

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

PROJECT VOTE, et al. : CIVIL ACTION NO. 1:06-cv-01628

Plaintiffs, : Judge Kathleen M. O'Malley

v. : Magistrate Judge Perelman

J. Kenneth Blackwell, et al,

Defendants

BRIEF OF AMICUS CURIAE VARIOUS MEMBERS OF THE OHIO GENERAL
ASSEMBLY MINORITY CAUCUSES IN SUPPORT OF PLAINTIFFS'
APPLICATION FOR PRELIMINARY INJUNCTION

I. Introduction and Interest of Amici Curiae

The appearance as *amici curiae* is made by thirty-four elected and acting members of the current General Assembly. The *amici curiae* include: State Senators C.J. Prentiss, Minority Leader; Kimberly Zurz, Assistant Minority Leader; Teresa Fedor, Minority Whip; Thomas Roberts, Assistant Minority Whip; Marc Dann; Eric Fingerhut; Robert Hagan; Eric Kearney; Dale Miller; Ray Miller; and Charlie Wilson; and State Representatives Joyce Beatty, Minority Leader; Steve Driehaus, Minority Whip; Catherine Barrett; John Boccieri; Edna Brown; Kenneth Carano; Kathleen Chandler; George Distel; John Domenick; Michael Foley; William Hartnett; Sandra Harwood; William Healy; Lance Mason; Michael Mitchell; Robert Otterman; Sylvester Patton; Jeanine Perry; Chris Redfern; Allan Sayre; Shirley Smith; Dan Stewart; Peter Ujvagi; Brian G. Williams; Claudette Woodard; Tyrone Yates; and Ken Yuko.

These state Senators and state Representatives represent nearly four million Ohioans who reside in rural, suburban, and urban districts. They have actively worked to make voting easier, more accessible, and more secure. *Amici* recognize the importance of preventing voter fraud and preserving the integrity of Ohio's election systems. However, *amici* file in support of the Plaintiffs to emphasize that a substantial number of Ohio

legislators opposed H.B. 3 because of the anticipated chilling effect it would have on voter registration.

In their Application for a Preliminary Injunction, Plaintiffs have clearly articulated both the harm Plaintiffs suffer as a result of Amended Substitute House Bill 3 and their likelihood of success on the merits. The purpose of this Amicus Brief is to put Plaintiffs' claims in a larger context. Through their unique legislative perspective, *amici* support the Plaintiffs' contention that H.B. 3 and Defendant Blackwell's corresponding interpretation of H.B. 3 unconstitutionally burden core free speech and associational rights. Unless this Court enjoins H.B. 3's and Defendant Blackwell's vague, complex, and convoluted barriers to voter registration, *amici* and others will continue to curtail their registration activities, inevitably resulting in voter suppression.

II. Summary of Argument

H.B. 3 unconstitutionally burdens core political speech and voting rights. The state burdens the rights of all Ohioans, including *amici*, through procedural obstacles and vague, complex and confusing requirements. Harsh criminal penalties that attach to the law's vague language only exacerbate H.B. 3's chilling effect. The result is ineffective protection against voter fraud or registration fraud, and substantial burdens on the political speech and voting rights of *amici* and all Ohioans.

Because H.B. 3 burdens core First and Fourteenth Amendment political speech and voting rights, it is subject to strict scrutiny. Accordingly, H.B. 3's limits on voter registration must serve a compelling state interest and be narrowly tailored. The state totally failed to narrowly tailor H.B. 3, even assuming *arguendo* the defendants are able

to establish a compelling interest. The state possessed myriad less restrictive means to guard against voter fraud, including increasing criminal penalties for registration fraud or allocating more state resources to combat fraud. The state, however, failed to adopt any of these more narrowly tailored and more effective means to prevent fraud.

Instead of narrowly tailoring H.B. 3 to prevent fraud and protect speech and voting rights, the legislature erected obstacles to voter registration. The burden of these obstacles is increased by H.B. 3's vague, complex and convoluted language and harsh criminal penalties. Because H.B. 3 fails to provide Ohioans with a reasonable opportunity to know what the law prohibits and is subject to arbitrary and discriminatory application, H.B. 3 is unconstitutionally vague.

