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## PRESERVING RIGHTS OR PERPETUATING CHAOS: AN ANALYSIS OF OHIO'S PRIVATE CHALLENGERS OF VOTERS ACT AND THE SIXTH CIRCUIT'S DECISION IN SUMMIT COUNTY DEMOCRATIC CENTRAL AND EXECUTIVE COMMITTEE V. BLACKWELL

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**PRESERVING RIGHTS OR PERPETUATING CHAOS: AN  
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VOTERS ACT AND THE SIXTH CIRCUIT'S DECISION IN  
SUMMIT COUNTY DEMOCRATIC CENTRAL AND  
EXECUTIVE COMMITTEE V. BLACKWELL**

*By Dale Smith\**

I. INTRODUCTION

With the seventh highest population among the fifty states, Ohio plays a critical role in presidential elections.<sup>1</sup> In fact, no Republican presidential candidate has ever made it to the White House without winning Ohio.<sup>2</sup> Furthermore, only two Democrats since 1900 have won a presidential election without taking the Buckeye State.<sup>3</sup> Political experts believe Ohio is a microcosm of the country because issues of great importance to Ohioans typically reflect those important to the rest of the country. Additionally, Ohio cannot be classified as either urban or rural. Ohio has twenty-seven counties with populations over 100,000, yet nearly two million of its residents are involved in the agricultural industry.<sup>4</sup> Like many other states, the recent economic recession has significantly impacted Ohio through job losses in the manufacturing sector.

In the months preceding the 2004 election, both President George W. Bush and Senator John Kerry recognized the weight Ohio would carry in the presidential race. By the end of July, President Bush had already visited six times and sent more than 50,000 volunteers to Ohio.<sup>5</sup> Four of the top five media markets targeted by the presidential campaigns were

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1. See U.S. Census Bureau home page, <http://www.census.gov/popest/states/tables/NST-EST2004-01.xls> (last visited Sep. 20, 2005). Ohio's Resident population as of July 1, 2004, was 11,459,011. *Id.* The presidential candidate that wins the popular vote in Ohio receives twenty electoral votes. See Federal Election Commission home page, <http://www.fec.gov/pages/elevote.htm> (last visited Sep. 20, 2005).

2. James Taranto, *With Trends Like These . . .*, WALL ST. J., July 27, 2004, at A16.

3. Case Western Reserve University, *All Eyes on Ohio: Experts from Case Explain Why Winning the Buckeye State is Essential for the 2004 Presidential Candidates* (Aug. 3, 2004), [http://www.case.edu/news/2004/8-04/why\\_ohio.htm](http://www.case.edu/news/2004/8-04/why_ohio.htm) ("Since first casting a ballot for President in 1804, Ohioans have voted with the winning candidate 82% of the time.").

4. *Id.*

5. *Id.*

cities in Ohio and more political advertisements were purchased in Ohio than any other state except Florida.<sup>6</sup> Given the national recognition of Ohio as a bellwether state and the result of Florida's popular vote in the 2000 election, where President Bush defeated Al Gore by a mere 537 votes,<sup>7</sup> each political party acknowledged the importance of registering new voters who would support its candidate. Additionally, both parties understood the significance of preventing ineligible voters from casting their votes for the other party.

The importance of these issues in the 2004 presidential election was prevalent throughout Ohio, particularly in the Cincinnati area. Between January 2004 and the November election, approximately 84,000 new voters were registered in Hamilton County alone.<sup>8</sup> Leaders from the Republican Party recognized that a majority of new voters would be supporting John Kerry, and in the weeks preceding the election, they compiled a list of 35,000 registered Democrats suspected to be ineligible to vote.<sup>9</sup> Under Ohio law, political parties are permitted to designate challengers at each precinct to challenge voters' eligibility.<sup>10</sup>

On October 20, 2004, Secretary of State Kenneth Blackwell issued a memorandum to all county boards of elections containing guidelines for implementing Ohio's voter challenger law.<sup>11</sup> Blackwell issued the memorandum because the statute does not specify the procedures and limitations for challenging voters.<sup>12</sup> The memo instructed that challengers could challenge voters only for good cause, and if a challenger unnecessarily delayed the voting process or intimidated voters, the presiding judge of the precinct was to take immediate action.<sup>13</sup> The memo also instructed that once a voter was challenged, the presiding judge was to administer form 10-U,<sup>14</sup> which requires the voter to swear under oath that he or she will truthfully answer the

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6. *Id.*

7. See Lance deHaven-Smith, *Clearing Up the Election That Won't Die*, TALLAHASSEE DEMOCRAT, Sep. 2, 2002.

8. *Spencer v. Blackwell*, 347 F. Supp. 2d 528, 535 (S.D. Ohio 2004).

9. Jordan Green, *Cincinnati Takes on Jim Crow-Era Voter Challenger Law*, S. EXPOSURE, Nov. 9, 2004, available at <http://www.southernstudies.org/reports/OhioProvisionals.pdf> (last visited Sep. 20, 2005). This list was compiled by mailing cards to newly registered voters and marking the pieces of mail returned because the address was wrong. *Id.*

10. See OHIO REV. CODE ANN. § 3505.21 (West 2005). This statute will be discussed in further detail in Part II.

11. See *Spencer*, 347 F. Supp. 2d at 531. This law is codified as section 3505.20 of the Ohio Revised Code. This statute will be discussed in Part II.

12. See *Spencer*, 347 F. Supp. 2d at 531.

13. *Id.*

14. Form 10-U is an affidavit the challenged voter is required to sign to maintain his or her eligibility.

questions regarding his or her eligibility to vote and then sign an affidavit under penalty of a fifth-degree felony for election falsification.<sup>15</sup>

Two days after Blackwell issued the memorandum, the Hamilton County Republican Party filed for hundreds of challengers to be physically present in the polling places in order to challenge the eligibility of voters.<sup>16</sup> In previous elections, precinct executives that served as challengers for political parties in Hamilton County had not actually come to polling places or participated in eligibility challenges.<sup>17</sup> Furthermore, the Republican Party filed for 251 challengers in addition to the precinct executive challengers.<sup>18</sup> Tim Burke, chairman of the Hamilton County Board of Elections, testified that two-thirds of the additional Republican challengers filed to be present at predominantly African-American precincts.<sup>19</sup>

In response to the Republican Party's plan to send hundreds of challengers to predominantly African-American precincts, a lawsuit was filed on October 27, 2004, against Blackwell, the Hamilton County Board of Elections, and the chair and individual members of that board.<sup>20</sup> The plaintiffs in this case were Marian and Donald Spencer, a couple residing in a predominantly African-American neighborhood in Cincinnati.<sup>21</sup> The Spencers sought to enjoin the defendants from allowing any challengers other than election judges and other electors into the polling places on Election Day, alleging that the defendants had "combined to implement a voter challenge system at the polls on Election Day that discriminates against African-American voters."<sup>22</sup> Around the time the Spencers filed in the U.S. District Court for the Southern District of Ohio, the Summit County Democratic Central and Executive Committee initiated a similar suit in the U.S. District Court for the Northern District of Ohio.<sup>23</sup> This suit alleged that enforcement

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15. *Spencer*, 347 F. Supp. 2d at 531.

