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

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| THE NORTHEAST OHIO COALITION FOR THE HOMELESS, et al., *Plaintiffs,* | ) | Case No. C2-06-896 Judge Algenon L. Marbley CONSOLIDATED |
| OHIO DEMOCRATIC PARTY, *Intervenor-Plaintiff,* | ) | |
| v. | ) | |
| JENNIFER BRUNNER, OHIO SECRETARY OF STATE *Defendant.* | ) | |
| OHIO REPUBLICAN PARTY, et al., *Plaintiffs,* | ) | Case No. C2-08-913 Judge Algenon L. Marbley |
| v. | ) | |
| JENNIFER BRUNNER, OHIO SECRETARY OF STATE *Defendant.* | ) | |
| STATE EX REL. SKAGGS *et al.*, *Plaintiffs,* | ) | Case No. C2-08-1077 Judge Algenon L. Marbley |
| v. | ) | |
| JENNIFER BRUNNER, OHIO SECRETARY OF STATE, et al. *Defendants.* | ) | |

# ***AMICUS CURIAE*** BRIEF ADDRESSING THE CIVIL RIGHTS ACT OF 1964, 42 U.S.C. § 1971, WHICH PROHIBITS THE REJECTION OF BALLOTS BASED ON ERRORS OR OMISSIONS WHICH ARE NOT MATERIAL TO THE VOTERS' QUALIFICATIONS

Subject to the court's ruling on the Motion for Leave to file Amicus Curiae Brief Addressing the Civil Rights Act of 1964, 42 U.S.C. § 1971, which Prohibits the Rejection

of Ballots Based on Errors or Omissions which are not Material to the Voter's Qualifications, Amici submit the following:

I. Statement of *Amici* ACLU Voting Rights Project and ACLU of Ohio

The ACLU of Ohio is one of the 53 affiliates of the American Civil Liberties Union Foundation, Inc. (ACLU), a nationwide, non-profit, nonpartisan organization with nearly 550,000 members dedicated to defending the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. As part of that commitment, the ACLU and its affiliates, including the ACLU of Ohio, have been active in defending the equal right of all citizens to participate in the electoral process. The ACLU has operated a Voting Rights Project since 1966. The ACLU of Ohio has nearly 30,000 supporters and members statewide. Through the Voting Rights Project, the ACLU of Ohio, and other ACLU offices nationwide, the ACLU has provided representation to plaintiffs in literally hundreds of voting cases involving electoral processes, throughout the country, including Ohio. The attorneys for the Voting Rights Project of the ACLU have represented voters, candidates and political parties in courts within the areas covered by each of the Circuits of the United States Courts of Appeals. Together, the Voting Rights Project of the ACLU and the ACLU of Ohio have litigated several cases on behalf of Ohio voters, namely *Stewart v. Blackwell,* 5:02-cv-02028 (N.D. Ohio); *Boustani v. Blackwell*, 460 F. Supp. 2d 822 (N.D. Ohio 2006); *ACLU of Ohio v. Brunner*, 1:08-cv-00145 (N.D. Ohio 2008); *Project Vote et al. v. Madison County Board of Elections*, 1:08-cv-02266 (N.D. Ohio 2008); and *ACLU v. Taft*. 02-00766 (S.D. Ohio).

II. Discarding the provisional ballots of voters who signed but failed to print their names on the ballot envelope violates Section 1971 of the Civil Rights Act of 1964.

According to the pleadings in this case, Plaintiffs allege that provisional ballots should not be counted if a voter may have failed to print his or her name on the provisional ballot envelope, even though the board could verify a voter's identity and signature. There is no specific requirement in Ohio law requiring an individual voter to print his or her name on their provisional ballot envelope. *See* OHIO REV. CODE § 3505.181(B)(4) (in describing the procedure for handling provisional ballots, the code directs that "[i]f the appropriate local election official to whom the ballot or voter or address information is transmitted ...determines that the individual is eligible to vote, the individual's provisional ballot shall be counted as a vote in that election."). The Franklin County Board of Elections created its own envelope form for use in the 2008 general election even though a provisional ballot envelope format was prescribed by the Secretary of State. Franklin County's envelope-form states that a voter is required to print his or her own name on the form. Had the board used the Secretary's prescribed form, a poll worker would have filled out the form for the provisional voter and simply asked the voter to sign. Indeed, Madison and Union Counties use the Secretary's forms and procedures.

