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

PROJECT VOTE, ASSOCIATION OF COMMUNITY ORGANIZATIONS FOR REFORM NOW, COMMON CAUSE OHIO, PEOPLE FOR THE AMERICAN WAY FOUNDATION, COMMUNITY OF FAITH ASSEMBLIES CHURCH, AMERICAN ASSOCIATION OF PEOPLE WITH DISABILITIES, MARY KEITH, JOHN R. T. MAY, and LINDA SCAMMICCA,

Plaintiffs,

v.

J. KENNETH BLACKWELL, individually and in his official capacity as Secretary of State**,** WILLIAM D. MASON, as Prosecuting Attorney for **Cuyahoga** County, Ohio, and SHERRI BEVAN WALSH, as Prosecuting Attorney for **Summit** County, Ohio,

Defendants.

CIVIL ACTION NO. 1:06-CV-01628

Judge Kathleen M. O'Malley

Magistrate Judge Perelman

PLAINTIFFS' REPLY TO DEFENDANTS' OPPOSITION TO PLAINTIFFS' APPLICATION FOR A PRELIMINARY INJUNCTION

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I. Introduction

Plaintiffs have demonstrated the severe burdens H.B. 3 places on their constitutional and statutory rights to conduct voter registration drives. Plaintiffs also have demonstrated the vagueness of H.B. 3 and the burden it places on Plaintiffs' submission of completed voter registration forms. These burdens have injured Plaintiffs by severely limiting their core political speech activity in conducting voter registration drives.

Defendants in their Opposition fail to supply sufficient state interests for the challenged provisions of H.B. 3 that impact Plaintiffs' voter registration drives.[1] Nor do they even attempt to show how the challenged provisions are narrowly tailored to advance Ohio's interests in protecting the integrity of its elections. Defendants repeatedly—twenty times—invoke fraud as justification.[2] But Defendants never articulate how these new provisions add perceptibly to Ohio's existing mechanisms for fraud prevention. For example, Defendants repeatedly invoke the attempted registration of Jive Turkey, Sr., Mary Poppins, and Mickey Mouse. However, none of these fictional characters could have voted in Ohio because of existing safeguards in Ohio and federal law, such as the requirement that first-time voters who registered by mail show identification before voting. *See* Ohio Rev. Code § 3505.18. Indeed, Jive Turkey and Mary Poppins were never entered onto the voter rolls nor did they attempt to cast fraudulent ballots. The wholly imagined benefits produced by the challenged provisions

[1] Plaintiffs respond herein only to those issues raised in Defendants' combined Opposition and Motion to Dismiss which are relevant to the questions raised in Plaintiffs' Preliminary Injunction Motion—namely, injunctive relief against the direct return provisions, the training, pre-registration, and affirmation provisions, and the registration form disclosure provisions on the basis of the First Amendment and the NVRA.

[2] Although Ohio law explains that submitting a false voter registration is a prima-facie case of fraud, *see* Ohio Rev. Code § 3599.42, the state interest is more properly the prevention of election falsification, *see id.* § 3599.36. Plaintiffs will refer to the state's interest as fraud for convenience.

of H.B. 3 must be weighed against the real injury to Plaintiffs' constitutionally and statutorily protected interests.

Defendants assert that these provisions are necessary to protect registrants and their right to vote. Specifically, Defendants claim that the challenged rules are necessary to guarantee that forms are returned before book-closing, to protect registrants' rights. Plaintiffs, however, are not challenging the state's right to demand that forms are returned before book-closing.[3] Plaintiffs have always endeavored to return all new voter registration forms promptly and will continue to do so. Consequently, the state's interest in the timely return of voter registration forms is not at issue in this motion. Although Defendants have attempted to divert attention to these and other issues, they have failed to effectively refute Plaintiffs' arguments for a preliminary injunction.

II. The Pre-registration, Training, and Affirmation Requirements For "Compensated" Voter Registration Workers Violate the Constitution and the NVRA

A. The Pre-Registration, Training, and Affirmation Requirements Violate Plaintiffs' First and Fourteenth Amendment Rights

Plaintiffs agree with Defendants that *Buckley v. American Constitutional Law Foundation, Inc.* ("*ACLF*") is the proper case under which to analyze the constitutionality of H.B. 3 under the First and Fourteenth Amendments. *See* Op. at 10 (citing 525 U.S. 182 (1999)). The Supreme Court's analysis in *ACLF* was "entirely in keeping with the 'now settled approach' that state regulations 'impos[ing] "severe burdens" on speech . . . [must] be narrowly tailored to serve a compelling state interest.'" 525 U.S. at 192 n.12. Under that approach, if H.B. 3 imposes a severe burden on speech or association, it must survive strict scrutiny. *Burdick v. Takushi*, 504 U.S. 428, 433 (1992). If it regulates core

[3] Plaintiffs also have not moved for a preliminary injunction against the ten-day deadline imposed by H.B. 3.

political speech or association—such as the circulation of initiative petitions or voter registration applications—its burdens are *per se* severe; it is subject to strict scrutiny or some similar form of "exacting scrutiny." *See ACLF*, 525 U.S. at 198–99 (comparing restrictions to those in *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995), in which "exacting scrutiny" was applied). As Justice Thomas explained in his opinion concurring in the judgment, unlike laws that regulate the "mechanics of the electoral process," "[w]hen core political speech is at issue, we have ordinarily applied strict scrutiny without first determining that the State's law severely burdens speech." *Id.* at 207 (Thomas, J., concurring in judgment). That is because "restrictions on core political speech so plainly impose a 'severe burden.'" *Id.* Those restrictions are subject to strict scrutiny "[e]ven where a State's law does not directly regulate" the affected core political speech and association. *Id.*[4]

Three of the restrictions that H.B. 3 imposes on compensated voter registration workers—the requirement that they (1) pre-register with the state, (2) complete a training that is available only online, and (3) sign an affirmation and provide a copy to the state each time they submit voter registration applications—violate the First and Fourteenth Amendments in several ways. Defendants fail to justify those restrictions under the applicable standards in *ACLF*.