16. *Id.* at 530.

17. *Id.*

18. *Id.* Hamilton County estimated that 629 Republican challengers would be present at polling places on Election Day. *Id.* at 530 n.3.

19. *Id.* Evidence shown at the district court hearing for *Spencer* showed that only fourteen percent of new voters in majority white polling places would face a Republican party challenger, while ninety-seven percent of new voters in predominantly African-American voting locations would see a challenger. *Id.*

20. *See id.* at 529.

21. *Id.* Marian Spencer estimated that one hundred percent of the voters in her precinct (ward 13, precinct H) were African-American. *Id.*

22. *Id.*

23. *See Summit County Democratic Cent. & Executive Comm. v. Blackwell (Summit County II)*, 388 F.3d 547, 549 (6th Cir. 2004).

of the voter challenger law deprived Ohio citizens of their constitutional rights to due process and equal protection.<sup>24</sup>

On October 29, the Secretary of State issued a statement recommending the removal of challengers from polling places to Attorney General Jim Petro.<sup>25</sup> While Blackwell did not address the constitutionality of the voter challenger statute, he believed “a full airing of the issues [could not] be completed prior to Tuesday’s election.”<sup>26</sup> Despite this recommendation, Petro refused to exclude challengers from polling places on Election Day.<sup>27</sup> He based his decision on his duty as attorney general to defend Ohio’s laws, and he stated that Ohio citizens would have the right to challenge voters at polling places until the law was declared unconstitutional.<sup>28</sup>

On October 31, the Northern District of Ohio court granted a motion for a temporary restraining order, stipulating that “persons appointed as challengers may not be present at the polling place for the sole purpose of challenging the qualifications of other voters” on Election Day.<sup>29</sup> The next day, the Southern District of Ohio court granted a similar motion in *Spencer v. Blackwell*.<sup>30</sup> The motions granted in each case were immediately appealed, and the United States Court of Appeals for the Sixth Circuit consolidated the appeals. Around midnight on November 2, Election Day, the Sixth Circuit overturned both decisions, allowing challengers to be present at polling places.<sup>31</sup>

This Comment advocates for a new standard in Ohio regarding the right of appointed parties and private individuals to challenge the eligibility of voters at polling places. Based on the United States Constitution, federal statutes, and prior case law, the Sixth Circuit’s decision was incorrect. The Ohio regulations are not narrowly tailored to protect the compelling interest of protecting voters from intimidation at the polls. Part II of this Comment presents the federal and state law surrounding the issue. Part III analyzes the opinions from the two federal district court cases and the Sixth Circuit case that was decided the morning of the November election. Part IV examines statutes from other states that regulate voter challenges at polling places. This Part

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24. *Id.*

25. *See Spencer*, 347 F. Supp. 2d at 532.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Summit County Democratic Cent. & Executive Comm. v. Blackwell (Summit County I)*, No. 5:04CV2165, 2004 U.S. Dist. LEXIS 22539, at \*27.

30. *Spencer*, 347 F. Supp. 2d at 538.

31. *See Green*, *supra* note 9.

also explains why the Ohio statute conflicts with federal law and is unconstitutional and why the Sixth Circuit's holding in *Summit County Democratic and Central Committee v. Blackwell* was erroneous. Part V discusses the impact the Sixth Circuit's opinion had on the November election and recommends changes the Ohio legislature should make to comply with federal law.

## II. ELECTION LAW

In order to analyze the validity of the Ohio challenger statutes and the Sixth Circuit's opinion, an understanding of the existing legislation and case law governing the matter is necessary. This Part examines constitutional amendments, federal statutes, federal case law, and the relevant Ohio statutes to provide a framework for analysis.

### A. U.S. Constitutional Amendments

The Fifteenth Amendment of the United States Constitution protects the right to vote and prevents infringement of that right by the States on account of race, color, or previous condition of servitude.<sup>32</sup> Section two of the Amendment gives Congress the power to enforce this right through appropriate legislation.<sup>33</sup> The Fourteenth Amendment prohibits States from denying to any person within its jurisdiction the equal protection of the laws.<sup>34</sup>

### B. Federal Statutory Law

Pursuant to section 2 of the Fifteenth Amendment of the U.S. Constitution, Congress enacted the Help America Vote Act of 2002 (HAVA).<sup>35</sup> This act was passed in response to the problems that occurred in the 2000 presidential election.<sup>36</sup> This Comment is particularly concerned with section 15482 of HAVA, which addresses

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32. U.S. CONST. amend. XV, § 1.

33. *Id.* § 2.

34. U.S. CONST. amend. XIV, § 1.

35. See Help America Vote Act of 2002, 42 U.S.C. §§ 15301–15545 (2004).

36. See U.S. Dep't of Justice, Civil Rights Division, Voting Section home page, <http://www.usdoj.gov/crt/voting/hava/hava.html> (last visited Sep. 20, 2005). The legislative aims of HAVA are: "(1) creating a new federal agency to serve as a clearinghouse for election administration information; (2) providing funds to states to improve election administration and replace outdated voting systems; and (3) creating minimum standards for states to follow in several key areas of election administration." *Id.*

provisional voting and voting information requirements.<sup>37</sup> According to this section, if an individual claims to be a registered voter and eligible to vote in an election for federal office in the jurisdiction where he desires to vote, but his name does not appear on the list of eligible voters, he must be permitted to cast a provisional ballot.<sup>38</sup> The presiding election official at that polling place must notify the individual of this right, and the individual must execute a written affirmation declaring his eligibility.<sup>39</sup> This section of HAVA also requires the election official to promptly verify provisional ballots and provide information to the individual filing the ballot that enables the voter to find out whether or not his vote was counted and, if it was not counted, the reason behind this decision.<sup>40</sup>

### C. Federal Case Law

In addition to the federal statutory law on point, a great deal of precedent has been handed down from the United States Supreme Court governing the disenfranchisement of voters and the abridgement of fundamental rights in general. The ratification of the Fifteenth Amendment in 1870 prohibited the states from disenfranchising individuals on the basis of race.<sup>41</sup> In *Baker v. Carr*, the Supreme Court held that “[a] citizen’s right to vote free of arbitrary impairment by state action has been judicially recognized as a right secured by the Constitution . . .”<sup>42</sup> In *Yick Wo v. Hopkins* the Court referred to “the political franchise of voting” as a “fundamental political right, because it is preservative of all rights.”<sup>43</sup> The Supreme Court has also declared:

The right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.<sup>44</sup>

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37. 42 U.S.C. § 15482.

