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

Laura Boustani, Mutsuyo Okumura Unger, Chia-Min T. Chen, Mary Savas, Efty Simakis, Sophia Loizos, Paramjit Singh, Joseph Hajjar, Catherine Ma, Sagarika Nayak, Eduardo A. Romero, Karil Bialostosky, Dagmar Celeste, Ali AlHaddad MD, Sawsan Alhaddad MD, Gia Hoa Ryan, Margaret Wong, P.S. Murthy, Asian American Bar Association of Ohio, The Federation of India Community Association, Service Employees International Union District 1199, American-Arab Anti-Discrimination Committee, Greater Toledo Association of Arab Americans, Council on American-Islamic Relations Ohio,	)	Civil Action No. 06-2065
Plaintiffs,	)	
v.	)	
J. Kenneth Blackwell,	)	
Defendant.	)	

PLAINTIFFS' MEMORANDUM IN SUPPORT OF THEIR MOTION FOR A PRELIMINARY INJUNCTION

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STATEMENT OF THE ISSUES

Whether plaintiffs are entitled to a preliminary injunction under Fed. R. Civ. P. 65(a)(2) enjoining the enforcement of the 2006 amendment to § 3505.20(A)(4) of the Ohio Revised Code on the grounds that it imposes an undue burden on the fundamental right to vote of naturalized citizens in Ohio, requires that naturalized citizens be given disparate treatment from native-born citizens in violation of the Fourteenth Amendment to the United States Constitution and the Civil Rights Act of 1964 (42 U.S.C. § 1971 (a)(2)(A) and (a)(2)(B)), and constitutes an unconstitutional poll tax in violation of the Fourteenth and Twenty-Fourth Amendment.

SUMMARY OF THE ARGUMENT

Plaintiffs respectfully move for the entry of a preliminary injunction under Fed. R. Civ. P. 65(a)(2) enjoining the enforcement of the 2006 amendment to § 3505.20(A)(4) of the Ohio Revised Code (House Bill 3 or H.B. 3) on the grounds that it imposes an undue burden on the fundamental right to vote of naturalized citizens in Ohio and requires that naturalized citizens be given disparate treatment from native-born citizens in violation of the Fourteenth Amendment to the United States Constitution and the Civil Rights Act of 1964 (42 U.S.C. § 1971 (a)(2)(A) and (a)(2)(B)). Requiring only naturalized citizens to bear additional burdens and expense by presenting a naturalization certificate also violates the Fourteenth and Twenty-Fourth Amendments' prohibition against poll taxes in state and federal elections. In short, § 3505.20 treats naturalized citizens as though they were second-class citizens to those who are native born—a form of discriminatory treatment the Supreme Court has made clear violates the Constitution.

H.B. 3 is a massive bill and only one provision is challenged in this litigation: the new § 3505.20 of the Ohio Election Code, which subjects only naturalized citizens to special requirements if their eligibility to vote is challenged. Under the newly amended law that will take effect for the first time statewide on November 7, 2006, documentation of citizenship may now be demanded of some voters as a part of the challenge process at the discretion of poll workers. Those who are naturalized citizens are then required to produce a naturalization certificate to cast a regular ballot. In contrast, the statute does not require voters who claim to be native-born Americans to produce any documents proving their citizenship to vote and have their votes counted. The statute thus facially discriminates between naturalized and native-born citizens, subjecting the former to more stringent rules to prove their citizenship before voting.

The right to vote occupies a pre-eminent position in our constitution. "Voting is of the most fundamental significance under our constitutional structure." *Reynolds v. Sims*, 377 U.S. 533, 554 (1964); *Harman v. Forssenius*, 380 U.S. 528, 537 (1965); *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Furthermore, distinctions based on national origin, such as those that differentiate between naturalized and non-naturalized citizens, are inherently suspect and subject to strict scrutiny. *Korematsu v. United States*, 323 U.S. 214, 216 (1944); *Plyler v. Doe*, 457 U.S. 202, 217 (1982); *Schneider v. Rusk*, 377 U.S. 163, 164 (1964); *Fernandez v. Georgia*, 716 F. Supp. 1475, 1477 (M.D. Ga. 1989); *Huynh v. Carlucci*, 679 F. Supp. 61 (D.D.C. 1988); *Faruki v. Rogers*, 349 F. Supp. 723, 727 (D.D.C. 1972). *Cf. Graham v. Richardson*, 403 U.S. 365, 372 (1971) (finding that classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny and that provisions of state welfare laws

conditioning benefits on citizenship and imposing durational residency requirements on aliens violated the equal protection clause); *In re Griffiths,* 413 U.S. 717, 721-22 (1973) (state court rule restricting admission to bar to citizens of United States denied equal protection to resident aliens). Because Ohio's new challenge statute facially discriminates against naturalized citizens with respect to the fundamental right to vote, it is constitutionally suspect. And because the statute is not narrowly tailored to a compelling government interest, it should be struck down.

I. Statement of Facts

A. History of Ohio's Challenger Statute

Ohio's challenge statute originated with the first session of the General Assembly in 1803 (1 v. 80). It read in relevant part:

> That where objections are made to an elector, and in all other cases where the qualification of a person to vote is a fact unknown to either of the judges, they shall have power to examine such person on oath or affirmation, touching his qualification as an elector, which oath or affirmation either of the judges is hereby authorized to administer.

The challenger statute has long been a vehicle for discrimination. For example, as the nascent nativist movement began to gain strength, Ohio added a provision to challenge the citizenship of an elector in 1841. Later, the legislature amended the statute with a Supplementary Act in April 1868 (by 65 Ohio L. 97 and 65 Ohio L. 100-104) to create a mechanism for challenging voters who have a "distinct and visible admixture of African blood." *Monroe v. Collins*, 17 Ohio St. 665, 678 (1868). This amendment was overturned in December 1868, when the Ohio Supreme Court found the challenge procedure for people who appear multi-racial to be unconstitutional – because it impermissibly burdened one category of eligible voters, and not another. Under the law at the time, men with "pure white blood" and mixed-race men with a "preponderance of

white blood" were deemed eligible to vote. The Ohio Supreme Court recognized that the challenger law was unconstitutionally partial in demanding greater evidentiary proof of eligibility of the "preponderance" voters, but not the "pure" others. Significantly, the court also recognized that by demanding the extra proof of these voters, "in the hands of unpracticed, though honest [election] judges, the exercise of the elector's right to vote would be likely to be impeded or denied." *Id*. at 689. For these voters, the challenger law "presents them with difficulties and impediments at every step, such that, if they are not absolutely insurmountable, a quiet, peace-loving citizen, in most cases, would choose to relinquish his right to vote rather than encounter them." *Id*. at 691-92

The challenge statute is currently codified at OHIO REV. CODE § 3505.20, and prior to its amendment this year, gave rise to further claims of discrimination. In 2004, several groups of plaintiffs alleged that partisan operatives, targeting African-American precincts, intended to engage in a large-scale campaign to challenge the qualifications of voters at the polls. Three lower courts deciding the cases found that the challengers' presence would likely hinder the ability to vote in unconstitutional fashion. *See Spencer v. Blackwell*, 347 F. Supp. 2d 528 (S.D. Ohio 2004); *Summit County Democratic Cent. & Exec. Comm. v. Blackwell*, No. 04-2165, 2004 U.S. Dist. LEXIS 22539 (N.D. Ohio Oct. 31, 2004) (attached hereto as Exhibit 18); *State ex rel. Wolf v. Blackwell*, 105 Ohio St. 3d 1204 (Ohio 2004). Although several plaintiffs had alleged an Equal Protection violation, no court rendered a decision on Equal Protection grounds. The Sixth Circuit reversed in an emergency ruling issued on Election Day. *Summit County Democratic Cent. & Exec. Comm. v. Blackwell*, 388 F.3d 547 (6th Cir. 2004). The decision was fractured: one judge found that the plaintiffs had not shown a likelihood of success on the merits, one

judge found a likelihood of success and a balance of harms favoring the plaintiffs, and the third judge ruled on standing grounds and did not reach the merits at all. The panel did not reach the question whether the challenger statute, as applied, constituted a denial of equal protection.