If Franklin County election officials were allowed to discard ballots solely because the voter declined to fill in a printed name but otherwise signed the envelope in such a way that election officials could verify the voter's identity, they would violate Section 1971 of the Civil Rights Act. Section 1971 provides that:

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

42 U.S.C. § 1971 (a)(2)(B).

Section 1971 was enacted as part of "a spurt of federal enforcement of voting rights after a long slumber ..." *Florida NAACP v. Browning,* 522 F.3d 1153, 1173 (11th Cir. 2008). "[O]ften referred to as 'the materiality provision,'" Section 1971 "was designed to eliminate practices that could encumber an individual's ability to register to vote" by prohibiting officials from blocking voters from registering or voting based on trivial clerical errors made on government paperwork. *Friedman v. Snipes,* 345 F. Supp. 2d 1356, 1370-71 (S.D. Fla. 2004)(emphasis omitted). "This was necessary to sweep away such tactics as disqualifying an applicant who failed to list the exact number of months and days in his age," *Condon v. Reno,* 913 F. Supp. 946, 949-50 (D.S.C. 1995), since "[s]uch trivial information served no purpose other than as a means of inducing voter-generated errors that could be used to justify rejecting applicants," *Florida NAACP,* 522 F.3d at 1173.

Ohio law does not make printing one's name on a ballot envelope material to any aspect of voting. OHIO CONST. ART. V, §I provides: "Every citizen of the United States, of the age of eighteen years, who has been a resident of the state, county, township, or ward, such time as may be provided by law, and has been registered to vote for thirty days, has the qualifications of an elector, and is entitled to vote at all elections." None of these requirements include having the voter print his name on the provisional ballot envelope instead of having it printed by poll workers. This is especially true when election officials are otherwise able to verify the identity and when the voter signed the envelope. Such a failure of the voter to print his name on the envelope constitutes an "other act requisite to voting," the omission of which is not "material" to determining

whether the voter is qualified to vote.[1] Furthermore, poll workers in other counties within the 15th Congressional district print the name of the provisional voter. If printing the name by the provisional voter is not needed for all voters, it cannot be required of any. Though perhaps having the voter print the name might be useful, Congress specifically stated that the requirement must be material. *See, e.g.*, *Schwier v. Cox*, 340 F.3d 1284, 1286 (11th Cir. 2003) (disclosure of Social Security number is immaterial to voter registration); *Washington Assoc. of Churches v. Reed,* 492 F. Supp. 2d at 1270-71 (requirement that state match potential voter's name, date of birth, and driver's license or Social Security digits to information in either the Social Security Administration database or the motor vehicles database before allowing that person to register to vote violates § 1971 because a failure to match such information is immaterial to eligibility). Congress sought to outlaw denying the right to vote based on unnecessary or duplicative information. Once there is evidence of qualification that is accepted as satisfactory for some voters, asking for an additional piece of information for other voters can only be acceptable under § 1971 if there is a defensible reason to question the evidence of the latter.

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[1] Though in existence in various forms since 1871, Section 1971 was strengthened by the Civil Rights Act of 1960, Pub. L. 86-449, Title VI, 74 Stat. 86 (1960), when an expansive definition of the word "vote" was added:

> When used in the subsection, the word "vote" includes all action necessary to make a vote effective ***including, but not limited to, registration or other action required by State law*** prerequisite to voting, ***casting a ballot, and having such ballot counted*** and included in the appropriate totals of votes cast with respect to candidates for public office and propositions for which votes are received in an election...

42 U.S.C. §§ 1971 (e) (emphasis added). The paragraph offended by Plaintiffs Skaggs and Ohio Republican Party's argument, § 1971(a)(2)(B), was added in the Civil Rights Act of 1964, Pub. L. 88-352, Sec. 101, 78 Stat. 241 (1964). It is significant that, in the 1964 amendments, Congress included 42 U.S.C. § 1971(a)(3)(A) specifically providing that the broad definition of "vote" quoted above from § 1971(e) applies to these additions to § 1971(a).

In enacting various voting rights statutes, Congress was concerned both with changes in implementation by local officials, regardless of what state law required, and with states adopting new discriminatory legislation when facing a court decision invalidating an existing practice. *South Carolina v. Katzenbach*, 383 U.S. 301, 314 (1966). As with the Voting Rights Act of 1965, the clear language of § 1971 is liberally construed. *United States v. McLeod*, 385 F.2d 734, 748 (5th Cir. 1967) (§ 1971 should be construed "liberally" to fulfill the protective aspect of "American Federalism"); *United States v. Mississippi*, 380 U.S. 128, 137-38 (1965) (relying on the language of the statute to reject defense argument that "otherwise qualified by law" could include laws "even though those laws were unconstitutional"); *Allen v. State Bd. of Elections*, 393 U.S. 544, 565-66 (1969) (construing various sections of the Voting Rights Act of 1965, noting that "compatible with the decisions of this Court the Act gives a broad interpretation to the right to vote, recognizing that voting includes 'all action necessary to make a vote effective,'"[2] and concluding with other indicia that Congress intended "to give the Act the broadest possible scope."). With § 1971 Congress sought to place voters on an equal footing and to remove the unequal and pretextual excuses for denial of the right to vote.