38. 42 U.S.C. § 15482(a).

39. *Id.*

40. *Id.*

41. U.S. CONST. amend. XV, § 1.

42. 369 U.S. 186, 208 (1962). In *Baker*, a group of Tennessee citizens challenged a state statute that allegedly appointed state representatives without reference to any logical formula. The Court reversed the lower court’s dismissal, holding that the complaint’s allegations of a denial of equal protection presented a justiciable constitutional cause of action upon which plaintiffs were entitled to a trial and a decision. *Id.*

43. 118 U.S. 356, 370 (1886).

44. *Reynolds v. Sims*, 377 U.S. 533, 561–62 (1964). In this case the plaintiffs alleged that,

The Court in *Harper v. Virginia State Board of Elections* held that where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications that might invade or restrain them must be closely scrutinized and carefully confined.<sup>45</sup> The Court also held that the Equal Protection Clause of the Fourteenth Amendment restrains the states from enacting voter qualifications that invidiously discriminate.<sup>46</sup>

Recent Supreme Court decisions have also reinforced the fundamental nature of the right to vote. In *Burson v. Freeman*, the Court held that allowing vote solicitation near the polls would cause voter intimidation.<sup>47</sup> The Supreme Court has also recognized that, “as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process.”<sup>48</sup> In *Bush v. Gore*, the Court stated that the individual citizen has no federal constitutional right to vote for electors of the president, but once a state legislature vests the right to vote for the president in its people, that right is fundamental.<sup>49</sup> The Court further held that, having once granted the right to vote on equal terms, the state may not, by later arbitrary and disparate treatment, value one person’s vote over that of another.<sup>50</sup> The opinion declared that equal protection of the law applies to the manner in which a law is exercised.<sup>51</sup> The Court also stated that, where state officials confer authority on local election officials, the state may have a greater burden

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despite uneven population growth from 1900 to 1960, the failure of the Alabama legislature to reapportion itself denied them equal suffrage in free and equal elections and the equal protection of the law, in violation of the Fourteenth Amendment. *Id.* at 541.

45. 383 U.S. 663, 670 (1966). In *Harper*, residents of Virginia filed an action against the voting officials, seeking a declaration that a poll tax was unconstitutional as a violation of the Equal Protection Clause. *Id.*

46. *Id.* at 666.

47. 504 U.S. 191, 206 (1992). Here the Court held that, because activity, even in a public forum, may interfere with other important activities for which the property is used, the government may regulate the time, place, and manner of the expressive activity, so long as such restrictions are content neutral, are narrowly tailored to serve a significant governmental interest, and leave open ample alternatives for communication. *Id.* at 197.

48. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)). In this case, the Court also held that if an election regulation imposes a severe burden, the regulation must be narrowly drawn to serve a compelling state interest. *Id.*

49. 531 U.S. 98, 104 (2000). *Bush v. Gore* examined whether the recount procedures adopted by the lower court were consistent with its obligation to avoid arbitrary and disparate treatment of the members of its electorate. In a per curiam opinion, the Court concluded that the lower court’s decision violated the Equal Protection Clause of the Fourteenth Amendment because the lower court failed to identify and require standards for accepting or rejecting contested ballots. *Id.*

50. *Id.* at 104–05.

51. *Id.* at 104.

to ensure the equal application of its laws to voters.<sup>52</sup> This case suggests that deprivations of voters' rights because of administrative malfeasance, disregard of the rules, or failure to apply the rules equally to all voters is against the law.<sup>53</sup>

The Supreme Court set forth a test for district courts to use when deciding constitutional challenges to specific provisions of a state's election law in *Anderson v. Celebrezze*.<sup>54</sup> A district court must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate.<sup>55</sup> It must then identify and evaluate the precise interests put forward by the state as justification for the burden imposed by its law.<sup>56</sup> The court must not only determine the strength of the state's interest, but also the extent to which those interests make it necessary to burden the voters' rights.<sup>57</sup> After balancing all of these factors, a court must then determine whether the challenged provision is constitutional.<sup>58</sup>

#### *D. Ohio Law*

Based on the text of HAVA, the Fourteenth and Fifteenth Amendments of the United States Constitution, and the Supreme Court decisions that interpret those amendments, any state attempting to challenge the eligibility of its voters must be precise in both statutory language and application. This section examines the language of the Ohio statutes applicable to determine whether they comply with federal guidelines.

Section 3505.20 of the Ohio Revised Code (Voter Challenger Statute) declares that any person attempting to vote at a polling place may have his or her eligibility challenged by any challenger, any elector then lawfully in the polling place, or any judge or clerk of elections.<sup>59</sup> If a voter is challenged, the presiding judge administers an oath to the voter,

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52. *Id.* at 109.

53. See Barry H. Weinberg & Lyn Utrecht, *Problems in America's Polling Places: How Can They Be Stopped*, 11 TEMP. POL. & CIV. RTS. L. REV. 401, 434-35 (2002).

54. 460 U.S. 780, 789 (1983). In this case, an independent candidate in the presidential election challenged an Ohio statute the preventing independent candidates from declaring their eligibility after a certain date. The Court set forth the standard for determining the constitutionality of statutes regulating the election process. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. OHIO REV. CODE ANN. § 3505.20 (West 2005).

and the election judges then ask that individual a series of questions depending on the basis for the challenge.<sup>60</sup> The statute further requires that the presiding judge shall put forth such other questions to the challenged party as necessary to test that potential voter's qualifications.<sup>61</sup> If the person challenged refuses to answer any question, is unable to answer a question, or refuses to sign his or her name, or if for any other reason a majority of the judges believes the person is not entitled to vote, the judges shall refuse the person a ballot.<sup>62</sup>

Section 3505.21 of the Ohio Revised Code (Appointment of Challengers Statute) governs the appointment of challengers at polling places.<sup>63</sup> This statute allows any political party supporting candidates to be voted upon at that election and any group of five or more candidates to appoint challengers at polling places.<sup>64</sup> This section requires political parties appointing challengers to notify the board of elections of the names and addresses of its appointees and the polling places at which they shall serve not less than eleven days before the election.<sup>65</sup> The statute requires individuals appointed as challengers to take an oath that they will not cause undue delay and will not disclose how any elector has voted in that election.<sup>66</sup>