1. The Restrictions on "Compensated" Voter Registration Workers Unconstitutionally Burden Plaintiffs' Speech and Association

The pre-registration, affirmation, and training requirements of H.B. 3 impede Plaintiffs' core political speech and association, in violation of the First and Fourteenth Amendments. Conducting a voter registration drive is a core political speech activity.

[4] *See also Meyer v. Grant*, 486 U.S. 414, 422 & n.22, (1988) (strict scrutiny applies to regulations of activities that are "characteristically intertwined" with protected speech if the regulations have the "inevitable effect" of reducing the amount of core political speech and association).

See Meyer, 486 U.S. at 422) (political canvassing is characteristically intertwined with speech and association); *cf. McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 345–46 (1995) (Ohio election law disclosure requirements regulate speech, not electoral process). In *ACLF*, the Supreme Court invalidated Colorado laws that required ballot initiative circulators to be registered voters because the law "limi[ts] the number of voices who will convey [the initiative proponent's] message and, consequently, cut[s] down the size of the audience [proponents] can reach." *ACLF*, 525 U.S. at 194–95 (quoting *Meyer*, 486 U.S. at 422) (second and fourth alterations in original) (internal quotation marks omitted). Colorado advanced the state interests of "administrative efficiency, fraud detection, [and] informing voters," which the court found insufficient. *Id.* at 192. Moreover, Colorado argued that it did not impose a severe burden on anyone's First Amendment rights because "it is exceptionally easy to register to vote." *Id.* at 195. The Court nevertheless held the registered voter prerequisite unconstitutional. *Id.* at 197.

The pre-registration, training, and affirmation requirements of H.B. 3 similarly inhibit Plaintiffs' core political speech and association by limiting the number of individuals who participate in their voter registration drives and thus limiting the size of the audience they can reach. The required pre-registration, training, and affirmation can only be accomplished online, presenting substantial obstacles to groups like Plaintiffs who do not have the facilities to offer individual computer terminals for their employees. (*See, e.g.*, Givens Aff. ¶ 11.) Even if it were easy to conform to the state's requirements, that is still not enough to justify the restriction on Plaintiffs' protected activities. Indeed, the Court in *ACLF* struck down a requirement that only registered voters could circulate petitions, and registering to vote is no more burdensome than the H.B. 3's requirements. In *ACLF*, the Court found Colorado's similar interests of "administrative efficiency, fraud detection, [and] informing voters" insufficient to justify comparable restrictions on

core political speech and association. *Id.* at 192. The net effect of these requirements is a substantial diminution in the number of individuals working with Plaintiffs in their voter registration drives. *See ACLF*, 525 U.S. at 194-95.

Moreover, under the state's scheme, any person compensated for merely distributing a voter registration application must disclose their name, address, birth date, and compensating organization, before handing a voter an application,[5] by registering online with the state and filing a signed affirmation. The registration and affirmation then become publicly accessible records, searchable online. *See* Ohio Sec'y of State, Public Registrars Search, http://orc.sos.state.oh.us/WRTSPublic/PublicRegistrantsSearch.aspx (last visited Aug. 23, 2006); *see also* Exhibit E attached hereto. This public availability of an individual's compensating employer, home address, and intention to register voters already has and will continue to "inhibit participation in the [voter registration] process," subjecting voter registration workers to "recrimination and retaliation" based on their involvement with "'volatile' issues or groups." *ACLF*, 525 U.S. at 198.

Defendants have not demonstrated that any of these requirements are necessary to advance their claimed interests. Defendants put forward the same arguments to justify the training and disclosure requirements that failed Colorado: policing fraud and their claim that an "exceptionally easy" requirement is not a burden. (*See* Op. at 29.) Defendants also claim that these requirements are "reasonable" and therefore do not impose severe burdens. But this inverts the analysis: Plaintiffs have demonstrated that

[5] H.B. 3 does not on its face require that the affirmation be submitted to the Secretary of State's office before the signatory can register voters, but instead requires that the affirmation be signed before registering voters and that the affirmation be given to the local boards of elections with each bundle of forms returned by the signatory. *See* Ohio Rev. Code § 3503.29(C)(3). However, Defendant Blackwell requires the return of the affirmation to the Secretary of State's office as part of the pre-registration process and has posted those affirmations on his official website available to the general public.

these laws impose severe burdens on their political speech and association, and it is up to Defendants to demonstrate state interests that the challenged laws are necessary to serve.[6]

Defendants offer no factual basis to support their purported interests—to educate voter registration workers, make voter registration workers subject to subpoena, and prevent fraud. Nor do Defendants explain why any of their asserted interests make it necessary to: (1) make the pre-registration, training, and affirmation available only online; (2) require pre-registration and submission of an affirmation annually *before* even distributing a voter registration application; (3) make compensated workers' registration and affirmation publicly available; or, as discussed *infra*, (4) apply these requirements only to compensated workers. Indeed, H.B. 3 imposes burdens on individuals in circumstances with no connection to voting fraud: Ohio has not produced any explanation of how these interests are even implicated by the mere provision of a state-issued form.