B. House Bill 3

In 2006, the Ohio General Assembly passed House Bill 3, which (among other things) substantively amended the citizenship provisions of the Ohio challenger statute for the first time since 1841. Section 3505.20 of the Ohio Revised Code now requires that voters who are challenged at a polling place on the ground that they are not United States citizens identify what documents they have which can prove their citizenship. The statute also requires that challenged voters who claim to be naturalized citizens produce their naturalization certificate for inspection by an election judge beforehand or be denied the right to cast a regular ballot.

The provision for challenging citizenship status, included in § 3505.20, is quoted in full below. New text is underlined and text deleted from the earlier version of the statute is crossed out.

> Any person offering to vote may be challenged at the polling place ~~by any challenger, any elector then lawfully in the polling place, or~~ by any judge ~~or clerk~~ of elections. If the board of elections has ruled on the question presented by a challenge prior to election day, its finding and decision shall be final, and the presiding judge shall be notified in writing. If the board has not ruled, the question shall be determined as set forth in this section. If any person is so challenged as unqualified to vote, the presiding judge shall tender the person the following oath: "You do swear or affirm under penalty of election falsification that you will fully and truly answer all of the following questions put to you~~, touching your place of residence and~~ concerning your qualifications as an elector at this election."
>
> (A) If the person is challenged as unqualified on the ground that the person is not a citizen, the judges shall put the following questions:

> (1) Are you a citizen of the United States?
>
> (2) Are you a native or naturalized citizen?
>
> (3) Where were you born?
>
> (4) What official documentation do you possess to prove your citizenship? Please provide that documentation.
>
> If the person offering to vote claims to be a naturalized citizen of the United States, the person shall, before the vote is received, ~~either~~ produce for inspection of the judges a certificate of naturalization and declare under oath that the person is the identical person named ~~therein, or state under oath when and where the person was naturalized, that the person has had a certificate of the person's naturalization, and that it is lost, destroyed, or beyond the person's power to produce to the judges~~ in the certificate. If the person states under oath that, by reason of the naturalization of the person's parents or one of them, the person has become a citizen of the United States, and when or where the person's parents were naturalized, the certificate of naturalization need not be produced. If the person is unable to provide a certificate of naturalization on the day of the election, the judges shall provide to the person, and the person may vote, a provisional ballot under section 3505.181 of the Revised Code. The provisional ballot shall not be counted unless it is properly completed and the board of elections determines that the voter is properly registered and eligible to vote in the election.

2006 Ohio Laws File 65 (Am. Sub. H.B. 3) (codified at § 3505.20).

Before the section was amended, naturalized citizens could respond to a challenge to their citizenship at the polls either (1) by producing their naturalization papers for inspection, or (2) by stating under oath where and when they were naturalized and stating that their naturalization certificate was lost, destroyed, or beyond their power to produce. The current version of the statute eliminates the opportunity for naturalized citizens to swear an oath affirming their status in lieu of producing a naturalization certificate. Thus, under the new statute, if a naturalized citizen's eligibility to vote is challenged based on citizenship, the only way that voter may cast a regular ballot is to produce his or her certificate of naturalization on the spot at the polls. Under the revised statute, only

election judges (more commonly known as poll workers) may make a challenge. There are typically poll workers at each polling place. Any one of those poll workers has complete discretion to challenge any voter, based on citizenship or any other enumerated ground. The statute provides no standards by which the election judges are to exercise such broad discretion.

Voters who are challenged under § 3505.20 may still cast a provisional ballot, OHIO REV. CODE § 3505.181(A)(7), but there is no guarantee that that ballot will be counted. In order to cast the provisional ballot, the voter is first notified that he or she may cast a provisional ballot. § 3505.181(B). The voter then executes an affidavit before the election official stating that the voter is (1) a registered voter in the jurisdiction in which he or she desires to vote and (2) eligible to vote in that election. *Id*. at (B)(2). The voter also receives a verification statement that contains information on how the voter may verify whether his or her ballot was counted. *Id*. at (B)(5) & (6). The election official is required to indicate, on the provisional ballot verification statement "that the individual is required to provide additional information to the board of elections or that an application or challenge hearing has been postponed with respect to the individual, such that additional information is required for the board of elections to determine the eligibility of the individual who cast the provisional ballot." *Id*. at (B)(7).

The provisional voter then has ten days after the election to appear at the office of the board of elections and provide "additional information necessary to determine the eligibility of the individual who cast the provisional ballot." Id. at (B)(8). Specifically, "[f]or a provisional ballot cast under division (A)(7) of this section [challenges under § 3505.20] to be eligible to be counted, the individual who cast that ballot, within ten

days after the day of that election, shall provide to the board of elections any identification or other documentation required to be provided by the applicable challenge questions asked of that individual under § 3505.20 of the Revised Code." *Id*. at (B)(8). What forms of documentation will be considered acceptable proof of citizenship status for those who claim to be naturalized citizens is nowhere spelled out in the statute or regulation.[1] This too appears to be completely within the discretion of local election officials.

Governor Robert Taft signed House Bill 3 into law on January 31, 2006. The effective date of the new challenge rules is June 1, 2006. Thus, the first statewide implementation of these rules will be in the November 2006 general election.

C. Who Is Affected by the Amended Challenge Statute

There were approximately 165,056 naturalized citizens of voting age in the State of Ohio as of the 2000 Census, roughly 2 percent of the state's total citizen voting age population. Salling decl., tbl. 1 (declaration of Mark Salling, attached hereto as Exhibit 4). According to 2000 census data, almost half of those naturalized citizens are over 55 years old, and over 15 percent over 75 years old. *Id.* tbl. 2. Ohio's voting-age naturalized citizens are a diverse group. Approximately 60 percent are white non-Hispanics, while approximately 24 percent are Asian American, 7 percent Hispanic/ Latin, and 4 percent African-American. *Id.* tbl. 4 (relying on 2000 census data). A substantial majority of Ohio's naturalized citizens of voting age have been in the United

[1] Some counties may construe § 3505.181(B)(8) to require a naturalized citizen casting a provisional ballot at the polls under § 3505.20 to produce a certificate of naturalization – the particular "documentation required to be provided by the applicable challenge" provision of § 3505.20. Other counties may permit naturalized citizens casting a provisional ballot under § 3505.20 to demonstrate their eligibility with a passport or sworn affidavit.

States for decades. Approximately 70 percent of Ohio's naturalized citizens of voting age came to this country in 1980 or before. *Id.* tbl. 5 (relying on 2000 census data). This increases the possibility that many of those naturalized citizens will not have ready access to their certificates of naturalization.