Section 3505.22 of the Ohio Revised Code (Impersonating Voter Statute) bestows upon any precinct officer, challenger, or other elector the ability to question the right to vote of another individual if the questioning party believes that individual is impersonating an elector.<sup>67</sup> If, in the opinion of a majority of the precinct officers, the signature is not that of the person who signed such name in the registration forms, then such person may be refused a ballot.<sup>68</sup> The individual who is

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60. *Spencer v. Blackwell*, 347 F. Supp. 2d 528, 530 (S.D. Ohio 2004). Section 3505.20 of the Ohio Revised Code instructs that a person may be challenged on the grounds that (1) he or she is not a citizen, (2) he or she has not resided in Ohio for thirty days immediately preceding the election, (3) he or she is not a resident of the county or precinct where he or she has arrived to vote, or (4) he or she is not of legal voting age.

61. OHIO REV. CODE ANN. § 3505.20.

62. *Id.*

63. *Id.* § 3505.21.

64. *Id.*

65. *Id.*

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

67. *See* OHIO REV. CODE ANN. § 3505.22.

68. *Id.*

refused a ballot may appeal that decision immediately to the board of elections.<sup>69</sup>

### III. SPENCER AND SUMMIT COUNTY

This Part analyzes the opinions of the two district court cases ordering preliminary injunctions to prevent challengers from being present at polling places. It then examines the Sixth Circuit ruling handed down the morning of Election Day that reversed the district courts' decisions and allowed for implementation of the Voter Challenger Statute.

#### A. District Court Holdings

Judge Susan J. Dlott of the U.S. District Court for the Southern District of Ohio based her decision in *Spencer* on an analysis of the four factors considered in determining the appropriateness of a preliminary injunction.<sup>70</sup> When examining the likelihood of success on the merits, the court acknowledged that the polling places faced an extraordinary and potentially disastrous risk of intimidation and delay based on the number of newly registered voters and the presence of inexperienced challengers.<sup>71</sup> The court determined that this delay and intimidation could severely burden the right to vote, and that prevention of intimidation was a compelling state interest.<sup>72</sup> It then considered whether the regulation imposed by the Voter Challenger Statute was narrowly tailored to serve this purpose.<sup>73</sup> The court concluded that the challengers at polling places had the same purpose as the election judges, and because election judges are knowledgeable and experienced in identifying potentially ineligible voters, a law allowing the disruption of the system by individuals with no experience in the process is not narrowly tailored.

The court discussed the additional factors considered when deciding a motion for a preliminary injunction. However, it primarily based its decision on the plaintiffs' showing of substantial likelihood of success

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69. *Id.*

70. *Spencer v. Blackwell*, 347 F. Supp. 2d 528, 533 (S.D. Ohio 2004). Pursuant to *Leary v. Daeschner*, 228 F.3d 729, 736 (6th Cir. 2000), the court considers the following factors: "(1) whether the movant has a 'strong' likelihood of success on the merits; (2) whether the movant would otherwise suffer irreparable injury; (3) whether issuance of a preliminary injunction would cause substantial harm to others; and (4) whether the public would be served by issuance of a preliminary injunction."

71. *Spencer*, 347 F. Supp. 2d at 535.

72. *Id.*

73. *Id.* at 536-37.

on the merits on the ground that allowing challengers at polling places is unconstitutional.<sup>74</sup>

Judge John R. Adams of the U.S. District Court for the Northern District of Ohio advanced similar justifications when deciding the *Summit County* case. However, the Northern District opinion contained an in-depth analysis to determine whether the standing requirement was met.<sup>75</sup> The court decided that, because individual voters were named as plaintiffs, and because voters faced an imminent and particularized risk of the deprivation of their constitutionally protected equal protection and due process rights, the plaintiffs had the requisite standing to pursue the claim.<sup>76</sup>

When analyzing the factors for a preliminary injunction, the court recognized that preventing election fraud is a compelling state interest, but it determined that the Voter Challenger Statute was not narrowly tailored to serve that interest.<sup>77</sup> The court reasoned that because election judges already have the power to challenge potential voters and because Ohio has a process for handling voter challenges prior to Election Day,<sup>78</sup> no additional challengers were necessary at polling places.<sup>79</sup>

The court went on to recognize that voters have a fundamental right to participate in elections, but that no fundamental right to challenge other voters exists.<sup>80</sup> It held that if challengers were permitted at polling places significant harm was substantially likely to occur not only to voters, but also to the voting process as a whole.<sup>81</sup> The court speculated that random challenges without cause by one political party could result in retaliatory challenges by the other party, giving rise to chaos and a level of voter frustration that would turn qualified electors away from the polls.<sup>82</sup>

### B. Sixth Circuit Holding

The U.S. Court of Appeals for the Sixth Circuit consolidated the appeals for the two district court cases and issued one ruling regarding

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74. *Id.* at 537.

75. *Summit County Democratic Cent. & Executive Comm. v. Blackwell (Summit County I)*, No. 5:04CV2165, 2004 U.S. Dist. LEXIS 22539, at \*\*10–15 (N.D. Ohio Oct. 31, 2004).

76. *Id.* at \*15.

77. *Id.* at \*\*20–21.

78. *See* OHIO REV. CODE ANN. § 3505.19 (West 2005).

79. *Summit County I*, 2004 U.S. Dist. LEXIS 22539, at \*21.

80. *Id.* at \*22.

81. *Id.* at \*24.

82. *Id.* at \*25.

the motion for an emergency stay of the district court orders.<sup>83</sup> A three-judge panel consisting of Judges John Rogers, James Ryan, and R. Guy Cole, Jr. heard the appeal.<sup>84</sup> In a 2-1 decision, the panel stayed the two district court orders.<sup>85</sup> The panel issued three separate opinions.<sup>86</sup> This section examines each opinion.