Finally, Defendants do not explain why their purported interests cannot be satisfied through less burdensome means. *SeeACLF*, 525 U.S. at 204-05 (state "retains an arsenal of safeguards" to preserve its interests "[t]hrough less problematic measures"). For instance, the Court in *ACLF* found that contemporaneous disclosure of a circulator's identity was not justified because the state's interests could adequately be served by requiring circulators to disclose their identities when submitting petitions. *Id.* at 198-99.[7]

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[6] Even if the burden on Plaintiffs' rights were not severe, Defendants would still have to demonstrate the need to burden Plaintiffs' rights; the standard for assessing statutes imposing "lesser burdens" on First Amendment rights is not simply rational basis review. Rather, any election regulation requires a *balancing* of the interest of voters against the interests of the state and an evaluation of "the extent to which those interests make it *necessary* to burden the plaintiffs' rights." *Burdick*, 504 U.S. at 434 (emphasis added). A law "which imposes only moderate burdens could well fail the balancing test when the interests that it serves are minor, notwithstanding that the regulation is rational." *McLaughlin v. N.C. Bd. of Elections*, 65 F.3d 1215, 1221 n.6 (4th Cir. 1995); *see also New Alliance Party v. Hand*, 933 F.2d 1568, 1576 (11th Cir. 1991).

[7] Any required affidavit should only include the voter registration worker's name and address. Additional information, such as the individual's birthdate, should not be required. *Cf. ACLF*, 525 U.S. at 189 n.7 (describing affidavit statute that required only name and address (quoting Colo. R. Stat. 1-40-

2. The Restrictions on "Compensated" Voter Registration Workers Are Unconstitutional Because of Their Discriminatory Application

Defendants do not justify the discriminatory application of the three provisions of H.B. 3 that apply only to persons compensated for voter registration. Under *ACLF*, those provisions violate the First and Fourteenth Amendments because they unjustifiably differentiate between paid and unpaid voter registration workers. 525 U.S. at 204 (striking down disclosure provision of Colorado law regulating circulation of ballot initiative petitions because it applied to paid circulators only). The Court in *ACLF* made clear that regulations of political speech and association that "target paid circulators" only are subject to "exacting scrutiny," and the state must demonstrate "substantial interests" in its discriminatory application of the law. *Id.*

Defendants utterly fail to meet their burden of establishing a substantial state interest in distinguishing between paid and unpaid voter registration workers with respect to the law's pre-registration, training, and affirmation requirements; indeed, they assert no interest at all. The sole mention in their brief of *any* alleged difference between uncompensated and compensated workers is in a footnote addressing a different provision of H.B. 3 in which they assert, without substantiation, that some paid voter registration workers have a greater incentive to commit fraud because they are paid based on the number of voter registration forms they submit. (Op. at 12 n.2.) This bare assertion does not satisfy Defendants' burden of justifying the discriminatory application of the law's pre-registration, training, and affirmation requirements. "Absent evidence to the contrary," the Court will not "assume that a professional circulator . . . is any more likely to [commit fraud] than a volunteer." *ACLF*, 525 U.S. at 203-04 (quoting *Meyer v.*

111(2) (1998)). The individual's name and address is sufficient to satisfy the State's interest in enforcing its subpoena power. *Id.* at 196. That information need not be made public to support the state's interest.

Grant, 486 U.S. 414, 426 n.23 (1988)). Moreover, H.B. 3 makes no effort to distinguish between those paid individuals who might be involved in election fraud and those who are not. *Cf. ACLF*, 525 U.S. at 210 ("[The statute] burdens all circulators, whether they are responsible for committing fraud or not. In any event, the State has failed to satisfy its burden of demonstrating that fraud is a real, rather than conjectural problem.") (Thomas, J., concurring in judgment).

Even if defendants' assertion could support a state interest in differentiating between paid and unpaid workers, that interest is more than adequately served by the provision of H.B. 3, unchallenged in this lawsuit, that separately prohibits the "recei[pt of] compensation on a fee per registration or fee per volume basis for registering a voter." Ohio Rev. Code § 3599.111.

The discriminatory application of the law further undermines the state's alleged purposes for all three requirements because it leads to results that are irrational. Under these provisions of H.B. 3, an individual commits a crime if she distributes voter registration forms while at work without complying with the statute's pre-registration, training, and affirmation requirements, but that same individual is not subject to any penalties if she engages in the same activities as a volunteer after work. In addition, paid voter registration workers are subject to criminal penalties for the same conduct that their volunteer counterparts *at the same organization* can do with impunity. Several plaintiffs use both compensated and uncompensated volunteers in their voter registration drives.

3. The Restrictions on "Compensated" Voter Registration Workers Are Unconstitutionally Vague

Defendants, for the first time in their brief, offer a definition of "compensated," suggesting that only remuneration valuable enough to trigger federal or state tax liability is covered by the statute. (Op. at 18-19.) Whether or not this definition—taken as a

litigation position—is sufficiently clear as applied to the First Amendment activity of individuals whose work consists *solely* of voter registration,[8] it suffers from a second infirmity. It entirely fails to make clear whether persons who are employed by Plaintiffs and who have a range of job responsibilities are "compensated" for registering voters when they distribute or collect voter registration forms in the course of their employment.

