IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO

BEACON JOURNAL PUBLISHING COMPANY, INC.,
44 E. Exchange Street
Akron, Ohio 44328

And

CHARLENE NEVADA
44 E. Exchange St.
Akron, Ohio 44328

Plaintiff,

vs.

J. KENNETH BLACKWELL
SECRETARY OF STATE
180 E. Broad St.
15TH Floor
Columbus, Ohio 43215

And

THE BOARD OF ELECTIONS
SUMMIT COUNTY
470 Grant St.
Akron, Ohio 44311

And

BRYAN J. WILLIAMS
EXECUTIVE DIRECTOR
THE BOARD OF ELECTIONS
SUMMIT COUNTY
470 Grant St.
Akron, Ohio 44311

Defendants

CASE NO.:

5:04CV 2178

MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY AND PERMANENT INJUNCTION

FILED
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NORTHERN DISTRICT OF OHIO
AKRON
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JUDGE: JUDGE MATIA

MAG. JUDGE BAUGHMAN

Now come the Plaintiffs, the Beacon Journal Publishing Co., Inc., and its Deputy Metro Editor, Charlene Nevada, (hereafter "The Beacon Journal" or "Newspaper"), by and through their attorneys, and moves this Court for a Restraining Order, and Preliminary and Permanent Injunction precluding and enjoining the Defendants as follows:

A. From interfering with any Beacon Journal employee or correspondent in the course of newsgathering at any polling place in Ohio on November 2, 2004.

B. From interfering in any manner with the Beacon Journal's reporters, photographers, other employees or correspondents, or in any way limiting their freedom of movement, including access to or egress from, any polling place in Ohio on November 2, 2004.

C. From harassing, intimidating or otherwise negatively affecting Beacon Journal reporters, photographers, other employees or independent contractor journalists as they are performing news-gathering responsibilities in or near any polling place in Ohio, or on public streets or highways leading to polling places.

In support of this Motion, the Beacon Journal states that it has learned that the Ohio Secretary of State J. Kenneth Blackwell (hereafter "Blackwell") has issued a directive to All Boards of Elections members, directors and deputy directors in Ohio, stating that "[T]he Ohio Revised Code 3501.30, 3501.35 and 3699.24 collectively prohibit ***anyone,*** on Election Day, from . . . Entering a polling place for any reason other than to vote, unless the person is an election official, a challenger or witness appointed pursuant to R.C. 2505.21, or a police officer. . . ." (Emphasis theirs.) The effect of such directive is to deny news media access to polling places, in violation of the First and Fourteenth Amendments to the U.S. Constitution and contrary to longstanding history and public practice. Failure to restrain Boards of Elections from banning news media

from polling places would cause irreparable harm to the Democratic process, as explained in Plaintiff's Memorandum in Support incorporated hereto.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

Background:

The Beacon Journal is a daily newspaper based in Akron, Ohio, and circulating in Summit and five contiguous counties. It has traditionally reported on voting on Election Day in a number of ways, including visiting polling places throughout its circulation area, usually with a reporter and a photographer to interview and photograph voters. (See Exhibit 1, attached to Affidavit of Karen C. Lefton at Appendix A.). In fact, over the last thirty Election years, there was *no occasion* on which a Beacon Journal reporter or photographer was banned from a polling place. In addition, during that same period, there was *no occasion* in which a Beacon Journal reporter or photographer was ever accused or suspected of any impropriety or causing any disruption at any polling place. (See Affidavit of Deputy Metro Editor Charlene Nevada, at Appendix B.)

Therefore, a Beacon Journal reporter and photographer were puzzled and dismayed when, on Friday, October 29, 2004, they were told that they had no right to be documenting the early voting procedures taking place at the Summit County Board of Elections and that, under a new directive issued by Secretary of State Blackwell, they could be banned from the premises. (See Nevada Affidavit attached at Appendix B.)

Keith Scott, HAVA attorney for the Secretary of State, confirmed that the directive would have the effect of banning news media from polling places. In a phone call with the undersigned, Attorney Scott stated that the directive was a "practical decision" that banning the news media from polling places would result in "less chaos." He acknowledged that it was an immense departure from the historical access granted to the news media. In a follow up e-mail, he wrote that "Secretary Blackwell's action was

merely a mandate to the boards to strictly adhere to the law." (See Exhibit 2, Scott's e-mail and copy of directive attached to Lefton Affidavit at Appendix A.)

The directive, headlined "Polling Place Access," states, in relevant part, that the Ohio Revised Code "collectively prohibit(s) ***anyone,*** on Election Day, from: . . . Entering a polling place for any reason other than to vote, unless the person is an election official, a challenger, or witness appointed pursuant to R.C. 3505.21, or a police officer." Enforcing that statute would violate the First and Fourteenth Amendments to the U.S. Constitution and would be an interpretation of Ohio Election Law never seen before. It would cause irreparable harm to the electorate and to the Democratic process.