When addressing the standing requirement, Judge Rogers determined that there was a nonspeculative possibility that voters would face delay and inconvenience when voting.<sup>87</sup> Based on this possibility, he held that the plaintiffs had met the standing requirement.<sup>88</sup> However, when examining the merits of the claim, Judge Rogers concluded that the possibility of longer lines and confusion at polling places did not amount to the severe burden upon the right to vote that required the statute to be declared unconstitutional.<sup>89</sup> This opinion also held that the policy considerations in favor of allowing registered voters to vote freely did not outweigh either the state's right to prevent ineligible voters from casting ballots or the public interest in the smooth and effective administration of voting laws.<sup>90</sup> Based on these considerations, he granted the motion to stay the district court orders.<sup>91</sup>

The concurring opinion of Judge Ryan reasoned that the motion should be stayed because the plaintiffs did not show that they had met the standing requirement.<sup>92</sup> This opinion stated that the Voter Challenger Statute had been on the books in Ohio for decades, and the problems of voter intimidation, chaos, confusion, and inordinate delay had never occurred in previous elections.<sup>93</sup>

In his dissent Judge R. Guy Cole, Jr. reasoned that because the State has other measures in place to prevent voter fraud at the polls balancing the competing interests in a vacuum was improper.<sup>94</sup> This opinion also recognized the plans of Republican challengers to target precincts with predominantly African-American voters without any legal restrictions

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83. See *Summit County Democratic Cent. and Executive Comm. v. Blackwell (Summit County II)*, 388 F.3d 547 (6th Cir. 2004).

84. See Edward B. Foley, *Sixth Circuit Opinions in Polling Place Challenges Cases: A Preliminary Analysis* (Nov. 2, 2004), <http://moritzlaw.osu.edu/electionlaw/analysis/041102a.html>.

85. *Id.*

86. *Id.*

87. *Summit County II*, 388 F.3d at 550.

88. *Id.*

89. *Id.* at 551.

90. *Id.*

91. *Id.*

92. *Id.* (Ryan, J., concurring).

93. *Id.* at 552.

94. *Id.* (Cole, J., dissenting).

and maintained that the court should have erred on the side of protecting those exercising the right to vote.<sup>95</sup>

Judge Cole referred to the evidence cited by the district courts supporting the conclusion that permitting voter challenges could lead to suppression, intimidation, and chaos at polls.<sup>96</sup> He then illustrated his concern with the following hypothetical situation. Hundreds of Republican lawyers arrive at polling places to challenge voters followed by hundreds of Democratic lawyers to challenge those challenges, a situation he described as a “recipe for confusion and chaos.”<sup>97</sup> Judge Cole also argued, “voter intimidation is likely [here] because the partisan operatives at the polls will be challenging the right to vote itself, rather than merely campaigning for a particular candidate or issue.”<sup>98</sup> He concluded by stating that the citizens of Ohio should have the right to vote without threat of suppression, intimidation, or chaos created by partisan politics.<sup>99</sup>

#### IV. DISCUSSION

This Part surveys a sample of laws from other states and analyzes the procedural safeguards that are in place to ensure that the rights of the voter are not infringed upon. It then examines the inherent conflicts between the Voter Challenger Statute in Ohio and federal law discussed in Part II. Finally, this Part discusses the flaws in the reasoning of the Sixth Circuit’s ruling and argues that the outcome should have been different.

##### A. *Statutes from Other Jurisdictions Regulating the Right to Challenge Voters*

This section examines statutes from a sample of states and compares these statutes to Ohio’s law regarding voter challenges and the right of voters to cast provisional ballots. The section concludes that the Ohio statutory provisions do not provide adequate safeguards to prevent foreseeable problems from occurring at polling places.

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95. *Id.*

96. *Id.* at 553. In *Spencer*, Judge Dlott of the U.S. District Court for the Southern District of Ohio heard testimony of challengers displaying an incomplete or confused understanding of the proper election procedures, relevant statistics as to the racial population of certain counties that were targeted, and the lack of guidelines regarding how to deal with challenges—and found that this was likely to lead to voter intimidation. *Id.*

97. *Id.* at 554.

98. *Id.*

99. *Id.* at 555.

Arizona law permits the county chairman of each political party to designate a party representative for each polling place to act as a challenger. When the eligibility of a voter is challenged, election officials determine whether the challenged party is registered in that precinct.<sup>100</sup> If it appears that the challenged person is registered, the officials will then ask the person to take an oath declaring his eligibility to vote and ask the person questions material to the challenge.<sup>101</sup> If the person challenged refuses to be sworn or affirmed, or refuses to answer questions material to the challenge, the person is still entitled to cast a provisional ballot.<sup>102</sup> The validity of this provisional ballot is determined at a later date.<sup>103</sup> Unlike Ohio's statute, Arizona's law allows any voter to fill out a provisional ballot, even if the elector refuses to take an oath declaring his eligibility.

In California, only a member of that precinct's board of elections may challenge a voter.<sup>104</sup> California law also requires that voter challenges only be made under certain circumstances set forth in the statute.<sup>105</sup> In addition to the statute regulating voter challenges, California has another statute stating, "Any doubt in the interpretation of the law shall be resolved in favor of the challenged voter."<sup>106</sup> Unlike the Ohio statute, which permits challenges from any eligible voter, California law requires that voter challenges come directly from precinct officials. This ensures that the party making the challenge is familiar with the guidelines of voter challenges. The California statute also categorizes grounds for challenging a vote, unlike the laws in Ohio and other jurisdictions that allow a party to challenge for "good cause," but provide no guidelines. California also ensures that any ambiguity in the enforcement of the law will not act to disenfranchise the voter. Ohio has no such law protecting voters from ambiguous interpretations of the law.

Georgia law allows any voter to challenge the eligibility of any other voter whose name appears on the list of electors.<sup>107</sup> However, this law

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100. ARIZ. REV. STAT. ANN. § 16-592 (2001).

101. *Id.*

102. *Id.*

103. *Id.* § 16-584.

104. CAL. ELEC. CODE § 14240 (West 2004).

105. *See id.* The challenge can only be made if the board member has reason to believe:

- (1) That the voter is not the person whose name appears on the list of voters.
- (2) That the voter is not a resident of the precinct.
- (3) That the voter is not a citizen of the United States.
- (4) That the voter has voted that day.
- (5) That the voter is presently on parole for conviction of a felony.

*Id.*

106. *Id.* § 14251.

107. GA. CODE ANN. § 21-2-230 (2005).

requires that the challenge be made in writing and distinctly specify the grounds for the challenge.<sup>108</sup> Upon the filing of a challenge, the board of registrars meets immediately to determine whether probable cause exists to sustain a challenge.<sup>109</sup> If the registrars find probable cause, the challenged party has a right to answer the challenge at that time, or cast an absentee ballot and wait for a hearing to determine the validity of his vote.<sup>110</sup> At this hearing, the challenging party still has the burden of proving that the voter is not eligible.<sup>111</sup> Either side can appeal the decision made by the registrars at this hearing to the superior court.<sup>112</sup> While Georgia law does not place limitations on the source of the voter challenge, it is the only state examined that requires voter challenges be reduced to writing. This helps ensure that challenges will not be made arbitrarily because the challenger must also state adequate grounds for the challenge. Unlike Ohio, Georgia law guarantees the challenged voter's right to cast a provisional ballot while the challenge is pending. Georgia also offers an appellate process to voters whose right is initially denied.