Is an employee "compensated" for registering voters when she periodically distributes voter registration forms at organizational meetings? When she participates in one voter registration drive a month? When she places a link to the state's voter registration form on the organization's website? Is a university librarian "compensated" for registering voters when he places a stack of forms on a table next to the circulation desk? Does a staff member in an elected official's office, while at work, commit a crime if she hands a voter registration form to a member of the elected official's constituency? Defendants' new definition still does not answer these questions.[9] The First Amendment requires greater clarity when a state regulates speech and association.

4. The Pre-Registration and Affirmation Requirements Interfere With Plaintiffs' First Amendment Right to Anonymous Association

Plaintiffs, their employees, and those who seek to use Plaintiffs' services (i.e., prospective registrants) have a First Amendment right to speak and associate anonymously. *See NAACP v. Alabama*, 357 U.S. 449, 461 (1958) (holding unconstitutional the forced disclosure of the names and addresses of NAACP's members). Because the pre-registration and affirmation provisions of H.B. 3 require the

[8] It bears noting that the federal tax code is so notoriously *not* clear that an entire industry of tax professionals is kept busy every year doing taxes for individuals and businesses.

[9] *See* Joint Comm. on Agency Rule Review, Secretary of State's proposed rules 112.xx.02 through 112.xx.06 (June 26, 2006) (explaining that compensation would have to be determined on a case by case basis) (statement of Allan Sowash, Secretary of State's election division), *forthcoming audio tapes by express mail as* exhibit C.

disclosure of workers' employers and other personal information, Ohio must justify its actions under exacting scrutiny. *See ACLF*, 525 U.S. at 199 (noting that Court in *McIntyre* applied "'exacting scrutiny' to Ohio's fraud preventing justifications," for a ban on anonymous circulation of pamphlets and "held that the ban on anonymous speech violated the First Amendment" (quoting *McIntyre*, 514 U.S. at 347)); *cf. Buckley v. Valeo*, 424 U.S. 1, 64–65 (1976) (per curiam) (applying exacting scrutiny to compelled disclosure of campaign-related payments).

These disclosure provisions are not sufficiently tailored to any important state interests to survive exacting scrutiny. Defendants' reliance on the affidavit requirement upheld by the Tenth Circuit in the opinion reviewed in *ACLF* is misplaced. *See ACLF v. Meyer*, 120 F.3d 1092 (10th Cir. 1997), *cert. denied sub. nom.*, *Buckley v. ACLF*, 522 U.S. 1113 (1998). The Colorado law did not require disclosure of the organization for which the circulator worked. *See ACLF*, 525 U.S. at 189 n.7.[10] Nor did it require the disclosure of any information before individuals circulated petitions. As the Supreme Court noted, "the affidavit requirement . . . which must be met only *after* circulators have completed their conversations with electors" does not inflict the same "injury to speech" as contemporaneous disclosure requirements like the ones at issue here. *ACLF*, 525 U.S. at 199-200 (emphasis added).[11]

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[10] Indeed, the part of the statute that linked the name of the circulator to the organization was held unconstitutional. *ACLF*, 525 U.S. at 203 (holding unconstitutional the finance reporting provision requiring disclosure of the amount paid to individual circulators).

[11] In addition, the return of petition signatures typically happens only once, after all signatures are gathered, and so the Colorado law would not result in the affidavits being publicly available during circulation. In contrast, voter registration forms are collected on a rolling basis, and so making an individual's affirmation publicly available after she returns her first bundle of forms would result in her affirmation being available while she is registering voters. In any case, the Supreme Court did not grant the appellees' cross-petition in *ACLF* challenging the Colorado's affidavit requirement, and thus its holding did not reach the constitutionality of the provision. *ACLF*, 525 U.S. at 191 n.10.

Defendants also rely on campaign finance disclosure cases for the proposition that Ohio's disclosure requirements do not unduly burden associational rights. (Op. at 12.) However, a voter registration drive does not implicate the same "*quid pro quo*" fraud concerns as contributions to individual candidates for public office. *See McIntyre*, 514 U.S. at 354 (discussing inapplicability of campaign finance precedent to anonymous campaign literature statute). As the Supreme Court explained, "ballot initiatives do not involve the risk of '*quid pro quo*' corruption present when money is paid to, or for, candidates." *ACLF*, 525 U.S. at 203.

B. The Pre-registration, Training, and Affirmation Requirements Violate the NVRA

The pre-registration, affirmation, and training requirements of H.B. 3 as interpreted by Defendant Blackwell conflict with the NVRA by limiting federal mail-in registration and imposing a *de facto* deputy registrar system. Defendants claim that the challenged act "does not impede voter registration" because drives can still be conducted under the state's rigid requirements. This is too cramped a view of the NVRA and preemption law, and it fails to account for the burdensome effects H.B. 3's requirements have already had on Plaintiffs.

