

IN THE SUPREME COURT OF OHIO

THE STATE OF OHIO ex rel. :
WILLIAM MYLES, *et al.*, :
 :
Relators, :
 :
vs. :
 :
JENNIFER BRUNNER, :
SECRETARY OF STATE OF OHIO, :
 :
Respondent. :

Case No. 2008-1842

ORIGINAL ACTION in Mandamus

Expedited Election Matter
Under S. Ct. Prac. R.X. § 9

REPLY BRIEF OF AMICI THE BRENNAN CENTER FOR JUSTICE AT NYU
SCHOOL OF LAW, DANIEL P. TOKAJI, AND ACLU OF OHIO AS AMICI CURIAE
IN SUPPORT OF RELATORS' PETITION FOR WRIT OF MANDAMUS

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TABLE OF CONTENTS

Table of Authorities	iv
Interest of the Amici	1
Argument	2
Proposition of Law No. I: Denying Absentee Ballot Applications Because of a Missing Check Mark Would Violate Section 1971 of the Voting Rights Act	2
Conclusion	9

TABLE OF AUTHORITIES

Cases

ACLU of Ohio v. Brunner,
1:08-cv-00145 (N.D. Ohio)..... 2

ACLU v. Taft.
02-00766 (S.D. Ohio) 2

Bishop v. Lomenzo,
350 F. Supp. 576 (E.D.N.Y. 1972)9

Boustani v. Blackwell,
1:06-cv-02065 (N.D. Ohio)..... 2

Condon v. Reno,
913 F. Supp. 946, 949-50 (D.S.C. 1995)3

Diaz v. Cobb,
435 F. Supp. 2d 1206 (S.D. Fla. 2006) 5, 6

Florida NAACP v. Browning,
522 F.3d 1153 (11th Cir. 2008) 3, 6

Friedman v. Snipes,
345 F. Supp. 2d 1356 (S.D. Fla. 2004) 3

In re Election Contest of Dec. 14, 1999 Special Election,
91 Ohio St. 302 (2001)..... 6

McKay v. Thompson,
226 F.3d 752 (6th Cir. 2000)2

McKee v. United States,
75 U.S. 163 (1869)..... 6

Reynolds v. Sims,
377 U.S. 533 (1964)..... 9

Stewart v. Blackwell,
5:02-cv-02028 (N.D. Ohio)..... 2

Wash. Ass’n of Churches v. Reed,
492 F. Supp. 2d 1264 (W.D. Wash. 2006))5, 9

Statutory and Constitutional Provisions

42 U.S.C. § 1971 *passim*

42 U.S.C. § 15483 4

R.C. 3509.03 *passim*

Ohio Const. § 5.01 5

Ohio Const. § 5.04 5

Ohio Const. § 5.06 5

Miscellaneous Authorities

Catherine Candisky, *Blackwell Ends Paper Chase; Some Could be Unable to Vote Because of Flap over Registration Forms*, Columbus Dispatch, Sept. 29, 2004..... 8

Aaron Deslatte and Mary Shanklin, *ID-Match Law Stalls 5,000 Voter Applications*, Orlando Sentinel, Oct. 1, 2008 9

Patrick Marley, *Van Hollen’s Voter-Check Lawsuit Sets off a Tempest*, Milwaukee Journal-Sentinel, Sept. 11, 20089

INTEREST OF *AMICI*

The Brennan Center for Justice at NYU School of Law (the “Brennan Center”) is a nonpartisan institute dedicated to a vision of effective and inclusive democracy. Through its Voting Rights and Elections Project, the Brennan Center seeks to protect rights to equal electoral access and full political participation. The Brennan Center has extensively addressed issues relating to barriers that prevent citizens from registering and voting, tracking the national experience with legislation that denies citizens access to ballots or the registration rolls, and participating as counsel or amicus in a number of federal and state cases involving voting and elections issues.

Daniel P. Tokaji is an Associate Professor of Law at the Ohio State University, Moritz College of Law and the Associate Director of Election Law @ Moritz. He is a Visiting Associate Professor at Harvard Law School in the fall of 2008. Professor Tokaji is an authority on election law and voting rights, specializing in election reform, including such topics as voting technology, voter ID, provisional voting, and other subjects addressed by the Help America Vote Act of 2002. Professor Tokaji also studies issues of fair representation, including redistricting and the Voting Rights Act of 1965. His published work addresses questions of election administration, political equality, and racial justice.