Illinois law permits election judges, pollwatchers, or any eligible voter to challenge the status of any other voter.<sup>113</sup> If the challenge is sustained by a majority of the election judges, then the voter challenged still has the opportunity to cast a provisional ballot, so long as the challenged party signs an affidavit affirming his eligibility to vote.<sup>114</sup> A person casting a provisional ballot may ascertain whether the provisional vote was counted and, if not counted, the reason it was not counted.<sup>115</sup> Illinois law gives local election boards the authority to design its own provisional voting verification system, but stipulates that the system must be in compliance with HAVA.<sup>116</sup> The Illinois regulations for voter challenges are similar to the laws in Ohio. However, the Illinois law on provisional voting verification systems strictly complies with the requirements of HAVA, and therefore does not attempt to supercede federal law. This is an example of the minimum protections a state must provide in order to comply with federal law.

South Carolina law permits voter challenges by watchers, electors, or

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108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* § 23-2-229.

112. *Id.*

113. 10 ILL. COMP. STAT. ANN. 5/18A-5 (West 2004).

114. *Id.*

115. *Id.*

116. *Id.*

managers,<sup>117</sup> but stipulates the circumstances for which a challenge can be made.<sup>118</sup> Once a person is challenged, that person must insist they are an eligible voter in order to receive a provisional ballot.<sup>119</sup> The voter then fills out the provisional ballot, and the ballot will be placed in an envelope and kept separate from the rest of the ballots.<sup>120</sup> If the challenger cannot offer adequate evidence that the person is not eligible to vote, the provisional ballot is taken out of its envelope and commingled with the other ballots.<sup>121</sup> South Carolina law complies with the HAVA provision entitling any person willing to take an oath declaring his eligibility to vote to a provisional ballot. However, like the Ohio and Georgia statutes, the South Carolina regulation places no limitation the source of the challenge. A measure such as this ensures that a voter will be allowed to cast a ballot but does not guarantee that the voter will be free from undue delay.

In Texas, only persons admitted to vote and precinct election officials are permitted to be within the polling place when the election is being conducted.<sup>122</sup> Previously, Texas had a statute permitting election officials, watchers, or other persons to challenge the eligibility of a voter.<sup>123</sup> However, this act has since been repealed.<sup>124</sup> Every voter is required to provide a statement of residence.<sup>125</sup> A voter may only be challenged if that party refuses to submit a statement of residence or if the voter's name does not appear on a poll list.<sup>126</sup> However, any party that is not permitted to vote is entitled to cast a provisional ballot if that person executes an affidavit stating his eligibility to vote in that precinct.<sup>127</sup> The Texas statute eliminates the possibility that challenges will be arbitrarily applied by requiring every voter to submit a statement declaring his residence. Even if a voter is unable or unwilling to declare his residence he will be permitted to cast a provisional ballot, in accordance with HAVA.

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117. See *Greene v. S.C. Election Comm'n*, 445 S.E.2d 451 (S.C. 1994).

118. See S.C. CODE ANN. § 7-13-830 (2005). The vote can be challenged based on the person's right to vote in that precinct, qualifications to vote, or the absence of his or her name on the voter registration list and the inability of the election commission to verify that the voter is registered to vote in that precinct.

119. *Id.*

120. *Id.*

121. *Id.*

122. TEX. ELEC. CODE ANN. § 61.001 (Vernon 2004).

123. See *id.* § 61.010.

124. Law of Sep. 1, 1997, Chs. 1078, 1349 (repealed Jan. 1, 2004).

125. § 63.0011.

126. See *id.* § 61.001.

127. *Id.* § 61.011.

In Virginia, any qualified voter may challenge the vote of any person who is listed on the pollbook but is known or suspected not to be a qualified voter.<sup>128</sup> If the challenged person insists that he or she is a qualified voter and the challenge is not withdrawn, one of the election officers shall give the voter a form containing a sworn statement for that person to sign.<sup>129</sup> So long as the challenged person signs the statement, he or she will be permitted to vote on the voting system used at that precinct.<sup>130</sup> The Virginia statute, like the Illinois statute, places no limitation on which party may challenge the voter. However unlike the Ohio statute, Virginia and Illinois guarantee that any person who takes an oath declaring his eligibility cannot be entirely disenfranchised.

Examining these various regulations shows that many states value the rights of third parties to challenge the eligibility of voters. However, every state examined provides at least one procedural safeguard that Ohio does not offer for the protection of its voters. California and Texas require voter challenges to come from qualified election officials. These two states also categorize the grounds for which a challenge can be sustained, rather than allowing challenges “for cause.” In Georgia, Illinois, South Carolina, and Virginia a voter cannot be unconditionally denied the right to cast a provisional ballot under any circumstances. This strictly complies with the HAVA provision that Ohio has chosen to ignore. These states also guarantee that a voter will have the opportunity to provide evidence supporting his eligibility before the state declares his ballot invalid.

Of the statutes examined, Georgia was the only state that required the challenge to be in writing. This measure forces a challenger to state the grounds for the contest, protecting voters from arbitrary challenges. The Georgia statute also provided the most extensive appeals process of the states from the sample. California, by passing a law that resolves any doubt in favor of the voter, recognizes that voting is a fundamental right and that voters should not be disenfranchised in the event of ambiguity.

### *B. Conflict Between Ohio Law and Federal Authority*

As discussed in Part II, the Fifteenth Amendment of the United States Constitution prevents states from infringing on the right to vote on account of race and gives Congress the power to enforce this right

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128. VA. CODE ANN. § 24.2-651 (Michie 2004).

129. *Id.*

130. *Id.*

through appropriate legislation.<sup>131</sup> Based on this right, Congress enacted HAVA, which includes a section governing provisional voting requirements.<sup>132</sup> This section requires that an individual who claims to be an eligible voter must be permitted to cast a provisional ballot, even if his name does not appear on a list of eligible voters for that precinct.<sup>133</sup> This section of HAVA also requires an election official to verify the ballot and give the voter contact information to determine whether his vote was counted.<sup>134</sup>

Despite the precise and unambiguous language contained in this section of HAVA, the Ohio Voter Challenger Statute permits judges at polling places to refuse a ballot to a party “if for any other reason a majority of the judges believes the person is not entitled to vote . . . .”<sup>135</sup> The language of the Ohio statute unquestionably conflicts with, and is thus superseded by, the relevant section of HAVA. Based on this facial violation of a federal statute on point, this portion of the Voter Challenger Statute should be declared invalid.