A state law is preempted by a federal scheme when it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373 (2000) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). This test requires the "examination of the federal statute as a whole and identifying its purpose and intended effects." *Id.* The NVRA was intended to liberalize voter registration procedures, which had previously in many states required the personal appearance of a registrant before a state official or someone deputized by the state. By requiring states to accept federal mail-in registrations and to make mail

applications freely available, "with particular emphasis on making them available for organized voter registration programs," 42 U.S.C. § 1973gg-4(b) (2000), the NVRA "impliedly encourages voter registration drives" like those conducted by Plaintiffs. *Charles H. Wesley Educ. Found. v. Cox*, 408 F.3d 1349, 1353 (11th Cir. 2005).[12] The NVRA empowered citizens by making it simple and convenient to register to vote, and it empowered grassroots groups by allowing them to engage in private voter registration drives without having to become agents of the state. In other words, it eliminated the state as a necessary middleman in the voter registration process.

While Ohio does not directly outlaw voter registration programs, H.B. 3's requirements for compensated workers severely burden Plaintiffs' ability to conduct such drives and will even cause some organizations to stop conducting drives. Those requirements have, in effect, resurrected the system of deputy registrars that the NVRA eliminated, making it more difficult for individuals to register to vote. They therefore conflict with Congress's purpose and the intended effects of the NVRA. Defendants concede that if "Ohio's voter registration laws limit the ability of private organizations to conduct voter registration drives," it would violate the NVRA. (Op. at 22.) Plaintiffs have already shown that these provisions limit their ability to conduct such drives. It cannot be the case, as Defendants suggest, that any burden short of outright prohibition is consistent with the NVRA. Rather, where, as here, a law imposes severe burdens that impede voter registration drives, it "stands as an obstacle to the accomplishment" of the purposes of the NVRA and should be enjoined.

[12] The encouragement of voter registration drives is consistent with the statutory purpose, cited by Defendants, "to establish procedures that will increase the number of eligible citizens who register to vote in elections for Federal office." (Op. at 19 (quoting 42 U.S.C. § 1973gg(b).)

III. The "Direct Return" Requirements in H.B. 3 And Defendants' Interpretation of the Statute Violate the Constitution and the NVRA

The three "direct return" provisions of H.B. 3—§§ 3503.19(B)(2)(c), 3599.11(B)(2)(a), and 3599.11(C)(2)—and the Secretary of State's materials interpreting those provisions should be enjoined because they are unconstitutionally vague, and if construed by the state to require individual workers and workers to return forms individually to the state, unconstitutionally burdensome. They also violate the NVRA.

A. The Direct Return Provisions Violate the First and Fourteenth Amendments

1. Despite Defendants' Purported Interpretation, the Direct Return Provisions Remain Unconstitutionally Vague

Defendants have finally, after months of pleading by Plaintiffs and others, attempted to provide a definitive interpretation of the direct return provisions. And yet, their brief contradicts itself. They state:

> There is no prohibition in the statute for the paid registration worker from first giving the completed voter registration form to his 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.

(Op. at 16.) Later they reverse themselves: "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*."[13] (Op. at 22 (emphasis added).) If Defendants are unable to decide whether the statute bars Plaintiffs' activities, it is difficult to imagine how a person of ordinary intelligence could decide. But a misstep could make that person a felon.

[13] Although on page 16 Defendants use "giving" and on page 22 they use "return", those words have the same meaning to Defendants: "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)." (Op. at 16 (emphasis added).)

Even if the first interpretation offered by Defendants is the construction they wish to rely upon—that an individual volunteer or worker may first hand off collected forms to a sponsoring organization, but must then get those forms back from the organization and personally return them to the state—this interpretation still leaves unanswered a key questions: Who must return the form when the registration is the result of a collective effort—for example, a voter registration drive at a community event where various individuals will staff a table during the course of a day? Not knowing the answer, all of these workers may subject themselves to criminal liability by doing their jobs.[14]

Moreover, Defendants previously have used these same terms differently. Defendant Blackwell's original "Compensated Registrars Training," available on the Secretary of State's web site during May and June, and the accompanying affidavit during that time, stated, "If you have been entrusted with a completed voter registration form, you must return the applicant's voter registration form *directly* to the office of a county board of elections or the Secretary of State. *You shall not, under penalty of law, return the complete form to any other person group, organization, office or entity.* R.C. 3599.11(C)." *See* http://www.sos.state.oh.us/sos/electionsvoter/cvrTraining.pdf (last visited June 24, 2006) (emphasis added); *see also* Exhibit D attached hereto. This

[14] Also, while Defendants rely on the rule promulgated by the Secretary of State which defines "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," *see* Ohio Admin. Code § 111-12-02(C), these rules only concern §§ 3503.28 and 3503.29. The direct return provisions enacted by H.B. 3 are *not* contained in §§ 3503.28 and 3503.29, but instead in §§ 3503.19 and 3599.11. The force of the rule as an interpretation of the relevant sections is therefore questionable. Furthermore, the current version of that rule was only made effective on July 27, 2006, just two weeks before Defendants filed their motion to dismiss. Prior to July 27, the very same rule stated that "'returning' a voter registration form *does not include* any service or act of the U.S. Postal Service or employees of the U.S. Postal Service or a common carrier acting in an official capacity." Ohio Admin. Code § 111-12-02(D) (effective May 1, 2006) (emphasis added). If the Secretary of State can, in the space of less than three months, change the meaning of "return" from *not* including the use of the mail for voter registration forms to *including* it, it is difficult to understand how a person of ordinary intelligence should be able to know the correct meaning.