The ACLU of Ohio is one of the 53 affiliates of the American Civil Liberties Union Foundation, Inc. (“ACLU”), a nationwide, non-profit, nonpartisan organization with nearly 550,000 members dedicated to defending the principles of liberty and equality embodied in the Constitution and this nation’s civil rights laws. As part of that commitment, the ACLU and its affiliates, including the ACLU of Ohio, have been active in defending the equal right of all citizens to participate in the electoral process. The ACLU has operated a Voting Rights Project since 1966. The ACLU of Ohio has nearly 30,000 supporters and members statewide. Through

the Voting Rights Project, the ACLU of Ohio, and other ACLU offices nationwide, the ACLU has sought to protect the voting rights of citizens in Ohio and elsewhere and has provided representation to plaintiffs in literally hundreds of voting cases involving electoral processes throughout the country, including Ohio. The attorneys for the Voting Rights Project of the ACLU have represented voters, candidates and political parties in courts within the areas covered by each of the Circuits of the United States Courts of Appeals. Together, the Voting Rights Project of the ACLU and the ACLU of Ohio have litigated several cases on behalf of Ohio voters, namely *Stewart v. Blackwell*, 5:02-cv-02028 (N.D. Ohio); *Boustani v. Blackwell*, 1:06-cv-02065 (N.D. Ohio); *ACLU of Ohio v. Brunner*, 1:08-cv-00145 (N.D. Ohio); and *ACLU v. Taft*, 02-00766 (S.D. Ohio).

Amici submit this brief to provide additional context in support of Relators' argument that the policy and conduct challenged in this action violate Section 1971 of the Voting Rights Act.

ARGUMENT

Proposition of Law No. I: Denying Absentee Ballot Applications Because of a Missing Check Mark Would Violate Section 1971 of the Voting Rights Act

As Relators argue, if county election officials were to follow the Secretary of State's memorandum of September 5, 2008 (the "Policy"), and deny the absentee ballot applications at issue here (the "Applications") solely because voters failed to place a check in an unlabeled box at the top of the application (the "affirmation box"), they would violate Section 1971 of the Voting Rights Act.¹ *See* Merits Brief of Relators at 20-21. Because federal law thus preempts

¹ In *McKay v. Thompson*, 226 F.3d 752 (6th Cir. 2000), the Sixth Circuit held that 42 U.S.C. § 1971(a)(2)(B) was directly enforceable only by the attorney general. How this section may be enforced, of course, has no bearing on whether Respondent's suggested statutory interpretation conflicts with federal law.

the interpretation of Ohio law embodied in the Policy, this Court should reject the Policy's interpretation, and construe Ohio law consistently with the Voting Rights Act.

Section 1971 of the Voting Rights Act provides that:

No person acting under color of law shall . . . deny the right of any individual to vote in any election because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election.

42 U.S.C. § 1971(a)(2)(B).

Section 1971 was enacted as part of “a spurt of federal enforcement of voting rights after a long slumber” *Florida NAACP v. Browning*, 522 F.3d 1153, 1173 (11th Cir. 2008).

“[O]ften referred to as ‘the materiality provision,’” Section 1971 “was designed to eliminate practices that could encumber an individual’s ability to register to vote” by prohibiting officials from blocking voters from registering or voting based on trivial clerical errors made on government paperwork. *Friedman v. Snipes*, 345 F. Supp. 2d 1356, 1370-71 (S.D. Fla. 2004) (emphasis omitted). “This was necessary to sweep away such tactics as disqualifying an applicant who failed to list the exact number of months and days in his age,” *Condon v. Reno*, 913 F. Supp. 946, 949-50 (D.S.C. 1995), since “[s]uch trivial information served no purpose other than as a means of inducing voter-generated errors that could be used to justify rejecting applicants,” *Florida NAACP*, 522 F.3d at 1173.

The failure to place a check mark in the affirmation box is arguably no error at all. The affirmation box appears in a boxed section at the top of the Application, along with the sentence, “I am a qualified elector and would like to receive an absentee ballot for the November 4, 2008 General Election.” That section of the Application can reasonably be — and arguably is best — interpreted as a title section that affirmatively states that any applicant who completes and signs

the Application affirms the sentence in that section. Moreover, the affirmation box itself can be easily interpreted as simply a bullet-point, not a box that must be checked — as thousands of Ohio citizens have interpreted it. The affirmation box is a single, stand-alone square, not a paired set of “yes” and “no” boxes, as are traditionally used when mandatory check boxes are included on government forms.² The affirmation box has no label indicating its purpose; indeed, there are no instructions on the Application stating that check marks are required anywhere. In short, the most logical interpretation of an individual’s completion of the Application is that she has affirmed the statement in the title section. At the very least, it is impossible to interpret an applicant’s failure to “check” the affirmation box as a disavowal of the statement located on its right; the resolution of ambiguity in favor of the applicant would therefore require acceptance of the Applications even under the Secretary’s interpretation of Ohio law.