While certain provisions of the Voter Challenger Statute clearly violate HAVA, no federal law on point prohibits challengers from being present at polling places on Election Day. Therefore, it is necessary to examine whether this statute is overreaching on its face and whether the statute permits the implementation of the measure in a manner that should be found unconstitutional.<sup>136</sup>

Case law handed down from the Supreme Court has established that the right to vote is fundamental, and that any alleged infringement of that right must be carefully scrutinized.<sup>137</sup> Furthermore, *Anderson v. Celebrezze* held that determining the constitutionality of an election law requires a district court to balance the magnitude of the injury asserted by the voter against the interest of the state and the extent to which the burden is necessary to protect the state’s interest.<sup>138</sup> The next step in determining whether the Ohio Voter Challenger Statute is constitutional is to analyze whether the law is narrowly tailored to fit Ohio’s interest in preventing election fraud.

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131. U.S. CONST. amend. XV, §§ 1–2.

132. See Help America Vote Act of 2002, 42 U.S.C. §§ 15301–15545 (2004).

133. See *id.* § 15482(a).

134. *Id.*

135. OHIO REV. CODE ANN. § 3505.20 (West 2005).

136. See *Bush v. Gore*, 531 U.S. 98 (2000) (holding that equal protection of the law applies to the manner in which the law is executed).

137. See *Baker v. Carr*, 369 U.S. 186 (1962); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Reynolds v. Sims*, 377 U.S. 533 (1964); *Harper v. Va. State Bd. of Elections*, 383 U.S. 663 (1966).

138. 460 U.S. 780, 789 (1983).

Ohio law gives election judges the authority to challenge the qualifications of voters on Election Day.<sup>139</sup> Furthermore, any qualified elector may challenge the eligibility of any other voter at any time during the year.<sup>140</sup> However, a challenge that takes place prior to Election Day requires the challenger to state the ground upon which the contest is made.<sup>141</sup> The presence of election officials at the polls and ability to challenge the eligibility of voters before an election takes place are evidence of other safeguards Ohio has in place to prevent voter fraud. Based on these safeguards the statute is not narrowly tailored to fit this interest.

The Ohio Voter Challenger Statute must also be analyzed to determine whether its implementation violates the Constitution or federal law. The Fourteenth Amendment prohibits states from denying individuals equal protection of the laws.<sup>142</sup> The Fifteenth Amendment prevents infringement by the states of the right to vote on account of race.<sup>143</sup> In *Bush v. Gore*, the Supreme Court held that a state may not value one person's vote over that of another.<sup>144</sup> This case also states that failure to apply rules equally to all voters is unconstitutional.<sup>145</sup>

The Ohio voter challenger law contains no requirement that challenges take place in uniformity across county or precinct lines. This characteristic is evidenced by testimony from the *Spencer* case that established that two-thirds of the 251 additional challengers in Hamilton County were to be stationed at predominantly African-American precincts.<sup>146</sup> Based on this plan of implementation, the Ohio statutes leave the door open for disparate treatment across racial lines, violating the Fourteenth and Fifteenth Amendments. Furthermore, one could argue that the longer lines caused by the presence of challengers at polling places is an indication that the state values the votes of citizens in certain precincts less than citizens in precincts where challengers are not present. By limiting the source of challenges to election officials only, Ohio could ensure that challenges are consistent across precinct lines.

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139. See *Summit County Democratic Cent. & Executive Comm. v. Blackwell (Summit County I)*, No. 5:04CV2165, 2004 U.S. Dist. LEXIS 22539 (N.D. Ohio Oct. 31, 2004); OHIO REV. CODE ANN. § 3505.20 (West 2004).

140. § 3505.19.

141. *Id.*

142. U.S. CONST. amend. XIV, § 1.

143. U.S. CONST. amend. XV, § 1.

144. *Bush v. Gore*, 531 U.S. 98, 104–05 (2000).

145. *Id.*

146. *Spencer v. Blackwell*, 347 F. Supp. 2d 528, 530 (S.D. Ohio 2004).

C. *The Flawed Reasoning of the Sixth Circuit*

The ruling of the Sixth Circuit panel, which was released only hours before the polls opened on November 2, 2004, overturned the rulings of the district courts and opened the gates for private challengers at polling places. This section examines the reasoning behind the majority and concurring opinions and argues that these opinions are fundamentally flawed. This section also discusses the dissenting opinion of Judge Cole and advocates that the majority should have taken this stance.

The opinion of Judge Rogers began by refuting the plaintiffs' argument that a more narrowly tailored approach was available.<sup>147</sup> Judge Roberts asserted that this claim was not likely to succeed on its merits because the challengers could only initiate the inquiry process and that precinct judges were responsible for carrying out the challenge.<sup>148</sup> However, Judge Rogers failed to recognize that the presence of precinct judges at polling places made the function performed by private challengers unnecessary. These precinct judges are appointed by the local elections boards, which have an interest in preserving the integrity of the voting process.<sup>149</sup> Furthermore, while precinct judges and other election officials have specific training and detailed knowledge of election law,<sup>150</sup> the Appointment of Challengers Statute allows any eligible voter to serve as a private challenger.<sup>151</sup> This opinion ignored evidence presented to the district court in *Spencer v. Blackwell* establishing that less than one-third of the registered Republican challengers in Hamilton County attended the training session for challengers that was held prior to Election Day.<sup>152</sup> Additionally, while the memorandum written from Secretary of State Blackwell to challengers stipulated that challenges must be made for "good cause," it offered no guidelines defining a good faith challenge.<sup>153</sup>

The opinion went on to reason that employing this procedure may cause longer lines at polling places resulting from delay and

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147. *Summit County Democratic Cent. & Executive Comm. v. Blackwell (Summit County II)*, 388 F.3d 547, 551 (6th Cir. 2004).

148. *Id.*

149. *See* OHIO REV. CODE ANN. § 3501.22 (West 2005). This statute stipulates the process a county board of elections follow to appoint precinct judges.

150. *See id.* This statute requires elections board members to carefully examine the qualifications of each potential precinct judge. *Id.*

151. *See id.* § 3505.21.