D. The Certificate of Naturalization and the Process for Obtaining a Replacement

Certificates of naturalization are issued to persons who obtained citizenship through naturalization by the United States Citizenship and Immigration Service (USCIS) or federal courts or certain state courts. In support of this motion, Plaintiffs submit the declaration of immigration attorney, David W. Leopold (attached hereto as Exhibit 3). In his experience, not all naturalized citizens can produce their certificates of naturalization. Exhibit 3, Leopold decl., para. 7; *see also* Boustani decl., para. 6 (declaration of Plaintiff Laura Boustani, attached hereto as Exhibit 5); Celeste decl., para. 6 (declaration of Plaintiff Dagmar Celeste, attached hereto as Exhibit 6); Bialostosky decl., para. 6 (declaration of Plaintiff Karil Bialostosky, attached hereto as Exhibit 7); Chen decl., para. 6 (declaration of Plaintiff Chia-Min Chen, attached hereto as Exhibit 8); Simakis decl., para. 4 (declaration of Plaintiff Efty Simakis attached hereto as Exhibit 9); Wong decl., para. 5 (declaration of Plaintiff Margaret Wong attached hereto as Exhibit 19). The certificate is not as easily transportable as a wallet-sized driver's license; rather, it is an 8½ x 11 inch document containing an original photograph of the naturalized citizen on the bottom left quadrant. *See* Exhibit 3, Leopold decl., para. 5. Other information contained on the certificate includes: the alien registration number, date of birth, sex, height, marital status, and former nationality of the naturalized citizen. *Id.* The certificate also states: "IT IS PUNISHABLE BY U.S.LAW TO COPY, PRINT OR

PHOTOGRAPH THIS CERTIFICATE WITHOUT LAWFUL AUTHORITY." *Id.* Naturalized citizens rarely are asked to produce their certificates of naturalization and rarely carrying them on their person. *See Id.*, para. 6; *e.g.*, Unger decl., para. 5 (declaration of Plaintiff Mutsuyo Okumura Unger, whose certificate of naturalization is located in a safe deposit box in a bank in Columbus, attached hereto as Exhibit 10).

For those whose certificate of naturalization has been lost or stolen, obtaining a new one is a lengthy and cumbersome process. If a naturalized citizen's certificate of naturalization is lost, mutilated, or destroyed USCIS instructs citizens to obtain a replacement certificate of naturalization. *See* http://www.uscis.gov/graphics/howdoi/replace_cert.htm (describing the certificate of naturalization and when replacement is necessary) (last accessed Aug. 29, 2006). A new certificate may also be necessary if a naturalized citizen's name has been legally changed either through court order, marriage or divorce. *Id.* It is neither cheap, easy, nor convenient to obtain a replacement copy, or to alter it due to marriage, divorce or legal name change. A naturalized citizen must first file Form N-565 in person or by mail with the local USCIS office that has jurisdiction over the citizen's place of residence. *See* Form N-565 (attached hereto as Exhibit 1) (also located at http://www.uscis.gov/graphics/formsfee/forms/files/N-565.pdf); Exhibit 3, Leopold decl. para. 8. Ohio citizens have one district office in Cleveland[2] and two sub offices in

[2] The District has jurisdiction over the entire state of Ohio.

The Cleveland District Office services the following counties:

Allen, Ashland, Ashtabula, Auglaize, Carroll, Columbiana, Crawford, Cuyahoga, Defiance, Erie, Fulton, Geauga, Hancock, Hardin, Henry, Holmes, Huron, Lake, Lorain, Lucas, Mahoning, Marion, Medina, Mercer, Ottawa, Paulding, Portage, Putnam, Richland, Ross, Sandusky, Seneca, Stark, Summit, Trumbull, Tuscarawas, Union, Van Wert, Wayne, Williams, Wood, and Wyandot.

Cincinnati and Columbus. *See* http://www.uscis.gov/graphics/fieldoffices/alphao.htm#anchorOHIO (last accessed Aug. 29, 2006).

Additionally, Form N-565 is a complex form. If a naturalized citizen's certificate was lost, stolen, or destroyed, he or she is asked to attach a copy of the certificate if he or she has one. If a new certificate is being sought because of a name change or error in the certificate, the applicant must attach the inaccurate or old certificate. Furthermore, an applicant is required to provide information regarding where and when the first certificate was issued and the certificate's original number. To complete the application, the applicant must submit two glossy, unmounted, standard passport-style photographs in color taken within the thirty days prior to the application. *See* Exhibit 1, USCIS Form N-565.

The applicant must also pay a $220 fee for the replacement certificate. *See* Exhibit 1, USCIS Form N-565; Exhibit 3, Leopold decl., para. 8. According to USCIS's website, it has the discretion to waive the fee for an applicant "who can prove that he/she is unable to pay the fee." *See* http://www.uscis.gov/graphics/formsfee/forms/forminfo.htm#Waiver (last accessed Aug.

The Columbus Sub Office services the following counties:

Athens, Belmont, Coshocton, Delaware, Fairfield, Fayette, Franklin, Gallia, Guernsey, Harrison, Hocking, Jackson, Jefferson, Knox, Licking, Logan, Madison, Meigs, Monroe, Morgan, Morrow, Muskingum, Noble, Perry, Pickaway, Pike, Ross, Union, Vinton, and Washington.

The Cincinnati Sub Office services the following counties:

Adams, Brown, Butler, Champaign, Clark, Clermont, Clinton, Darke, Greene, Hamilton, Highland, Lawrence, Miami, Montgomery, Preble, Scioto, Shelby, and Warren.

[4] Marie Cocco, "Ohio Shenanigans," Washington Post Writer's Group, June 13, 2006, available at http://www.postwritersgroup.com/archives/cocc0613.htm.

29, 2006). This additional process is even more burdensome and time consuming, leading to inquiries into the applicant's age, financial status, employment, living arrangements, and familial relationships. *See* U.S. Citizen and Immigration Services, Fact Sheet: USCIS Fee Waiver Guidance (Mar. 29, 2004) (attached hereto as Exhibit 2) (available at http://www.uscis.gov/graphics/publicaffairs/newsrels/FeeWaiver03_29_04.pdf) (last accessed Aug. 29, 2006). "If a fee waiver request is denied, the entire application package will be returned to the applicant, who must then begin the application process again by re-filing for the benefit with the appropriate fee." *Id*. at 4.

According to USCIS, an applicant can expect to wait *up to one year* to receive a replacement certificate. *See* http://www.uscis.gov/graphics/services/natz/faq.htm#q22 (last accessed Aug. 29, 2006). Therefore, a person who is in the process of changing the names on her certificate will have surrendered her original certificate to USCIS for up to a year awaiting a replacement. A voter would thus be unlikely to receive a replacement certificate in the ten days a naturalized-citizen voter has after the time of challenge to produce a certificate to the Board of Elections.

E. The Rationale for the Amended Challenge Statute

There is little available evidence regarding the Ohio General Assembly's purpose in revising § 3505.20 to require naturalized citizens whose eligibility is challenged to produce a certificate of naturalization. In the course of the discussion of this massive bill, there appears to have been scant legislative deliberation over the reason for the revisions. One of the few places in which this provision is discussed is a recent news article, in which the bill's chief sponsor in the House, Rep. Kevin DeWine, reportedly

acknowledged that non-white citizens with foreign accents are the ones most likely to face a challenge.[4]

While the legislature was less than clear about its reasons for revising § 3505.20 to require a certificate of naturalization at the polls, the only imaginable reason for this change is to prevent illegal voting by noncitizens pretending to be naturalized citizens. There is no evidence that this is a problem in Ohio, and very little evidence of this being a problem elsewhere in the United States.