H.B. 3's chilling effect has even reached persons such as *amici* with ready access to legal counsel. If legislators who voted on H.B. 3 are unsure of its meaning, how can Ohio citizens be expected to follow the law? How is it possible for prosecutors and judges to fairly and uniformly enforce such a vague law? Through procedural barriers and vague language, the state has erected obstacles to voter registration which will inevitably lead to voter suppression.

The state should balance the prevention of voter fraud with the core democratic principle of making voter participation easier, not harder. Instead, the state has replaced crude instruments of voter suppression like literacy tests with H.B. 3's convoluted and perhaps equally chilling schemes. In order to end the chill on voter registration activities of *amici* and Plaintiffs, this Court must grant Plaintiffs' Application for Preliminary Injunction.

III. Background

a. Legislative History

Amici opposed the passage of H.B. 3 because of the predicted chilling effect it would have on voter registration. Because public confidence in the fairness of election administration and results is essential to democratic governance, *amici* would have supported **clear** legislation **narrowly tailored** to prevent fraud while adequately protecting voting rights. Legislative testimony, however, convinced *amici* that H.B. 3 would criminalize traditional, established methods of voter registration. Over the protest of *amici*, Governor Taft signed H.B. 3 into law.

H.B. 3 did not begin in a controversial manner. The bill as introduced would merely have conformed Ohio law to the federal Help America Vote Act of 2002 (HAVA). The version passed by the House of Representatives in June 2005 even contained enough voter-friendly election reform to win bipartisan support.

H.B. 3 took on a more partisan edge in the Senate. Developed behind closed doors and without input from *amici*, the Senate unveiled in December 2005 a substitute version of H.B. 3. When *amici* finally learned the contents of the bill, they immediately expressed alarm. Several Ohio newspapers agreed. *The Akron Beacon Journal*, for example, stated that: “C.J. Prentiss of Cleveland, the Senate minority leader, took a look at [H.B. 3’s] language and came to the right conclusion: The Republican measure is mostly about voter suppression. ” *Suppress the Vote? Statehouse Republicans hope to use the cover of reform to make voting more burdensome for many Ohioans*, *The Akron Beacon Journal*, Dec. 6, 2005, at A8. In addition, the *Dayton Daily News* editorialized

that “[H.B. 3] if it becomes law, will be just another sad entry on the long list of political scandals emanating from Columbus.” *Requiring ID is form of voter fraud*, *Dayton Daily News*, Dec. 5, 2005, at A8.

The legislature also ignored the lack of evidence that voter fraud is a problem in Ohio. In fact, not a single individual or organization testified in support of the final version of H.B. 3. As *The Akron Beacon Journal* concluded, “In the end [of a review of the 2004 election], there was no evidence of organized, systematic fraud. Voter fraud continues to be very rare in Ohio, usually the result of voter confusion.” *Suppress the Vote? Statehouse Republicans hope to use the cover of reform to make voting more burdensome for many Ohioans*, *The Akron Beacon Journal*, Dec. 6, 2005, at A8.

b. Administrative Rules

Amici also opposed the adoption of Defendant Blackwell’s administrative rules to implement H.B. 3. At the June 26, 2006 meeting of the Joint Committee on Agency Rules Review (JCARR), over the opposition of *amici* Senator Prentiss, Senator Zurz, Representative Carano and Representative Strahorn, the committee allowed the Secretary of State’s proposed rules to become law. Representative Strahorn moved to invalidate rule 111-12-03 and *amici* Senator Kimberly Zurz moved to invalidate rule 111-12-02. Both motions failed on a 6-4 vote.

IV. Law and Argument

H.B. 3 violates *amici*’s core political speech rights in at least two ways: (a) by imposing undue procedural burdens on voting rights that are not narrowly tailored to serve an overriding interest and (b) by imposing vague and confusing standards subject to

criminal penalties. This Court must consequently grant plaintiffs' Application for Preliminary Injunction.

H.B. 3 requires a "person" who is "compensated" for registering voters to complete the Secretary of State's on-line training program. R.C. 3503.29. Section 1.59(C) of the Revised Code states:

As used in any statute, unless another definition is provided in that statute or a related statute: . . . 'Person' includes an individual, corporation, business trust, estate, trust, partnership, and association.

Despite the broad definition of "person" in R.C. 1.59(C), the Secretary of State promulgated an administrative rule defining the word "person" to mean "an individual human being, not an entity or organization." O.A.C. 111-12-02. Neither the Revised Code nor the Secretary of State's administrative rules define the term "compensation" for purposes of voter registration.