152. *Spencer v. Blackwell*, 347 F. Supp. 2d 528, 532 (S.D. Ohio 2004). Drew Hicks, an attorney and registered Republican challenger testified to the district court that approximately two hundred people attended a training session held on October 31 for challengers. *Id.*

153. *See id.* at 531.

confusion.<sup>154</sup> However, having to endure longer lines at the polls did not amount to the type of severe burden that would require the procedure be declared unconstitutional.<sup>155</sup> This rationalization fails to acknowledge that the delay and confusion are byproducts of an unnecessary procedure. As Judge Cole points out in his dissent, each polling place is equipped with election officials and election judges to challenge potential voter fraud.<sup>156</sup> Permitting private challengers to contest voter eligibility at polls essentially allows unqualified people to perform a function that can be executed by qualified people and creates additional chaos without justification. Judge Rogers' opinion was based primarily on the state's interest in not having to change its elections rules at the last minute<sup>157</sup> rather than a careful analysis of the Voter Challenger Statute and the manner in which the political parties planned to implement the statute.

Judge Ryan, in his concurring opinion, based his decision on the theory that the plaintiffs had no standing because their injury was not "actual or imminent," but rather "conjectural or hypothetical."<sup>158</sup> He stated that the Voter Challenger Statute had been on the books in Ohio for decades and that the injury asserted by the plaintiffs had never surfaced in previous elections.<sup>159</sup> Furthermore, he claimed that the plaintiffs offered no evidence that the injury alleged by the plaintiffs would occur on Election Day.<sup>160</sup> However, this statement ignores evidence heard by the district court confirming that this would be the first election where challengers would actually come to polling places and participate in eligibility challenges.<sup>161</sup> Judge Ryan based his decision on the fact that disorder and confusion have not occurred in previous elections without acknowledging that the political parties had never sent challengers to precincts in previous elections. For this reason his opinion is fundamentally flawed.

Judge Cole began his dissenting opinion by acknowledging the

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154. *Summit County Democratic Cent. & Executive Comm. v. Blackwell (Summit County II)*, 388 F.3d 547, 551 (6th Cir. 2004).

155. *Id.*

156. *Id.* at 552 (Cole, J., dissenting).

157. *Id.* at 551 (majority opinion).

158. *Id.* at 551–52 (Ryan, J., concurring).

159. *Id.* at 552

160. *Id.*

161. *See Spencer v. Blackwell*, 347 F. Supp. 2d 528, 530 (S.D. Ohio 2004). Defendant Tim Burke testified to the district court that Hamilton County Republican and Democratic parties had traditionally filed a list of precinct executives to serve as challengers, but that those named challengers have not actually come to the polling places or participated in eligibility challenges in the past. *Id.*

historic magnitude of the case.<sup>162</sup> He noted that this election marked the first since the civil rights era where political parties targeted voting precincts with predominantly African-American voters to challenge their qualifications.<sup>163</sup> He recognized his judicial role of balancing the right to vote without undue burden against the state's right to prevent voter fraud, but asserted that where this balance is close, the courts must err on the side of those exercising the franchise.<sup>164</sup> When weighing these interests, Judge Cole found that the balance of harms was not even close.<sup>165</sup> He argued the Voter Challenger Statute is not the least restrictive means of advancing the state's interest based on the presence of election officials and election judges at polling places.<sup>166</sup> Additionally, he maintained that the harm caused by chaos and uncertainty far outweighed the slight decrease in voter fraud that would result from implementation of the statute.<sup>167</sup>

Judge Cole's opinion was the only one among the panel to recognize that casting a ballot is a fundamental right, and that federal case law requires close scrutiny of any measures that restrain this right.<sup>168</sup> In *Bush v. Gore*, the Supreme Court established that equal protection of the law applies to the manner in which a law is exercised and that a state may not apply a law to value one person's vote over another.<sup>169</sup> In cases such as this, where the state gives authority to local election officials, *Bush v. Gore* places a heightened burden on the state to ensure that the laws are applied equally.<sup>170</sup> The Ohio Voter Challenger Statute, with its broad and ambiguous language, vests the state's duty of preventing voter fraud in county elections boards and private individuals. Furthermore, the law leaves the door open for private individuals and political groups to focus its challenges upon a specific racial class. By allowing private challengers to apply the law disparately across racial lines, the Voter Challenger Statute does not provide Ohio citizens equal protection of the law, and therefore is unconstitutional.

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162. *Summit County II*, 388 F.3d at 552 (Cole, J., dissenting).

163. *Id.*

164. *Id.*

165. *Id.* at 554.

166. *Id.*

167. *Id.*

168. *See, e.g.*, *Baker v. Carr*, 369 U.S. 186 (1962); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Reynolds v. Sims*, 377 U.S. 533 (1964); *Harper v. Va. Bd. of Elections*, 383 U.S. 663 (1966).

169. *Bush v. Gore*, 531 U.S. 98 (2000).

170. *Id.*

## V. CONCLUSION

The Sixth Circuit ruling in *Summit County II* that stayed the injunctions issued by the district courts opened the door for private challengers on Election Day. However, despite the Sixth Circuit ruling, very few challenges were made to voters.<sup>171</sup> Based on publicity from these cases, the Republican Party instructed its challengers only to witness the voting process, rather than make individual challenges.<sup>172</sup> Furthermore, media exposure from the *Summit County* and *Spencer* cases resulted in increased participation among African-American voters.<sup>173</sup> Plaintiff Donald Spencer believes that if the suit had not been filed, Republicans would have been able to intimidate the African-American community, resulting in a lack of representation at the polls.<sup>174</sup>

Despite the successful turnout of African-American voters and the lack of intimidation from Republican challengers, the Ohio Voter Challenger Statute violates federal law and is unconstitutional. This regulation gives election judges discretion to deny any voter a ballot despite the language of HAVA, which requires election officials to issue provisional ballots to voters suspected to be ineligible. Furthermore, allowing private challengers to contest the eligibility of voters at polling places allows interest groups and political parties to target the eligibility of certain classes of voters. By allowing these classes to be disproportionately targeted, Ohio law does not ensure equal protection to voters and violates the Fourteenth and Fifteenth Amendments of the United States Constitution.

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171. See Jordan Green, *Challenging Jim Crow in Cincinnati*, at <http://www.counterpunch.org/green11162004.html> (Nov. 16, 2004).

172. *Id.* In an Election Day interview, Ohio Governor Bob Taft issued a statement that Republican challengers would only be witnessing the process and reporting concerns to precinct officials. *Id.*

173. *Id.*

174. *Id.* On Election Day, Donald Spencer was quoted, "We are certain that if we had not filed the suit, the Republicans might have been able to intimidate and cause a lack of representation in the African American community. We think the big turnout we had in the election may have been caused by the publicity this suit brought." *Id.*