language is still contained in the online training that each individual worker must complete, and in the affirmation each worker must sign. *See* http://orc.sos.state.oh.us/Training.aspx (last visited Aug. 22, 2006); *see also* Exhibit E attached hereto. But the downloadable training manual contains a different statement of the law, stating that "Voter Registration Violation Penalties" include "knowingly returning any voter registration form entrusted to you to any location other than a board of elections of the secretary of state." *See* http://www.sos.state.oh.us /sos/electionsvoter/cvrTrainingInfo.pdf (last visited Aug. 22, 2006); *see also* Exhibit D attached hereto. If the Secretary of State did not believe the statute needed interpretation to make it more understandable, he would not have altered the wording—not once, but twice. Nevertheless, he refused to clarify the statute or these administrative pronouncements on the numerous occasions that Plaintiffs requested it.[15]

Finally, Defendants argue that this Court should "resort to every reasonable construction in order to declare a statute constitutional," before striking the direct return provisions for vagueness. (Op. at 14.) Plaintiffs agree that a construction of the direct return provisions could have avoided its constitutional problems, as they repeatedly advocated for the past four months to no avail.[16] The best reading of the direct return provisions, and the one most in line with the legislature's original intent,[17] is that the provisions limit the locations to which a third-party voter registration drive could return forms to the boards of elections and Secretary of State's office, but do not limit the ability

[15] *See* Joint Comm. on Agency Rule Review, Secretary of State's proposed rules 112.xx.02 through 112.xx.06 (June 26, 2006) (discussing confusion over "return" in rules), *forthcoming audio tapes by express mail as* exhibit C.

[16] *See, e.g.,* Letter from Donald J. McTigue to the Honorable J. Kenneth Blackwell (Apr. 28 2006) attached to Mot. for Prelim. Inj. Exhibit K.

[17] *See* Prelim. Inj. at 25 n.5 (noting H.B. 3 sponsor Rep. DeWine's public statements that the intent of the direct return provisions was to limit the locations to which a drive could return forms).

of third-party groups to collect forms from their volunteers and employees and return the forms to the state on behalf of their volunteers and employees. This reasonable construction would avoid the constitutional problems detailed *infra*. Nonetheless, given the limits on a federal Court's power authoritatively to interpret a state statute, *see Va. Soc. For Human Life v. Caldwell*, 152 F.3d 268, 270 (4th Cir. 1998), especially in the fact of conflicting state agency interpretations, the appropriate remedy is to declare the direct return provisions unconstitutional and to enjoin their enforcement.

2. Under Defendants' Apparent Interpretation of the Direct Return Provisions, They Impose an Unconstitutional Burden on Plaintiffs

Even if the interpretation offered by Defendants in their brief were sufficient to cure the vagueness of the direct return provisions, that interpretation would still create a severe burden on Plaintiffs' voter registration activity. Requiring individual workers and volunteers to personally deliver forms to the state severely constrains Plaintiffs' voter registration drives by limiting their ability to implement quality control measures and by imposing inefficient, unnecessary, and taxing burdens on their employees and volunteers.

Contrary to Defendants' suggestion, the quality control performed by Plaintiffs serves a number of key interests, of which fraud prevention is only one. Reviewing forms gathered by Plaintiffs' workers and volunteers allows Plaintiffs to (1) monitor their own volunteers and employees for compliance with internal performance standards and the law; (2) follow up with applicants to confirm they intended to complete a form and that the information is accurate and complete; (3) flag deficient forms for further investigation and remedial action; (4) create a database to assist in voter education and get-out-the-vote activities.

Defendants do not address the costs the direct return provisions impose on individual canvassers, who must personally return forms to the state, and who may lack

the resources to do so—especially if they must do so every ten days, on pain of criminal penalties. This burden is clearly severe, and is subject to exacting scrutiny under *ACLF*, 525 U.S. at 192 n.12, and *Burdick*, 504 U.S. at 433.

The state has identified numerous amorphous interests that it claims are advanced by H.B. 3, including the prevention of fraud and the assurance of "accountability." While the state has an undeniable interest in guaranteeing that citizens are in fact registered to vote, they have not demonstrated a particular interest in requiring individual voter registration workers or volunteers to personally return forms to the state, nor have they demonstrated how the direct return rule serves any interest the state might have more effectively than a less burdensome rule.[18]

The question is not merely whether Defendants have an interest in guaranteeing that voter registration forms are returned in a timely fashion; it is whether the challenged law serves that interest and does not burden Plaintiffs' rights any more than is necessary to serve that interest. *ACLF*, 525 U.S. at 192 n.12. Defendants have not explained why it is necessary (1) to require each volunteer or worker to personally deliver forms to the state, rather than entrust them to another person or organization; (2) to disallow volunteers or workers from turning over forms to an organization for quality-control

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[18] Defendants casually suggest that Plaintiffs "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" as to miss book-closing. (Op. at 6, 10.) This of course is *not* what Plaintiffs argue; Plaintiffs engage in voter registration activity for the primary purpose of getting people on the voter rolls.