*Amici* acknowledge *McKay v. Thompson*, 226 F.3d 752 (6th Cir. 2000), in which the Sixth Circuit held that 42 U.S.C. § 1971(a)(2)(B) was directly enforceable only by the attorney general. *McKay's* one paragraph discussion of § 1971 cites the subsection, added in 1957, in which Congress gave the Attorney General the authority to enforce this statute. The court did not discuss, and presumably had not been made aware by briefing,

[2] *Allen v. State Bd. of Elections* construed the definition of "vote" found in 42 U.S.C. § 1973(l)(c)(1). The definition of "vote" in § 1971(e) is not different in any relevant respect. Both sections include the phase "all action necessary to make a vote effective."

that private litigants had enforced § 1971 since 1871, and that Congress was aware of this private enforcement when it sought to strengthen the Act by expanding this authority to include the Attorney General. As discussed immediately below, *McKay's* holding is contrary to the statutory history of the Act, precedent discussing the enforcement of federal voting rights legislation, and the decision of another circuit.[3]

*Schwier v. Cox*, 340 F.3d 1284, 1294-97 (11th Cir. 2003), discussed and disagreed with the Sixth Circuit in *McKay*. The Eleventh Circuit in *Schwier v. Cox* noted that the original version of § 1971 had been utilized by private litigants since 1871. 340 F.3d at 1295.[4] The original statute protected the right to vote only against discrimination based on race, color or previous condition of servitude. The statute thus did little more than intone the language of the Fifteenth Amendment. The statute was repeatedly amended between 1957 and 1965 to expand its coverage, essentially codifying the "freezing principle," the doctrine developed in the former Fifth Circuit to prohibit unequal

[3] Even should this Court find that there is no independent private right of action created in § 1971, parties have the ability to sue under 42 U.S.C. § 1983 to remedy a violation of their rights under § 1971. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 284 (2002) (Plaintiffs suing under § 1983 do not have the burden of showing an intent to create a private remedy because § 1983 generally supplies a remedy for the vindication of rights secured by federal statutes... Once a plaintiff demonstrates that a statute confers an individual right the right is presumptively enforceable by § 1983.). The test of whether a federal statute creates enforceable rights cognizable under § 1983 is: "First, Congress must have intended that the provision in question benefit the plaintiff. Second, the plaintiff must demonstrate that the right assertedly protected by the statute is not so "vague and amorphous" that its enforcement would strain judicial competence. Third, the statute must unambiguously impose a binding obligation on the States. In other words, the provision giving rise to the asserted right must be couched in mandatory, rather than precatory, terms." *Blessing v. Firestone*, 520 U.S. 329, 340-41 (1997). Claims under 1971 satisfy these requirements. A defendant may attempt to rebut the presumption that a statute is enforceable created through § 1983, but to do so has to show that Congress "specifically foreclosed a remedy under § 1983." *Gonzaga*, 536 U.S. at 284, n. 4 (citation omitted). The opposite occurred because Congress affirmatively strengthened the private right of action in 1957 when it added the Attorney General's authority to sue.

[4] As *Schwier v. Cox* discussed, private litigants had enforced § 1971 through suits authorized by 42 U.S.C. § 1983 since the latter was enacted in 1871. The first part of § 1971, now codified as § 1971(a)(1), was Section 1 of the Enforcement Act of 1870, ch. 113, 16 Stat. 140. Section 1983 came from the Civil Rights Act of 1871, 17 Stat. 13, § 1 (1871). *See Griffin v. Breckenridge*, 403 U.S. 88, 99 (1971). Sections 1971 and 1983 were used as the basis for striking down the white primary. *See Smith v. Allwright*, 321 U.S. 649, 651, n. 1 (1944) (quoting text of the two statutes then codified as 8 U.S.C. §§ 31 and 43); *Chapman v. King*, 62 F. Supp. 639, and n. 1 (M.D.Ga. 1945), *aff'd*, 154 F.2d 460 (5th Cir. 1946).

application of voting requirements. *United States v. Duke*, 332 F.2d 759 (5th Cir. 1964). Although there have been fewer reported cases on § 1971 since the 1960s, the chronology of amendments reveals Congress' intent to expand the law to assure full protection of the right to vote in a manner that extends to plaintiffs' claims here.