Along with this motion, Plaintiffs submit a sworn declaration from Dr. Rodolfo de la Garza, a Professor of Political Science, International Affairs, and Municipal Law at Columbia University. De la Garza decl., para. 2 (declaration of Rodolfo de la Garza, attached hereto as Exhibit 11). The author or editor of more than 17 books and 80 other publications, Dr. de la Garza is a widely recognized expert on political participation (including registration and voting) and immigration. *Id.* para. 3. Based on his extensive research in this area, Dr. de la Garza concludes that "it is extremely rare for noncitizens to attempt to vote in U.S. elections." *Id.* para. 6. The only documented instance of non-citizen voting was in a 1996 congressional election in Orange County, California, but even in that election the evidence showed that the level of non-citizen voting was so small as not to have affected the election's outcome. *Id.* para. 7. And even in that exhaustively investigated circumstance, there was no evidence that any non-citizen misrepresented his or her citizenship status after being questioned on the issue.

Dr. de la Garza also discusses a 2004 study of voting fraud in Ohio, conducted by the League of Women Voters of Ohio and the Coalition on Housing and Homelessness in Ohio, in cases of voter fraud that county prosecutors found to have merit. *Id.* para. 8; *see*

also Betti Decl. (declaration of Thomas Betti, attached hereto as Exhibit 12). That study showed a total of four reported instances of alleged voter fraud in the 2002 and 2004 Ohio elections, out of more than nine million votes cast. Exhibit 11, De la Garza decl., para. 8; Exhibit 12, Betti decl., para. 4 & Exh. A. Subsequent follow-up showed that only three incidents actually resulted in prosecutions. Exhibit 12, Betti decl., para. 4. None of the reported instances of fraud involved a non-citizen attempting to vote illegally. *Id.* para. 4.[5]

II. Discussion

A preliminary injunction should issue where plaintiffs show: (1) a substantial likelihood of prevailing on the merits of at least one of their claims; (2) that the plaintiffs and other Ohio voters will suffer irreparable harm to their rights as voters unless injunctive relief is granted; (3) that the threatened injury to the rights of the plaintiffs and other Ohio voters outweighs whatever damage the proposed injunction may cause the opposing party; and (4) the grant of an injunction would not adversely affect the public interest. *Summit County Democratic Central and Executive Committee v. Blackwell*, 388 F.3d 547, 550 (6th Cir. 2004). As explained below, all of these criteria are satisfied in this case.

[5] There was one instance in which a non-U.S. citizen was reportedly believed to have tried to vote, but that instance was not prosecuted because the voter was apparently unaware of voting requirements, and specifically of the requirement that only U.S. citizens may vote. Betti Dec., para. 5.

A. Plaintiffs Are Likely to Prevail on the Merits

1. Because the New OHIO REV. CODE § 3505.20 Discriminates Against Naturalized Citizens with Respect to the Fundamental Right To Vote, Plaintiffs Are Highly Likely to Prevail on Their Equal Protection Claim

a. Courts Apply Strict Scrutiny to Laws That Discriminate Based on National Origin, Including Those That Subject Naturalized Citizens to Differential Treatment.

The Supreme Court has consistently rejected classifications that differentiate between naturalized and native-born citizens, even in cases that do not involve the fundamental right to vote. Government action that classifies citizens on the grounds of national origin is inherently suspect, subject to strict scrutiny and thus can be sustained only if necessary to achieve a compelling state interest. *Graham v. Richardson*, 403 U.S. 365, 372 (1971); *Korematsu v. United States*, 323 U.S. 214, 216 (1944). Discrimination on the basis of national origin is subject to strict scrutiny and can be sustained only if there is a close relationship between the classification and promotion of a compelling interest, the classification is necessary to achieve that interest, and the means or procedures employed are precisely tailored to serve that interest. *Plyler v. Doe*, 457 U.S. 202, 217 (1982); *In re Griffiths*, 413 U.S. 717, 721-22 (1973). As shown below, courts applying equal protection analysis to laws that distinguish between naturalized and native-born citizens have emphasized that such distinctions are almost always based on irrational prejudice. Therefore, although Ohio may have a legitimate interest in preventing non-citizens from voting, placing extra burdens on naturalized citizens runs afoul of the Constitution.

In *Schneider v. Rusk*, 377 U.S. 163 (1964), for example, the Court struck down a federal statute that subjected naturalized and native-born citizens to differential treatment,

denaturalizing those in the former category if they lived in their country of origin for more than three consecutive years. *Id.* The Court concluded that this statute rested on the "the impermissible assumption that naturalized citizens as a class are less reliable and bear less allegiance to this country than do the native born." *Id.* at 168. It specifically declined to apply rational basis review, instead holding that the Constitution "forbid[s] discrimination that is 'so unjustifiable as to be violative of due process.'" *Id.* (quoting *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954)).[6] By treating naturalized and native-born citizens differently, the Act created an unconstitutional "second class" status for naturalized citizens. *Id.* at 169; *cf. Knauer v. United States*, 328 U.S. 654, 658 (1946) ("Citizenship obtained through naturalization is not a second-class citizenship. It has been said that citizenship carries with it all of the rights and prerogatives of citizenship obtained by birth in this country 'save that of eligibility to the Presidency.'"); *Luria v. United States*, 231 U.S. 9, 22 (1913) (same).

Since *Schneider*, lower federal courts have consistently viewed with skepticism laws that distinguish between native-born and naturalized citizens. The Court of Appeals for the D.C. Circuit invalidated a portion of the Foreign Service Act of 1946 because it required foreign-service officers to have been U.S. citizens for ten years, functionally discriminating against naturalized citizens. *Faruki v. Rogers*, 349 F. Supp. 723, 725 (D.C. Cir. 1972). The court applied strict scrutiny to the statute because it implicated suspect classifications of alienage and national origin. *Id.* at 729. Under that standard, the statute failed because it swept too broadly to protect the government's interest in

[6] Because the case involved discrimination by the federal government, the Court's reasoning was based on the Due Process Clause of the Fifth Amendment rather than the Fourteenth Amendment. Under *Bolling*, however, the reasoning is the same under both constitutional provisions.

hiring foreign-service officers steeped in American culture and history. *Id.* at 730. The court criticized the statute as over-inclusive, as it would disqualify immigrants with knowledge of and enthusiasm for Americana, and under-inclusive, as it would not disqualify native-born citizens who had spent their lives abroad. *Id.* at 731-32. The statute was so irrational that it failed even rational-basis review because "there is no proffered factual basis, except apparently blind assumption, supporting the exclusionary classification at issue." *Id.* at 734-735. Even if screening for qualified foreign-service officers could not be done by testing alone, the government was not rationally forwarding its interest by having a durational requirement for citizenship but no requirement for residency in the United States. *Id.* at 735. Thus, the durational citizenship requirement failed even under rational-basis review.