Defendants also state offhandedly that "Plaintiffs . . . withheld more than 1,000 voter registration forms during the 2004 election." This is not borne out even by the newspaper articles submitted by Defendants in lieu of affidavits; instead, those articles describe only one box of misplaced applications turned in three days after the deadline, representing .03 % of the forms collected by ACORN in Ohio, *see* Cindi Andrews, *Alleged Fraudulent Voter Cards Scrutinized*, THE CINCINNATI ENQUIRER, Oct. 8, 2004, at 1C, and 323 forms in Minnesota held by a rogue employee that were ultimately turned in before the general election book-closing, *see* Mark Brunswick & Pat Doyle, *High-stakes Registration Efforts Fuel an Industry*, STAR TRIBUNE (Minneapolis), Oct. 18, 2004, at 8A; *see also* Gall Decl. ¶¶ 4-6.

review; and (3) to criminally enforce these provisions with incarceration and/or fines. They fail to explain how allowing returns through an organization, while placing the ultimate responsibility for timely returning the forms on both the individual collecting the forms and the organization to which they entrust the forms, or enforcing such a rule through lesser penalties, would not serve their interests.

B. The Direct Return Provisions Violate the NVRA by Impairing Plaintiffs' Ability to Conduct Voter Registration Drives Using Mail-In Registration

Because they severely impair Plaintiffs' voter registration efforts, the direct return provisions violate the NVRA and "stand[] as [] obstacle[s] to the accomplishment and execution of the full purposes and objectives of Congress." *Crosby*, 530 U.S. at 373. Plaintiffs do not seek merely to conduct voter registration drives—they seek to conduct *effective* voter registration drives. That requires strict quality control procedures, and the direct return provisions prohibit such procedures by requiring workers to return the forms directly to the Secretary of State or to a board of elections, rather than allowing the organizations to conduct their quality control operations and then deliver the applications in a large batch each week. Forbidding Plaintiffs from conducting quality control not only hurts the State (since Plaintiffs' quality control procedures help cut down the number of incomplete and identify potentially fraudulent registration forms), but it also harms Plaintiffs' legal right to conduct private voter registration drives. In fact, by making the failure to return registration forms to the proper location a felony, Defendants have severely limited Plaintiffs' operations because few, if any, workers are willing to take the risk of being prosecuted for improperly returning forms.

Defendants assert that nothing prevents Plaintiffs from conducting registration drives and that Ohio's rules are unlike those at issue in *Wesley* because Ohio will accept forms even if they were mailed in violation of Ohio Rev. Code §§ 3503.19 and 3599.11.

However, Ohio is merely paying lip-service to the NVRA by accepting the forms, because the criminal sanctions imposed for returning forms in violation of § 3599.11 effectively eviscerate Plaintiffs' ability to conduct private voter registration drives that facilitate the use of mail-in registration. Even if the forms are accepted, private registration workers simply will not be willing to take the risk of committing a felony by returning the forms to their employer for quality control before they are mailed in. As the Eleventh Circuit has held, "[t]he NVRA protects Plaintiffs' rights to conduct registration drives and submit voter registration forms by mail." *Wesley*, 408 F.3d at 1354. Defendants have violated those rights by criminalizing conduct allowed by the NVRA.

One of the most powerful aspects of private voter registration drives is that they bring forms to the voters; the voters do not have to go to the forms. Private voter registration drives educate citizens on the benefits of voting, thereby resulting in more people registering than may have otherwise registered if left to do so on their own. Private voter registration drives can also reach those who might not be able to easily get to a public agency to register—the poor, the disabled, and the elderly. Private voter registration drives are thus essential tools for increasing the number of eligible citizens who are registered to vote. *See* U.S. Census Bureau, *Voting and Registration in the Election of November 2004*, (issued March 2006), attached hereto as Exhibit B.

IV. The Requirement That Compensated Voter Registration Workers Disclose Their Name and Employer on Voter Registration Forms Violates Both the First Amendment and the NVRA

A. The Disclosure Requirement Violates Plaintiffs' Employees' First Amendment Right to Anonymity

Plaintiffs have a First Amendment right to speak and associate anonymously. *See McIntyre*, 514 U.S. at 334. Question 15 of the Ohio voter registration form (created pursuant to Ohio Rev. Code § 3503.14) violates this right by requiring a person who

receives compensation for registering a voter to give her name, address, and the name of the organization compensating her on another individual's voter registration form. Question 15 is analogous to the badge requirement struck down in *ACLF*, forcing disclosure of association with a particular group or "volatile issue" at just the moment where an individual's susceptibility to harassment on the basis of their association is highest. Like the badge, public disclosure of an individual's pre-registration information and affirmation burdens Plaintiffs' political speech by discouraging individuals from working as registrars. Again, the disparate treatment of compensated and volunteer registrars is left unexplained. *See supra* Part II.A.2.

Question 15 also discourages voters who do not want to disclose the name of the organization assisting them. For example, a disabled individual may not want to publicly disclose that she registered with the help of a disability advocacy group. The forced public record of a voter's disability is triggered by the receipt of a state-issued voter registration form from an employee of such a group.[19] This concern is reflected in Congress's policy decision under the NVRA to forbid the disclosure of the public agency at which a voter registers. *See* 42 U.S.C. § 1973gg-6(a)(6) (2000).

B. The Disclosure Requirement Violates the NVRA by Requiring Additional Information Not Required for Voter Registration

The NVRA provides that a state-created voter registration form "may require *only* such information (including the signature of the applicant) and other information . . . as is necessary to enable the appropriate State election official to assess the eligibility of the applicant and to administer voter registration and other parts of the election process." 42

[19] Another example is an individual who may not want to have his name associated with the Plaintiffs because of wild accusations—such as those cited by the Defendants as "evidence" in their answer brief—that have been made against them. These allegations have been proven false. But the damage is still done when the activities of a particular organization are explained as "sloppy, haphazard and, in some cases, downright illegal," by the chairman of a national party. (See Op. Exhibit B.)