But even assuming that a failure to check the unlabeled affirmation box were properly considered an error or omission in the completion of the form, the mistake is plainly immaterial to an individual’s voter qualifications. Accordingly, denying a voter’s request for an absentee ballot because of the missing check mark would violate Section 1971.

Section 1971 prohibits rejecting a voter’s absentee ballot request on the basis of a missing check mark just as it forbids rejecting a voter’s registration application because she listed the wrong number of months and days in her age.³ By the act of filling out the form and affixing her

² See, e.g., 42 U.S.C. 15483(b)(4)(A) (providing that any federal mail voter registration form shall have yes and no boxes next to questions regarding applicants’ age and citizenship, and shall include the statement “If you checked ‘no’ in response to either of these questions, do not complete this form.”).

³ Though adopted in response to restrictions on *registering* to vote, the materiality provision applies to all actions a citizen must take in order to vote — including filling out a registration application, casting a countable ballot, and everything in between. By its express terms, the provision extends to “any application, registration, or other act requisite to voting.” 42 U.S.C. § 1971(a)(2)(B). Elsewhere, the Voting Rights Act confirms this reach, defining the

signature beneath the title affirmation, “I am a qualified elector,” and submitting the ballot request, a voter clearly communicates to election officials that she believes herself to be an eligible voter.⁴ Whether or not that voter has made a statutorily unnecessary check mark in an ambiguous square is not material in determining whether she is over the age of 18, a United States citizen and resident of Ohio, and has not been convicted of a felony or adjudicated mentally incompetent without restoration of her voting rights. Under Ohio law, these are the only factors that bear on a citizen’s qualification to vote, and a missing check mark provides no material information about any of them. *See* Ohio Const. §§ 5.01, 5.04, 5.06 *see also* *Wash. Ass’n of Churches v. Reed*, 492 F. Supp. 2d 1264, 1270-71 (W.D. Wash. 2006). This is especially true in this case, when all the relevant information relating to an individual’s qualifications to vote is already included in her voter registration record, which is in the Secretary’s possession.

The only court to consider whether Section 1971 prohibits rejecting voter applications because of missing check marks confronted that issue in a context that is readily distinguishable from that presented here. In *Diaz v. Cobb*, the court was faced with two seemingly conflicting statutes, Section 1971 a provision of the Help America Vote Act of 2002 (“HAVA”) that mandated that the national voter registration form “include the question ‘Are you a citizen of the United States of America?’ next to ‘yes’ and ‘no’ check boxes.” 435 F. Supp. 2d 1206, 1213 (S.D. Fla. 2006). The question presented in the case was whether Congress rendered checking a

word “vote” as including “all action *necessary to make a vote effective* including, but not limited to, registration or other action required by State law prerequisite to voting” *Id.* § 1971(e) (emphasis added).

⁴ The idea that an individual who knows herself to be unqualified to vote would be deterred from committing fraud by having to check a box affirming her eligibility — but would otherwise go ahead and submit a completed request form — is absurd on its face. Accordingly, Respondent cannot reasonably argue that the check mark is necessary to ensure that absentee ballots are only sent to eligible voters.

box material for purposes of Section 1971(a)(2)(B). The *Diaz* court answered the question in the affirmative, holding that HAVA’s language “reflects a Congressional determination that the question is material to a determination of eligibility, and constitutes a specific Congressional direction to reject an application as incomplete for failure to check one of the boxes.” *Id.* at 1213-14; *cf. Florida NAACP*, 522 F. 3d at 1174 n.22 (“because Congress required the identification numbers to be on voter registration applications, they are per se material under § 1971(a)(2)(b)”). Because HAVA was the more recent statute and explicitly required check boxes, the *Diaz* court held that it superseded Section 1971. *See, e.g., McKee v. United States*, 75 U.S. 163, 167 (1869) (“It is a well-settled principle of law, that in the case of the repugnancy between two statutes, the latter one must prevail over the former. In that particular in which the prior and the latter act cannot consistently stand together, the latter act must be taken, pro tanto, as a modification or repeal of the former.”). There is no parallel superseding federal legislation here, and thus Section 1971 clearly governs.