So too, in *Hunyh v. Carlucci*, 679 F. Supp. 61 (D.D.C. 1988), the Court applied strict scrutiny to a statute that discriminated between naturalized and native-born citizens. The case involved naturalized citizens who were employed by the Department of Defense and challenged the constitutionality of a new regulation denying security clearance to recently naturalized citizens from certain countries. After holding that such classifications based upon national origin were subject to strict scrutiny, the court found that the Defense Department had failed to offer sufficient evidence that the regulation was necessary to achieve a compelling state interest. 679 F. Supp. at 67. Indeed, the court found that the recent policy change was unsupported by any convincing empirical evidence or was a necessary or precisely tailored procedure for preserving national security. *Id.*

Similarly, in *Fernandez v. Georgia*, 716 F. Supp. 1475 (M.D. Ga. 1989), the plaintiff challenged a statute excluding naturalized citizens from the state trooper corps. *Id*. at 1477. The court applied strict scrutiny, but noted that Georgia was unable to offer any acceptable justification for the classification. *Id.* at 1479. In any case, the state could not have defended itself successfully, because "given the holdings of the Supreme Court in *Knauer* and *Schneider*, any purpose offered by the State of Georgia must fail equal protection scrutiny." *Id.*

b. Because OHIO REV. CODE § 3505.20 Discriminates Based on National Origin, Imposing Higher Burdens on Naturalized Citizens Who Seek to Exercise Their Fundamental Right to Vote, It Is Subject to Strict Scrutiny.

OHIO REV. CODE § 3505.20 discriminates based on national origin, by targeting naturalized citizens for differential treatment. Worse still, it facially discriminates against one group of citizens regarding their fundamental right to vote—and casts them as the second-class citizens that the Supreme Court says they are not. For both reasons, the statute is subject to strict scrutiny.

On its face, the statute subjects naturalized citizens to different treatment than those who are native-born. It requires naturalized citizens to produce a specific document at the polling place – a certificate of naturalization – that many of them will not have with them, and some will not have at all. *See, e.g.*, Exhibit 5, Boustani decl., para. 6 (unsure where her certificate of naturalization is); Exhibit 6, Celeste decl., para. 6 (same); Exhibit 7, Bialostosky decl., para. 6 (same); Exhibit 8, Chen decl., para. 6 (same); Exhibit 9, Simakis decl., para. 4 (same); Exhibit 19, Wong decl., para. 5 (same); Exhibit 10, Unger decl., para. 5 (certificate of naturalization is located in a safe deposit box in a bank in Columbus). The new provision can therefore be expected to prevent naturalized citizens

without a readily available certificate of naturalization from voting. Native-born citizens, on the other hand, can cast a regular ballot even if they have no proof of citizenship at the polls.

As alleged in the Complaint, para. 44, plaintiffs have a reasonable fear that they and their members will be imminently harmed by OHIO REV. CODE § 3505.20. *See*, *e.g.*, Mobin-Uddin decl., para. 4 (declaration of Asma Mobin-Uddin, president of Plaintiff CAIR-Ohio, attached hereto as Exhibit 13); Romero decl., paras. 4, 5 (declaration of Plaintiff Eduardo Romero, attached hereto as Exhibit 14); Loizos decl, paras. 3, 4 (declaration of Plaintiff Sophia Loizos, attached hereto as Exhibit 15); Singh decl., paras. 3, 4 (declaration of Plaintiff Paramjit Singh, attached hereto as Exhibit 16); Exhibit 10, Unger decl., paras. 3-5; Savas decl., paras. 3, 4 (declaration of Plaintiff Mary Savas, attached hereto as Exhibit 17); Exhibit 7, Bialostosky decl., paras. 4, 6; Exhibit 9, Simakis decl., paras. 3, 4; Exhibit 19, Wong decl., paras. 4, 5; Exhibit 6, Celeste decl., paras. 4-6; Exhibit 8, Chen decl., paras. 4-6; Exhibit 5, Boustani decl., paras. 4-6. Regardless of its actual effects when it is implemented, the law is facially discriminatory and therefore unconstitutional on its face – no less so than a law, for example, which subjects voters of Latino descent to higher proof requirements than those of European descent, in the event that their eligibility is challenged at the polls.

c. Section 3505.20 Is Also Subject to Strict Scrutiny Because It Discriminates with Respect to the Fundamental Right to Vote.

The fact that § 3505.20 facially discriminates based on national origin is sufficient to warrant strict scrutiny, but that is not the only reason the statute is subject to strict scrutiny. As the Supreme Court has repeatedly affirmed, laws that discriminate with

regarding the franchise – based on race, national origin, or some other ground – are also subject to strict scrutiny.

In a democracy, the right to vote is both the wellspring and the protector of all other rights: "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right." *Wesberry v. Sanders*, 376 U.S. 1, 17-18 (1964). Indeed, "[t]he right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). "In decision after decision, this Court has made clear that a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction." *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972).

Statutes that discriminate as to the fundamental right to vote are subject to strict scrutiny, and are unconstitutional unless "the State can demonstrate that such laws are ***necessary*** to promote a ***compelling*** governmental interest" *Dunn*, 405 U.S. at 342 (emphasis added) (internal citations and quotations omitted). As the Supreme Court held in *Dunn*:

> [T]he State cannot choose means that unnecessarily burden or restrict constitutionally protected activity. Statutes affecting constitutional rights must be drawn with precision . . . and must be tailored to serve their legitimate objectives. . . . And if there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose less drastic means.

Id., at 342-43 (internal citations and quotations omitted).

Thus, in *Reynolds*, the Court held that a redistricting plan discriminating against voters based upon their place of residence "must be carefully and meticulously scrutinized." *Id.* at 560. Similarly, in *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966), the Court applied strict scrutiny to a statute that discriminated against poorer voters, by requiring them to pay a $1.50 poll tax. *Id*. at 670 ("We have long been mindful that where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined").

There are clear distinctions between laws that discriminate against some citizens, which are subject to strict scrutiny, and those that impose minor non-discriminatory burdens on *all* citizens that are subject to lesser scrutiny. *Compare Dunn*, 405 U.S. at 342 (durational residence laws subject to strict scrutiny); *with Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (election practices must be "narrowly drawn to advance a state interest of compelling importance" if they impose a severe or unequal burden on voting rights but upholding state prohibition on write-in voting, concluding that it did not impose severe restriction on the right to vote, but only "reasonable, nondiscriminatory restriction[].").

Section 3505.20 falls squarely into the former category. This provision states that a naturalization certificate is the only acceptable proof of identity for naturalized citizens attempting to vote. Challenged voters who are naturalized citizens but who do not produce their naturalization certificates on Election Day must vote by provisional ballot. Thus, the Act renders all other proof, even where no doubt about the voter's citizen status

exists, completely irrelevant. Absent the naturalization certificate, the law imposes a presumption that the voter is not a citizen, despite the fact that Ohio has already listed such voters as properly registered.[7]

That the statute further applies this presumption unevenly constitutes an equal protection violation. While native-born citizens are not required to present any proof of citizenship to produce a regular ballot, naturalized citizens are only allowed to do so if they present a specific document. Because the statute treats some citizens differently from others with respect to the fundamental right to vote, it can only be upheld if the state shows that the statute is narrowly tailored to serve a compelling interest.

d. Amended § 3505.20 Does Not Satisfy Strict Scrutiny Because It Is Not Narrowly Tailored to Serve a Compelling Government Interest, and Therefore Violates the Fourteenth Amendment.

In order to satisfy strict scrutiny, the state must show that the distinction drawn by § 3505.20's distinction between naturalized and other citizens is narrowly tailored to satisfy a compelling government interest. While ensuring that only eligible persons are allowed to vote is unquestionably an important interest, the state cannot show that this provision is remotely tailored to serve that interest.