U.S.C. § 1973gg-7(a)(4)(b)(1) (2000) (emphasis added). To justify Question 15, therefore, Defendants would have to demonstrate that it "is necessary to enable the appropriate State election official to assess the eligibility of the applicant and to administer voter registration and other parts of the election process." *Id.*

Defendants have not even attempted to demonstrate that Question 15 is necessary, rather than merely convenient for the state, or that other means, including a less burdensome affidavit requirement, would not serve its interest. Defendants assert that Question 15 is designed merely to "find out the identity of the paid circulator," but it goes beyond that by requiring disclosure of the organization compensating the circulator, information that is unnecessary to finding out the identity of a paid circulator or determining the eligibility of an applicant.

This case is entirely different from the *Gonzalez v. Arizona*, No. CV 06-1268, 2006 U.S. Dist. LEXIS 42309 (D. Ariz. June 19, 2006), cited by Defendants. In *Gonzalez*, the issue was whether a temporary restraining order should issue against Arizona's requirement that applicants submit proof of citizenship when submitting a voter registration form. The district court found the plaintiffs had failed to show a likelihood of success on the merits because the "NVRA does not act as a ceiling preventing states from enforcing their own laws regarding *voter qualifications*." *Id.* at *19 (emphasis added). But the disclosure of a paid circulator's identity and employer has absolutely no relationship to voter qualifications.

V. The Defendant Prosecutors Are Not Entitled To Absolute Immunity from Injunctive Relief

Defendants also argue that Plaintiffs' Motion should be denied as to Defendants Bevan-Walsh and Petro on the basis of absolute prosecutorial immunity. (Op. at 31.) While it is true that prosecutors enjoy absolute immunity from suits for *damages* based

on their conduct intimately associated with the judicial phase of the criminal process, *see Imbler v. Pachtman*, 424 U.S. 409, 428 (1976), "plaintiffs[‘] claim[s] for *injunctive relief* against the . . . state prosecutors [are] not barred by judicial immunity." *Davidson v. Eblen*, No. 97-5486, 1998 U.S. App. LEXIS 2136, *4 (6th Cir. Feb. 10, 1998) (emphasis added).[20] Since plaintiffs seek primarily injunctive and declaratory relief, the doctrine of prosecutorial immunity is not applicable here.[21]

VI. Conclusion

For the foregoing reasons, Plaintiffs Application for a Preliminary Injunction should be granted.

Respectfully submitted,

/s/ Donald J. McTigue

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Donald J. McTigue (OH 0022849)
Trial Counsel
Mark A. McGinnis (OH 0076275)
MCTIGUE LAW GROUP
886 North High Street
Columbus, OH 43214
Tel: (614) 263-7000
Fax: (614) 263-7078
mctiguelaw@rrohio.com

Counsel for Plaintiffs

[20] *See also Tarter v. Hury,* 646 F.2d 1010, 1012 (5th Cir. 1981) ("Prosecutors do not enjoy absolute immunity from [declaratory and injunctive relief] claims."); *Scott v. Rumsey*, No. 4:91cv 138, 1991 U.S. Dist. LEXIS 21887, *8 (W.D. Mich. Oct. 10, 1991) ("The absolute immunity doctrine, however, does not bar injunction claims."); *cf. Pulliam v. Allen*, 466 U.S. 522, 541-42 (1984) ("We conclude that judicial immunity is not a bar to prospective injunctive relief against a judicial officer acting in her judicial capacity."), *superseded in part by* Pub.L. No. 104-317, 110 Stat. 3847; *Imbler*, 424 U.S. at 423 (prosecutorial immunity is subset of judicial immunity).

[21] Each of the four cases cited by Defendants involves claims for damages only. Plaintiffs will address the effect of the doctrine of prosecutorial immunity on Plaintiffs' nominal damages claims in our response to Defendants' motion to dismiss.

Karl J. Sandstrom*
Ezra W. Reese*
PERKINS COIE LLP
607 14th Street NW
Suite 800
Washington, DC 20005
Tel: (202) 628-6600
Fax: (202) 434-1690
KSandstrom@perkinscoie.com

Counsel for Association of Community Organizations for Reform Now, Project Vote, Common Cause and American Association of People with Disabilities

Elliot M. Mincberg*
Devin Willis*
PEOPLE FOR THE AMERICAN WAY FOUNDATION
2000 M Street N.W. #400
Washington, D.C. 20036
Tel: (202) 467-4999
emincberg@pfaw.org

Counsel for People For the American Way Foundation & Community of Faith Assemblies Church

Brian Mellor (MA 43072)*
1486 Dorchester Avenue
Dorchester, Ma, 02122
TEL: (617) 282-3666
FAX: (617) 436-4878
ELECTIONSCOUNSEL1@PROJECTVOTE.ORG

Counsel for Project Vote

Wendy R. Weiser*
Renée Paradis**
BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW
161 Avenue of the Americas, 12th Fl.
New York, NY 10013
Tel: (212) 998-6130
Fax: (212) 995-4550
Wendy.weiser@nyu.edu

Of Counsel

* *Pro Hoc Vice Motions Submitted*

** *Admitted in CA only*

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was electronically filed this 24th day of August, 2006. 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/ Donald J. McTigue

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Donald J. McTigue, Attorney at Law