In this case, there is not even a state law statutory basis for including a check box on the absentee ballot application — much less for finding that the absence of a check mark in a poorly labeled box is *material* to determining whether an individual is a qualified voter. Ohio law includes no requirement that an absentee ballot application include any check box. Indeed, it expressly provides that an absentee ballot request “need *not* be in any particular form,” R.C. 3509.03 (emphasis added), a provision that this court has interpreted as requiring only substantial compliance, *see In re Election Contest of Dec. 14, 1999 Special Election*, 91 Ohio St. 302, 306 (2001). The Ohio legislature has never indicated that checking a box on an absentee ballot application is material to determining her voter qualifications. While Ohio law does require that an application include a statement that the applicant is a qualified elector, R.C. 3509.03(F), that

statement appears on the Application as well as in the applicant's voter registration record. If R.C. 3509.03(F) were interpreted to require an application for an absentee ballot to be rejected if a check box is not checked (or even the application does not include any statement of voter qualifications but is filed by an individual whose registration information on file with the Secretary of State contains an affirmation of her qualifications), then the statute would violate Section 1971. But since the Application is susceptible of a reasonable interpretation that renders it consistent with R.C. 3509.03(F), it is unnecessary to reach the question of whether R.C. 3509.03(F) is consistent with federal law. Accordingly, the Secretary's Policy, if implemented, would violate Section 1971 of the Voting Rights Act.

* * *

It is particularly inappropriate to permit the state to reject absentee ballot applications that contain trivial mistakes where, as here, weeding out those applications serves no legitimate state interest. As demonstrated, a voter's act of completing, signing, and submitting the Application implicitly affirms the statement that the voter is "a qualified elector and would like to receive an Absentee Ballot." The failure to check the box does not render the application insufficient for failing to include a qualified elector statement. Nor does the State's argument regarding voters who may have changed address justify discarding every application without a check mark. Even if this justification were sound — and it is not — it would not justify rejection of requests from voters who ask that their ballots be sent to the same address at which they are registered; for these voters, there is no possibility of a changed address. Moreover, the absentee ballot application is required to contain "the address at which the elector is registered to vote," R.C. 3509.3(C), and the address to which the voter would like to have the ballot mailed, R.C. 3509.03(G), and the Application expressly includes spaces for the "voter's registration address"

as well as the “address to mail the ballot,” so there is no room for confusion. The putative justification for rejecting “un-checked” applications — the possibility of sending the wrong ballots to voters to have moved — does not withstand scrutiny, and cannot justify a blanket policy of rejecting such applications.

Given the State’s inability to identify any legitimate purpose that is advanced by denying ballots to voters who do not make check marks on their applications, for this Court to permit such a policy would open the door to unfair conduct, manipulation and partisan mischief. This case presents the Court with an important opportunity to signal that it will not countenance such manipulation of the electoral process.

It is equally important for this Court to send a clear signal that disenfranchisement by clerical error will not be tolerated. It was the disenfranchisement of voters for imperfect paperwork that inspired Congress to adopt Section 1971 of the Voting Rights Act, but unfortunately, such discriminatory (and unnecessary) policies are not simply a vestige of a far gone era. Even today, in Ohio and elsewhere, election officials have adopted a range of ministerial policies and procedures that have had the effect — if not the intent — of disenfranchising voters because of trivial errors.

Just four years ago, Ohio’s previous Secretary of State tried to enforce a policy that would have invalidated thousands of voter registrations because voters did not submit them on “white, uncoated paper of not less than 80-pound test weight,” even though the State itself did not print voter registration forms on such paper.⁵ Wisconsin’s Attorney General recently sued that state’s election agency in an attempt to remove voters from the registration rolls if their data was not successfully cross-checked against motor vehicle and social security databases — a

⁵ See Catherine Candisky, *Blackwell Ends Paper Chase; Some Could be Unable to Vote Because of Flap over Registration Forms*, Columbus Dispatch, Sept. 29, 2004.

process which fails 22% of the time in Wisconsin because of typos, data entry errors, and other ministerial mistakes,⁶ and which a federal court struck down in Washington State as violating Section 1971, *see Wash. Ass'n of Churches*, 492 F. Supp. 2d at 1270-71. Similarly, Florida launched a matching program — with less than a month to go before that state's registration deadline — that has already blocked the registrations of thousands of voters because of typos and other trivial errors.⁷

It is axiomatic that the right to vote is “a fundamental matter in a free and democratic society,” *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964), and this fundamental right must not be denied because of meaningless clerical errors that have no bearing on a voter's eligibility to vote. *Cf. Bishop v. Lomenzo*, 350 F. Supp. 576, 587 (E.D.N.Y. 1972) (“The state may not deny a voter the right to register (and hence to vote) because of clerical deficiencies.”). This principle led Congress to adopt Section 1971, and it should lead this Court to grant Relators' petition for mandamus here.

CONCLUSION

For the foregoing reasons, Relators' petition for mandamus should be granted.

⁶ *See* Patrick Marley, *Van Hollen's Voter-Check Lawsuit Sets off a Tempest*, Milwaukee Journal-Sentinel, Sept. 11, 2008.

⁷ *See* Aaron Deslatte and Mary Shanklin, *ID-Match Law Stalls 5,000 Voter Applications*, Orlando Sentinel, Oct. 1, 2008.

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