[7] The severe burden on the right to vote imposed by § 3505.20 is compounded by the fact that Ohio law fails to provide clear guidance to the counties, on the circumstances in which provisional ballots cast by naturalized citizens will counted. As noted above, naturalized citizens whose eligibility to vote is challenged and who do not have a certificate of naturalization will be denied a regular ballot and required to cast a provisional ballot. Those casting provisional ballots have 10 days from the date of the election within which to bring in additional information. § 3505.181. What remains less than clear is what forms of documentation will be considered acceptable proof of citizenship status for those who claim to be naturalized citizens. In particular, it raises the possibility that some counties will require naturalized citizens to present a certificate of naturalization within 10 days, while others may accept a passport or a sworn affidavit verifying citizenship. This creates a further equal protection problem. To the extent that similarly situated voters are treated differently, due to variations in the standards applied to determine whether their votes count, the state is denying the "equal treatment" to voters that is at the heart of the fundamental right to vote. *See Bush v. Gore*, 531 U.S. 98, 107 (2000).

As noted above, there is little publicly available evidence on the interest that the amended § 3505.20 is supposed to serve. But whatever justifications the state might seek to assert – prevention of voter fraud, purity of the ballot box, or administrative convenience – there is no evidence that such interests were in fact the basis for the statute or that the statute is narrowly tailored to serve such interests. Hypothesized justifications will not suffice; the State must put forward proof its actual interest. *See, e.g., Thompson v. Western States Medical Center*, 535 U.S. 357, 373 (2002) ("We have generally only sustained statutes on the basis of hypothesized justifications when reviewing statutes merely to determine whether they are rational"). The statute lacks any legislative history or empirical evidence showing the precise interests served by the amendments, much less that the policy is necessary or precisely tailored to combat illegal voting.

The Supreme Court's approach in analyzing the governmental need for the durational residency requirement in *Dunn* is particularly instructive because the purported justification is the same as that which the state will presumably assert here – namely fraud prevention. *Dunn v. Blumstein*, 405 U.S. 330, 342 (1972) (durational residence laws fail under to strict scrutiny). The *Dunn* court stated that although "'purity of the ballot box' is a formidable-sounding state interest" and that prevention of voter fraud "is a legitimate and compelling government goal," the means employed were too imprecise to pass constitutional muster because the durational residency requirement at issue excluded legitimate voters and because the state's interest in fraud prevention was protected in other ways. 405 U.S. at 345-46, 351.

The fundamental flaw of Ohio's current scheme is similar to that considered in *Dunn*. It also targets only one portion of the population – in this case naturalized citizens

– without any showing that the means adopted are tailored to address the purported ends. If prevention of voter fraud were ever a justification for denying the right to vote, the process would require a finely tuned-structure designed to minimize the harm to the rights of eligible voters. *See Dunn*, 405 U.S. at 343 ("In pursuing that important interest, the State cannot choose means that unnecessarily burden or restrict constitutionally protected activity. Statutes affecting constitutional rights must be drawn with 'precision'"). Neither the interest in preventing fraud nor the interest in separating qualified from unqualified persons (citizens from noncitizens), however, is advanced by classifying voters based on *how* they obtained citizenship. *Id.* at 352.

Because native-born citizens are not required to show any proof of their citizenship under § 3505.20, the statute creates an obviously unequal application of voting requirements and cannot meet the standard of necessity required by the Supreme Court. As in *Dunn*, the state cannot reasonably claim that a conclusive presumption of ineligibility is necessary for one class of voters while simultaneously permitting individualized determinations for a different class of voters. The state cannot reasonably claim that it must treat differently longtime naturalized citizen Plaintiff Dagmar Celeste, who emigrated from Austria and became a citizen decades ago, *see* Exhibit 6, Celeste decl., para. 2, than her adult son, Christopher Celeste, also an Ohio voter, who was born in New Delhi, India but is considered a native-born citizen because his father was an American diplomat. The state cannot reasonably claim that the Americans who developed American's nuclear capability, New York-born J. Robert Oppenheimer on the one hand, Albert Einstein (naturalized from Germany) and Edward Teller (naturalized from Hungary) would and should be treated differently if they were alive and Ohio voters

today.

Section 3505.20 is therefore unconstitutional because it accords differential treatment to one class of citizens, without any showing that this differential treatment is needed to address the government's asserted interest in the integrity of the ballot. Thus, plaintiffs are likely to prevail upon the merits in this case and a preliminary injunction should be granted.

e. Even If a Standard Less Than Strict Scrutiny Were Applied, Amended § 3505.20 Still Violates Equal Protection by Imposing an Irrational and Unreasonable Burden on Naturalized Citizens

As explained above, strict scrutiny applies to laws that discriminate against a category of voters with respect to the fundamental right to vote, or that discriminate on their face with respect to national origin. Because § 3505.20 does both, it is clearly subject to strict scrutiny.

Even if a lesser standard were applied, however, the statute would still be unconstitutional. In *Burdick v. Takushi*, 504 U.S 428 (1992), the Supreme Court held that "reasonable, nondiscriminatory restrictions" on voting rights are subject to constitutional scrutiny. While discriminatory laws -- like the one in this case -- must satisfy strict scrutiny, "the State's important regulatory interests are generally sufficient to justify" nondiscriminatory restrictions. *Id.* at 434. Thus, even if Ohio's law were deemed "nondiscriminatory," an important interest would still be required to uphold it. This the state cannot show. There is no evidence of people pretending to be naturalized citizens to vote, and certainly none to support the conclusion that this is a more serious problem than people pretending to be native-born citizens. Yet that is precisely the sort

of evidence that the state would have to produce to show that its more stringent proof requirement for naturalized citizens serves an "important regulatory interest[]."

2. Plaintiffs Are Likely to Prevail on Their Claim that § 3505.20 Imposes an Unconstitutional Poll Tax Upon Naturalized Citizens.

In *Harman v. Forssenius*, 380 U.S. 528 (1965), the Supreme Court held Virginia's $1.50 poll tax unconstitutional under the Twenty-Fourth Amendment as applied to federal elections. A year later in *Harper v. Virginia Bd. of Elections*, the Supreme Court held the same $1.50 poll tax assessed by the State of Virginia unconstitutional as applied to state elections under the Equal Protection Clause of the Fourteenth Amendment. 383 U.S. 663 (1966). As shown below, for those Ohio voters who are naturalized citizens but whose certificates of naturalization have been destroyed, lost or misplaced, or those for whom the names on the registration do not match the names on the certificate of naturalization due to marriage, legal name changes, or divorce, the payment of the $220 fee for a replacement is an unconstitutional condition on the right to vote that also violates the Twenty-Fourth Amendment for federal elections and the Fourteenth Amendment for state elections.

a. Requiring a Naturalization Certificate in order to Vote Violates the Twenty-Fourth Amendment as applied to Federal Elections

The Twenty-Fourth Amendment provides:

> The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any **poll tax** or **other tax**.

The effect of the Twenty-Fourth Amendment is to abolish "[T]he poll tax . . . absolutely as a prerequisite to voting and no equivalent or milder substitute may be imposed."

Harman, 380 U.S. at 542. Moreover, the Twenty-Fourth Amendment "nullifies sophisticated as well as simple-minded modes of impairing the right guaranteed." *Id.* at 540-41. The fact that the fee is incident to having to obtain a naturalization certificate and is not imposed by the state itself does not ameliorate its effects or make it any less of a poll tax than the $1.50 poll tax found unconstitutional in *Harman*.

b. The Requirement Also Violates the Equal Protection Clause of the Fourteenth Amendment

Harman was followed a year later by *Harper*, in which the Court held invalid under the Equal Protection Clause the imposition by the State of Virginia of a $1.50 tax on the right to vote in state elections:

> It is argued that a State may exact fees from citizens for many different kinds of licenses; that if it can demand from all an equal fee for a driver's license, it can demand from all an equal poll tax for voting. **But we must remember that the interest of the state, when it comes to voting, is limited to the power to fix qualifications**…. To introduce wealth or payment of a fee as a measure of a voter's qualifications is to introduce a capricious or irrelevant factor, the degree of discrimination.