Additionally, H.B 3 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." R.C. 3503.19(B)(2)(c). H.B. 3 also prohibits any person who helps another person register outside an official voter registration place" from knowingly failing "to return any registration form entrusted to that person to any board of elections or the office of the secretary of state." R.C. 3599.11(B)(2)(a). A "person who receives compensation for registering a voter" is also prohibited from knowingly returning "any registration form entrusted to that person to any board of elections or the office of secretary of state." R.C. 3599.11(C)(2). Although H.B. 3 fails to define "returning," Defendant Blackwell define the term to "include

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. Violation of R.C. 3599.11 is a fifth degree felony.

H.B. 3 burdens core political speech rights and fails strict scrutiny. The failure to define “compensation” on the one hand, and the failure to consistently define “person” on the other adds to confusion and further burdens *amici*’s rights. As result, this Court must grant Plaintiff’s Application for Preliminary Injunction.

a. H.B. 3 Unconstitutionally Burdens the First and Fourteenth Amendment Rights of Voters and Public Officials.

Because Ohio’s new registration and training provisions directly burden *amici*’s core political speech rights, H.B. 3 is subject to strict scrutiny. *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 345-346 (1995) (citing *Meyer v. Grant*, 486 U.S. 414, 420 (1988)). A direct burden on core political speech is permissible only if the burden is narrowly tailored and serves a compelling, overriding state interest. *Id.* at 348. H.B. 3 fails this exacting standard.

The legislature failed to narrowly tailor H.B. 3 to prevent registration fraud, even assuming *arguendo* that such prevention is a sufficiently established compelling interest. The legislature took a sledgehammer to an issue that required a scalpel, and scalpels were readily available. In fact, the legislature possessed numerable less restrictive means to guard against registration fraud. Because Ohio election already prohibited registration fraud, for example, the criminal penalties for registration fraud simply could have been increased. Similarly, the legislature could have provided additional resources to local prosecutors to enforce existing laws prohibiting registration fraud. Additionally, the

legislature could have provided increased resources to county boards of elections to screen voter registration forms for potential fraud. The legislature failed to adopt any of these less restrictive, more narrowly tailored policies.

Instead, the legislature substantially burdened the registration activities of all Ohio citizens, including *amici*. Prior to the enactment of H.B. 3, *amici* were able to freely assist constituents with voter registration without fear of criminal prosecution. For example, when attending community events, legislators and their campaign staff could freely distribute registration forms to constituents and have campaign staff collect and return the forms. The process was simple. As long as the forms were returned before the registration deadline, neither legislators nor their campaign staff had to be trained or worry about criminal prosecution for mundane procedural missteps.

Now, paid campaign staff and legislators may be required to follow a specific procedure for returning registration forms because both are arguably “compensated” within the meaning of H.B. 3. The forms also be returned in the correct manner, although what is “correct” is a matter of debate. Because Defendant Blackwell limits the meanings of “person” to an individual, *amici* may be prohibited from distributing registration forms and instructing compensated staff to collect and return the forms. Instead, a compensated legislator may have to distribute, collect and return registration forms. Failure to do so would likely be a criminal act. Because of H.B. 3’s procedural obstacles to registration and the harsh penalties, *amici* are reluctant to register voters.

b. H.B. 3’s vague and confusing language exacerbates the burden on voting rights.

The vagueness of H.B. 3 further compounds the burden on *amici*’s core free speech rights. H.B. 3 and Defendant Blackwell’s rules are unconstitutionally vague in at

least three ways. First, the law fails to define “compensation,” a term essential to understand in order to exercise core First Amendment speech rights. Second, Defendant Blackwell failed to follow the legislature’s intent by defining “person” more narrowly than and in conflict with the Revised Code. Third, Defendant Blackwell failed to clearly define the manner in which voter registration forms may be returned. All these failures make the burdens on core free speech rights even worse and chill *amici*’s voter registration activities.

Because H.B. 3 fails to adequately define terms like “compensation” and “person,” H.B. 3 is unconstitutionally vague. “The void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.”

Kolender v. Lawson, 461 U.S. 352, 357 (1983).