The original statute, 42 U.S.C. § 1971, now § 1971(a)(1), declares that citizens who are otherwise qualified to vote in any state "shall be entitled and allowed to vote ... without distinction of race, color, or previous condition of servitude." The Voting Rights Act of 1957, the first civil rights statute enacted since the end of Reconstruction, Pub. L. 85-315, 71 Stat. 634 (1957), added sections (b), (c) and (d) to § 1971. Section (b) protected citizens from intimidation, threats or coercion under color of law or otherwise which would interfere with their right to vote in federal elections.[5] Section (c) gave the Attorney General the authority to file civil suits for injunctive relief to enforce sections (a) and (b). And section (d) gave authority to hear private suits instituted under section 1971 to federal district courts and authorized federal courts to exercise authority "without regard to whether the party aggrieved shall have exhausted any administrative or other remedies that may be provided by law."[6]

The 1957 amendments changed the substantive protections of § 1971, expanded the ability to enforce it, and the remedies available to private citizens.[7] For instance, the

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[5] Notably, Congress did not make racial discrimination an element of § 1971(b). A plaintiff had to prove only that a defendant had an intent to interfere with his right to vote, not that the intent was specifically to discriminate on the basis of race. Sections 1971(a)(2)(A) and (B) likewise are not limited to racial discrimination.

[6] 42 U.S.C. § 1971(d); *Schwier v. Cox*, 340 F.3d at 1296. The removal of the administrative exhaustion barrier was a significant expansion for enforcement of the statute.

[7] One of the debates in 1957 was whether the Attorney General should also be authorized to file suits for damages. 1957 U.S.C.C.A.N. 1969. The final version limited suits by the Attorney General to seeking injunctive relief. *See* § 1971(c). But the 1957 Act also amended 28 U.S.C. § 1343 to add what is now

Attorney General did not have authority to sue under § 1971 until the 1957 amendments. Previously, the Attorney General could only proceed through criminal prosecution. *See* Attorney General Herbert Brownwell, Jr., letter of April 9, 1956 to the Speaker of the House of Representatives, published as part of H. Rep. No. 291 on The Civil Rights Act of 1957, 1957 U.S.C.C.A.N. 1966, at 1978-79. Brownwell sought authority to file civil suits in part because, in his words, "[criminal cases in a field charged with emotion are extraordinarily difficult for all concerned." *Id.* The committee report explains that insofar as state judicial remedies, this language was declaratory of existing law because *Lane v. Wilson*, 307 U.S. 268, 274 (1939), had settled there was no need to exhaust judicial remedies. But the committee report noted that the language dispensing with exhaustion of state administrative remedies was necessary because some courts had enforced such a requirement. H. Rep. No. 291, 85th Cong., 1st Sess, reprinted in 1957 U.S.C.C.A.N., 1966, 1975. Furthermore, the removal of the exhaustion barrier could only apply to private litigants; it was not a doctrine that could have applied to the Attorney General. *See Schwier*, 340 F.3d at 1296.

It is equally important for this Court to send a clear signal that disfranchisement by clerical error will not be tolerated. Disfranchisement of voters for imperfect paperwork inspired Congress to adopt Section 1971 of the Civil Rights Act, but unfortunately, such discriminatory (and unnecessary) policies are not simply a vestige of a far gone era. Even today, in Ohio and elsewhere, election officials have adopted a range

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§ 1343(a)(4), giving federal district courts jurisdiction to hear civil actions "by any person" "[to recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, *including the right to vote*." (Emphasis added.) *See* sec. 121 of Public Law 85-315, 71 Stat. 637. Because the Attorney General could not sue for damages according to the same 1957 legislation, these provisions cannot be reconciled with *McKay's* holding that only the Attorney General can sue to enforce § 1971.

of ministerial policies and procedures that have had the effect - if not the intent – of disfranchising voters because of trivial errors.

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

For these reasons, *amici* respectfully ask this court to declare that no ballot should be rejected based on any omission, such as a lack of voter-supplied printed name, that is not material to the voter's qualifications.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

This is to certify that a copy of the foregoing was served upon all counsel of record by means of the Court's electronic filing service on this 18th day of November, 2008.

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