Harper, 383 U.S. at 668 (emphasis added).

Legislation that effectively puts a price on the right to vote cannot survive strict scrutiny because "wealth or fee paying has . . . no relation to voting qualifications, the right to vote is too precious, too fundamental to be so burdened or conditioned." *Id.* at 670; *see also Jenness v. Little*, 306 F. Supp. 925, 929 (N.D. Ga. 1969) (holding that prohibiting candidates from being listed on the ballot unless they post a certain amount of money is illegal and unconstitutional). There can be no doubt, therefore, that § 3505.20's requirement is unconstitutional under the Fourteenth Amendment. *See Hill v. Stone*, 421 U.S. 289, 303 (1975) (noting that the Court struck down a requirement that a voter "render" even a small item such as a pair of shoes to be subject to taxation in order to

vote in bond referendum) (Rehnquist, J., dissenting); *Turner v. Fouche*, 396 U.S. 346, 363 (1970) (Georgia's property ownership qualification to serve on school board was not "rational state interest" and held to be invidious discrimination).

c. The Ability of USCIS to Waive the $220 Replacement Fee Does Not Redeem the Requirement under either the Fourteenth or the Twenty-Fourth Amendment

Any argument that the discretionary ability of USCIS to grant a waiver of $220 fee for a replacement naturalization certificate saves § 3503.20's new requirement from being a poll tax must also fail. Even if the certificate fee is waived, naturalized citizens must still pay fees for the supporting documentation necessary to receive a certificate, as well as purchasing the photographs that must accompany the USCIS N-565 application. In other words, even if the certificate fee itself is waived, the certificate will still cost money to obtain. And even if the underlying documentation were completely free, § 3505.20 would still unconstitutionally compel the naturalized citizen to take the time to make a burdensome and unnecessary trip to a government office.

On similar grounds, a federal district court in Georgia enjoined the implementation of a requirement that Georgia voters must show government issued photo identification in order to vote at the polls. *Common Cause/Georgia v. Billups*, 406 F. Supp. 2d 1326 (N.D. Ga. 2005) (finding that plaintiffs were likely to prevail on merits of their claim that photo identification requirement at polls was unconstitutional poll tax). In Georgia, obtaining photo identification cost $20 for a card that was valid for five years and $35 for a card that was valid for ten years. Those who did not have photo identification and claimed they were indigent were able execute an affidavit that they

were indigent and the identification would be free. The court found that the requirement -- even with the fee waiver -- was an unconstitutional poll tax. *Id*. at 1370.

Notably, when the Supreme Court invalidated Virginia's poll tax for federal elections under the 24th Amendment, it rejected Virginia's alternative to requiring payment of the poll tax because of the burden of the otherwise unnecessary trip to the courthouse. *Harmon v. Forssenius*, 320 U.S. 538, 541 (1965). Under Virginia law, registered voters who did not or could not pay the poll tax could file an affidavit of residency at the county courthouse instead. The document had to be filed in person at the courthouse and filed at least six months prior to the election. *Id.* The Court in *Harman* found the Virginia requirement of filing a notarized or witnessed certificate of residency six months before an election to be "plainly a cumbersome procedure." 380 U.S. at 541.

Though a large part of the rationale for invalidating the law was that only citizens who insisted on their 24th Amendment right to be free of a poll tax for voting would be required to undertake the alternative step, the Court termed the alternative certificate "a real obstacle." *Id*. That holding was not based on the timing of the trip to the courthouse. The Court subsequently upheld a requirement that voters wishing to switch political parties had to change their enrollment eleven months before the primary. *Rosario v. Rockefeller*, 410 U.S. 752 (1973).[8] The burden in *Harmon* was invalid because it compelled a completely unnecessary trip that served no legitimate function.

Having to travel to a government office to obtain a replacement certificate creates a burden on voters just as severe as the burden in past cases where the Supreme Court has

[8] *See also Kusper v. Pontikes*, 414 U.S. 51 (1973), which invalidated a statute than barred voters from voting in a primary of one political party if they had voted in the primary of a different party within the preceding 23 months. The Court invalidated the statute not because of the length of time but because the requirement would compel voters to miss an entire election cycle in order to switch registration.

required strict scrutiny – for example, a $1.50 annual poll tax in 1966 (*Harper*), a ninety-day county and one-year state-residency requirement (*Dunn*), and a residency and parenthood condition for voting (*Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621 (1969)). Both the Supreme Court and Congress have recognized the burdens of traveling to an office to obtain a document allowing a citizen to vote. Therefore, even if USCIS were able to process the Form N-565 in time and even if the district office exercised its discretion to waive the $220 fee, requiring this extra step by naturalized citizens burdens their constitutionally protected right to vote. Accordingly, the magnitude of the asserted injury is "substantial," and for all the reasons already discussed above, this statute cannot survive strict scrutiny.

3. Plaintiffs Are Also Likely to Prevail on Their Claim under the Civil Rights Act of 1964

The requirements of § 3505.20, on its face, violate the Civil Rights Act of 1964, codified at 42 U.S.C. § 1971, by applying different standards to naturalized and US-born voters within the same county and by precluding voting due to an omission that is not material to the right to vote under Ohio law. Plaintiffs 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, 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.[9]

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.[10] 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 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

[9] Even should this Court find that there is no independent private right of action created in § 1971, plaintiffs have the ability to sue under 28 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). Here plaintiffs' 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). As discussed in the following text, the opposite occurred because Congress affirmatively strengthened the private right of action in 1957 when it added the Attorney General's authority to sue.

[10] 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).

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.[11] 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."[12]

The 1957 amendments changed the substantive protections of § 1971, expanded the ability to enforce it, and the remedies available to private citizens.[13] For instance, the

[11] 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.

[12] 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.

[13] 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 § 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,

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.

The Civil Rights Act of 1960, Pub. L. 86-449, Title VI, 74 Stat. 86 (1960), further strengthened § 1971 by providing an expansive definition of the word "vote." It added a new paragraph (e), which reads in part:

> 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...

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these provisions cannot be reconciled with *McKay's* holding that only the Attorney General can sue to enforce § 1971.

42 U.S.C. § 1971(e) (emphasis added).

The paragraphs under which this suit was brought, §§ 1971(a)(2)(A) and (B), were added in the Civil Rights Act of 1964, Pub. L. 88-352, Sec. 101, 78 Stat. 241 (1964). These sections read in their entirety as follows:

> (2) No person acting under color of law shall—
> (A) in determining whether any individual is qualified under State law or laws to vote in any election, apply any standard, practice, or procedure different from the standards, practices, or procedures applied under such law or laws to other individuals within the same county, parish, or similar political subdivision who have been found by State officials to be qualified to vote;
>
> (B) 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;…

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).

Section 1971(a)(2)(A) covers unequal application of voting standards whether imposed by state law or local enforcement such as through unequal application of voting and registration standards by county or municipal officials. 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,'"[14] and concluding with other indicia that Congress intended "to give the Act the broadest possible scope"). With paragraphs (A) and (B) of § 1971(a)(2), Congress sought to place all registration applicants on an equal footing and to remove the unequal and/or pretextual excuses for denial of the right to vote.

a. Ohio's New Citizenship Challenge Requirement Violates 42 U.S.C. § 1971(a)(2)(A)

Section 1971(a)(2)(A) precludes the application of different standards in determining whether persons within the same county or other political subdivision are qualified to vote:

> No person acting under color law shall –
> (A) In determining whether any individual is qualified under State law or laws to vote in any election, **apply any standard,** practice, or procedure **different from the standards**, practices or procedures applied under such law or laws to other individuals **within the same county**, parish, or similar political subdivision who have been found by State officials to be qualified to vote[.]

