating in the Court's ECF/CM system this 29th day of October, 2004.

/S/ Tom Houlihan
Counsel for Intervenor-Defendants