It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so the he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute ‘abut[s] upon sensitive areas of basic First Amendment freedoms,’ it ‘operates to inhibit the exercise of [those] freedoms.’ Uncertain meanings inevitably lead citizens to “‘steer far wider of the unlawful zone’ . . . than if the boundaries of the forbidden areas were clearly marked.” *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972).

The failure to define “compensation” fails to provide individuals with a reasonable opportunity to know what the law prohibits. In addition, this failure does not provide guidelines sufficient to prevent arbitrary and discriminatory law enforcement. Without a definition of “compensation,” *amici* are uncertain whether a legislator or campaign staff member must go through Defendant Blackwell’s on-line voter registration training before distributing voter registration forms to constituents. A legislator is certainly “compensated.” Must a “compensated” legislator undergo the on-line training in order to assist constituents with voter registration? Must a paid campaign staffer who may at times distribute voter registration forms complete the on-line training? Must an erstwhile voter registration volunteer who a legislative candidate “compensates” with a t-shirt and a bottle of water complete the on-line registration? Because *amici*, legislators who voted on H.B. 3, are unsure of the law’s intent, Ohioans cannot possibly be expected to know whether they are following the law. As a result, Ohioans engaged in voter registration efforts are left to the *ad hoc* and subjective determinations of law enforcement officers and county prosecutors.

H.B. 3 fails to provide even a scintilla of clarity with regard to how registration forms may be returned. This failure is primarily due to the failure to consistently define “person” and by Defendant Blackwell’s interpretation that registration forms must be delivered in person or to the U.S. Postal Service. Prior to H.B. 3, *amici* clearly could distribute registration forms, collect the forms, give the forms to a campaign staff member and direct the staff member to send the forms to the county board of elections. *Amici* likewise could return registration forms via common carrier like Federal Express. Now, pursuant to Defendant Blackwell’s instructions an individual registrar who helps

another individual register to vote must return a registration form. This means that a legislative campaign committee, for example, could not collect registration forms from its compensated staff and return them to the board of elections. Defendant Blackwell's rule also apparently prohibits returning registration forms via Federal Express, DHL, or other common carrier. Either course of conduct could subject a legislator or campaign staff member to a fifth degree felony.

H.B. 3 is so vague, complex and convoluted that a person who wants to register voters and avoid being prosecuted for a felony must consult with an attorney. Even with the benefit of legal counsel, a legislator is likely to be advised that the only sure way to avoid criminal prosecution is to refrain from conducting organized voter registration drives until they learn how county prosecutors intend to interpret and enforce the law. How can Ohioans conduct organized voter registration drives if they need to consult with a lawyer beforehand? How will lawyers provide sound legal advice regarding such a vague, complex and convoluted law? If legislators are uncertain as to how to avoid criminal prosecution, how can Ohio citizens be expected to comply? Such uncertainty is precisely the deficiency the void-for-vagueness doctrine prohibits.

V. CONCLUSION

The state should balance the prevention of voter fraud with the core democratic principle of making voter participation easier, not harder. Instead, the state has replaced crude instruments of voter suppression like literacy tests with H.B. 3's convoluted and perhaps equally chilling schemes.

H.B. 3 burdens core political speech and voting rights with burdensome procedures, vague requirements and severe penalties. Because the legislature failed to narrowly tailor

H.B. 3 to prevent registration fraud, it fails strict scrutiny. The state failed to adopt less restrictive and more effective means by which to guard against vote and registration fraud.

Plaintiffs state that voter registration drives have largely been halted by H.B. 3. H.B. 3 also chills the registration activities of *amici*. Thousands, perhaps tens of thousands, of potential Ohio voters will not be registered to vote as a direct result of H.B. 3. Each day H.B. 3 remains in effect, Ohioans miss another opportunity to become registered voters. *Amici* refuse to tolerate such suppression of fundamental constitutional rights.

Plaintiffs have clearly articulated both harm they suffer as a result of H.B. 3 and their likelihood of success on the merits. Accordingly, this Court must enjoin H.B. 3's and Defendant Blackwell's vague, complex and convoluted barriers to voter registration.

Respectfully submitted,

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Certificate of Service

I hereby certify that on August 2, 2006, the brief of *amici curiae* various members of the Ohio General Assembly Minority Caucuses in support of the Plaintiffs' Application for Preliminary Injunction. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/Marc E. Dann