42 U.S.C. § 1971(a)(2)(A) (emphasis added).

[14] *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."

Section 3505.20 on its face violates § 1971(a)(2)(A) because it applies different standards to voters who reside in the same city or county who achieved citizenship by the naturalization process than it applies to voters who became citizens by nature of birth in the United States. Section 3505.20 by its express language, requires proof of citizenship only for naturalized citizens. Under the statute, Ohio voters who were born in the United States are not required to produce their birth certificate for proof of their citizenship. Once the citizens have been determined eligible to vote and placed on the registration list, such discrimination among groups of voters violates § 1971 (a)(2)(A). For example, election officials cannot discriminate between different groups of qualified electors once the right to vote by absentee ballot has been granted. *Brown v. Post*, 279 F. Supp. 60, 63-64 (W.D. La. 1968). The *Brown* court found that election officials had allowed patients at white nursing homes, white voters at home, and white workers to vote absentee without affording the same opportunities to similarly situated black voters. *Id*. at 63. The court in *Brown* held that even though the outcome of the election was unaffected by these absentee votes, failure to treat similarly situated potential absentee voters equally was a violation of § 1971(a).[15] *Id*. at 64. Indeed § 3505.20 subjects naturalized citizens to more stringent requirements than native-born citizens in ways similar to the more stringent and racially discriminatory devices placed upon minority voters that necessitated the passage of § 1971. *See*, *e.g.*, *United States v. Mississippi*, 339 F.2d 679, 684 (5th Cir. 1964) (enjoining election officials from determining qualifications of Negro citizens in any

[15] Although *Brown v. Post* involved allegations of race based action, race is not a required element under § 1971(a)(2)(A). *See Ball v. Brown*, 450 F. Supp. 4, 10 (D.C. Ohio 1977) (finding practice of automatically canceling woman's registration form upon her marriage without determining whether woman actually changed her name through marriage violated § 1971); *accord Schwier v. Cox*, 340 F.3d at 1297 (challenging under § 1971(a)(2)(B) requirement of applicants to disclose their social security numbers in order to register to vote).

manner or by any procedure different from or more stringent than those previously used to determine qualifications of white citizens); *United States v. Association of Citizens Councils of La., Inc.*, 196 F.Supp. 908 (W.D. La. 1961)(voting registrar who arbitrarily discriminated against Negroes in identification requirements, who applied far more stringent qualification standards upon Negro applicants than she had upon white applicants enjoined from discrimination).

b. Ohio's New Citizenship Challenge Requirement Violates 42 U.S.C. § 1971(a)(2)(B)

Likewise, H.B. 3, on its face, violates 42 U.S.C. § 1971(a)(2)(B). Subsection 1971(a)(2)(B) prohibits denial of the right to vote for an act or omission that is not material to determining whether the voter is qualified under state law:

> No person acting under color of law shall –
> (B) 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) (emphasis added).

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 the presentation of a certificate of naturalization. The presentation of one's certificate of naturalization or the failure to do so is an "other act requisite to voting," the omission of which is not "material" to determining whether the voter is qualified to vote. Prior to 2006, a voter could simply swear or affirm that he or she was a

citizen and qualified to vote. Furthermore, the presentation of papers proving citizenship is limited only to those who were naturalized. Proof of citizenship is relevant for all applicants. For one group of citizens (native-born citizens), an oath is sufficient proof; for another group (naturalized) additional indicia is required. Accepting the oath of one group while saying the oath of another group is insufficient proves that the officials do not consider documentation of citizenship material in any of its possible definitions. *E.g.*, *United States v. Mississippi, supra*. If it is not needed for all voters, it cannot be required of any. If 98% of voters (those claiming to be native-born citizens) are deemed eligible without documentation, it cannot possibly be material to require this additional certification of the 2% of voters who acquired their citizenship by naturalization. Though the documentary proof might be relevant or useful, Congress specifically stated that the requirement must be material. *See*, *e.g.*, *Schwier*, 439 F.3d at 1286 (disclosure of Social Security number is immaterial to voter registration); *Washington Assoc. of Churches v. Reed*, C06-0726RSM, at *6-8 (W.D. Wa. Aug. 1, 2006) (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 information.[16] Once there is evidence of qualification that is accepted as satisfactory for some voters, asking for an additional

[16] Information also cannot be "material" within the meaning of 42 U.S.C. § 1971(a)(2)(B) if it is a sufficiently *unreliable* determinant of eligibility. While some naturalized voters will likely be able to produce their certificates, a substantial percentage will not be able to do so. The failure of a voter to provide a naturalization certificate therefore gives an election official little useful information about whether that voter is an eligible citizen – and cannot therefore be "material" in determining whether the voter is qualified.

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. Here, it appears that Ohio's General Assembly is more interested in the *manner* (naturalization) that someone because a citizen rather than the fact that they are citizen. The former is immaterial to whether one is eligible to vote.

The plain language of § 3505.20 violates the federal Civil Rights Act of 1964, codified at 42 U.S.C. 42 U.S.C. § 1971(a)(2)(A) and (B). For these reasons, plaintiffs have demonstrated a substantial likelihood of success on the merits of this claim.

B. Plaintiffs Will Be Irreparably Injured Absent an Injunction

The right to vote is one of the most fundamental rights in our system of government. *Reynolds v. Sims*, 377 U.S. at 554 (1964). For that reason, the loss of the constitutionally protected right to vote "for even minimal periods of time, constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Plaintiffs will suffer irreparable injury if challengers are permitted to turn away lawfully qualified electors or refuse to count provisional ballots on a discriminatory basis.

C. The Threatened Injury Outweighs any Damage to Defendants

The threatened injury to plaintiffs outweighs any damage that an injunction might cause defendants. The only harm to defendants in issuing an injunction would be the expense in educating election officials to resume the prior method of addressing citizenship verification. That burden, however, is remote given the fact that the regular general election is not scheduled to be held until November 7, 2006. In any event, the purported expense or administrative inconvenience is outweighed by the loss of the equal right to vote that will be suffered by plaintiffs. *See Taylor v. Louisiana*, 419 U.S. 522,

535 (1975) ("administrative convenience" cannot justify a state practice that impinges upon a fundamental right). Given the absence of evidence that non-citizens have fraudulently attempted to vote in Ohio, the state cannot seriously argued that its interests would in any way be harmed by an injunction against amended § 3505.20's requirement that naturalized citizens produce a certificate of naturalization to cast a regular ballot.

D. An Injunction Would Be in the Public Interest

The public has a broad interest in the integrity of elections and seeing election laws applied in a non-discriminatory manner. Subjecting qualified Ohio voters to unconstitutionally discriminatory procedures would be adverse to the public interest. Under the circumstances, an injunction would promote the public interest.

III. Conclusion

For the foregoing reasons, Plaintiffs' motion for preliminary injunction should be granted.

Respectfully submitted,

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Certificate of Service

This is to certify that a copy of the foregoing was served upon the defendant by hand delivery addressed as follows:

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This 29th day of August 2006, at Atlanta, Georgia.

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