Civil Rule 65:

In order for this Court to issue a temporary restraining order, the Beacon Journal must demonstrate that: 1) it is likely to prevail in its action; 2) unless the restraining order is issued, irreparable harm will result; 3) a balance of hardships favors the movant; and 4) that issuing a temporary restraining order is in the public interest. Civil Rule 65; See, e.g., CBS, Inc. v. Smith, 681 F. Supp. 794, 802 (D.C. Fla. 1988); Federal Deposit Insurance Corp. v. Cafritz, 762 F.Supp. 1503 (D.C.C. 1991); U.S. v. Phillips, 527 F.Supp. 1340 (D.C. Ill 1981); Wright v. Columbia University, 520 F. Supp. 789 (D.C. Pa. 1981).

In this case, the Beacon Journal clearly meets all four elements. First, R.C. 3501.35 is overbroad and invasive of Ohioans' rights under the First and Fourteenth Amendments to the U.S. Constitution. The First Amendment, which applies to the states through the Fourteenth Amendment, prohibits laws abridging the freedom of speech, or

of the press. Mills v. Alabama, 384 U.S. 214 (1966). Any statute that intrudes upon the First Amendment right to free speech and free press must be narrowly tailored to serve that interest. The right to gather news cannot be restricted unless it is narrowly tailored to the purpose. In re Express-News Corp., 695 F.2d 807,808 (5th Cir. 1982).

In First Amendment cases, when a statute "covers the particular conduct" of the statute's challengers, it is "proper to reach the constitutional question involved in th[e] case." Daily Herald Co. v. Munro, 838 F.2d 380 (1988) (internal cites omitted.) The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech or of the press."

The media access to the public forum of a polling place is protected by the First Amendment's provisions protecting speech and the free press. "[A] major purpose of [the First] Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates. . . .'" Brown v. Hartlage, 456 U.S. 45, 52-53 (1982) Moreover, the First Amendment protects the media's right to gather news. *See, e.g.,* Richmond Newspapers Inc. v. Virgina, 448 U.S. 555, 576 (1980) ("Free speech carries with it some freedom to listen."); Branzburg v. Hayes, 408 U.S. 665, 681 (1972) ("Without some protection for seeking out the news, freedom of the press could be eviscerated."). Access to polling places is thus activity that is protected by the First Amendment.

Even where the right to access is qualified, any restriction must be narrowly tailored to serve a compelling governmental interest. Press Enterprise Co. v. Superior Court, 464 U.S. 501, 510 (1984); Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 607 (1982). A statute that restricts the media's right of access to information crucial to

the political process violates the principles embodied in the First Amendment. As Justice Reinhardt wrote in his concurring opinion in Munro, 838 F. 2d at 389:

> The public forum approach takes street corner discussions as its paradigm and defines the obligation of the state negatively. The state must simply abstain from interfering with the freedom of individuals to engage in public speech acts in public fora. This approach, thus, focuses on the right of individuals to expressive autonomy under the first amendment.
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> The public forum approach enables [. . .] the court, to deal adequately with one aspect of this case, i.e., the right of the voters and of the representatives of the media to engage voluntarily in discussion about the candidates and the election. The second dimension of this case -- the right of the media and, more important, the right of society to gather and disseminate information important to the democratic political process -- requires a broader approach to the First Amendment. Under such an approach, the state does not simply have a duty not to interfere with the expressive autonomy of individuals in the hope that a healthy public debate will take place on its own. The state has an affirmative obligation to preserve the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open. . . ." (internal cites omitted.)

The Ohio statute at issue states: "No person, not an election official, employee, witness, challenger or police officer, shall be allowed to enter the polling place during the election, except for the purpose of voting." This statute, effective since March 23, 1981, has never before been interpreted to ban the news media from entering a polling place to gather news on Election Day. It is unconstitutional on its face in that it is overbroad and not the least restrictive means of advancing the state's legitimate interest of keeping peace, order, and decorum at the polls. Because the statute so broadly restricts activity, the State must use the least restrictive means in achieving its goal. To the extent that the statute is designed to prevent disruption at the polling place, the statute cuts too deep because it proscribes [all access] whether disruptive or not. See CBS, Inc. v. Smith, 681 F. Supp. 794, 803 (D.C. Fla. 1988).

The statute is unconstitutional because it prohibits even non-disruptive access to the polls. If county elections directors are being instructed that "obey(ing) the law is prudent," as Blackwell's attorney writes, they would be compelled not only to ban the news media, but also to ban the community clubs which hold bake sales at polling places and the children who are toddling along behind their civic-minded parents.

Second, if the news media is banned from polling places on Election Day, there would be no independent documentation of the voting process, and voting irregularities may go unchecked. No evidence suggests that the presence of the media at polling places contributes in any way to disruption, chaos, or voting irregularities. To the contrary. While the effect of this statute is to prohibit public access to voters at polling places, its residual impact is to incite distrust of government which does its business behind closed doors. The public takes comfort in knowing that the news media is overseeing the important events of the day and will report those events. There would be no way of ascertaining the truth about what went on at the polling places. Banning the news media would only serve to engender distrust of our democratic process at a time when some newly registered voters are already feeling disenfranchised. That damage would be irreparable.

Third, the media will suffer severe hardship if this relief is not granted, as it will be unable to effectively cover and report the news of the election in Ohio, one of the most pivotal states in this presidential election. The Plaintiffs will suffer irreparable injury if the State is not preliminarily enjoined from enforcing this statute. Some courts have held that the loss of First Amendment rights, even for a brief period, causes irreparable harm.

Cate v. Oldham, 707 F.2d 1176, 1188 (11th Cir. 1983); see also Florida Committee for Liability Reform v. McMillan, 682 F. Supp. 1536.

Eyes all across America will be on Ohio. The Democratic process demands that those eyes be allowed to follow the process firsthand, as they do in every state in this nation.[1] Not only would this statute restrict protected speech and the press's ability to gather and report the news, but also would result in the loss of valuable voter information during this Presidential election year. Because of the very nature of this news story, there are no alternative days or different methods to collect the information that is accessible only through observation and interviews at polling places.

Issuing a temporary restraining order to prevent the Secretary of State and Boards of Elections from improperly and overbroadly interpreting R.C. 3105.35 is in the public interest. The news media has historically had access to polling places. It is not seeking to peek over the shoulder of a voter as he pokes his chads. It is merely seeking the same access it has had historically – to observe and report on the registration and administration of the voting process. Absent a showing that the press has *caused* "chaos" or *incited* mayhem, there is no reason to curtail the First Amendment rights of the citizens to a free press. The State is unable to demonstrate that it has any compelling interest that is served by its new interpretation of R.C. 3105.35 or any other election statute.

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[1] While all 50 states limit access to the areas in or around polling places, the undersigned has been unable to find any other state that has interpreted its statute to ban the news media from polling places. The public will be able to watch Tuesday's evening television news and see President George W. Bush cast his vote in Crawford, Texas, and John F. Kerry cast his vote in Massachusetts. Only in Ohio would the public get secondhand coverage of the Democratic process.

No right is more precious in a free country than that of having a choice in the election of those who make the laws under which, as good citizens, they must live. Other rights, even the most basic, are illusory if the right to vote is undermined. Wesberry v. Sanders, 276 U.S. 1, 17 (1964). While the Beacon Journal acknowledges that the State has a compelling interest in protecting voters from interference, harassment and intimidation during the voting process, the statute at issue does not bear a substantial relation to that interest, nor is it the least intrusive method to achieve the State's goals. Burson v. Freeman, 504 U.S. 191 (1992).

The U.S. Supreme Court has recognized that a state has a compelling interest in ensuring that an individual's right to vote is not undermined by fraud in the election process. However, Defendants' interpretation of R.C. 3505.01 does nothing to further that interest. In fact, it does the opposite. By excluding the media, Defendants are ensuring that any election fraud or malfeasance will go undocumented, perhaps even unreported or reported inaccurately through second-hand sources. While that might serve individual officeholders' interest, it does not serve the State interest. Defendants bear the heavy burden of demonstrating that their silencing of the free press is necessary and narrowly tailored to serve a compelling state interest. It is a burden they cannot meet. (See also National Broadcasting Co. v. Cleland 697F.Supp.1204, 1211-12. [ND Ga. 1988] holding that the law was not narrowly tailored to promote the legitimate state interest because it proscribed all exit polling no matter how unobtrusive and non-disruptive. Statute was found to be overbroad.)

An examination of the history of election regulation in this country reveals a persistent battle against two evils: voter intimidation and election fraud. That battle

continues in this emotionally charged election season, and it can be won only in the light of openness. As the U.S. Supreme Court pointed out in Burson, *supra*, allowing members of the general public access to the polling place makes it more difficult for political machines to buy off all the monitors. The Beacon Journal does not cast aspersions upon any "political machine" or governmental official. However, Defendants' interpretation of the election statutes is unreasonable and significantly impinges on constitutionally protected rights. Even when pursuing a legitimate interest, a State may not choose means that unnecessarily restrict constitutionally protected liberty. Anderson v. Celebrezze, 460 U.S. 780, 806 citing Dunn v. Blumsteinm, 405 U.S. 330, 343 (1972) If the State has open to it a less drastic way of satisfying its legitimate interests, it may not choose a legislative scheme that broadly stifles the exercise of fundamental personal liberties. Kusper v. Pontikes, 414 U.S. 51, 58-9 (1973). A statute is overbroad if it seeks to control or prevent activities properly subject to regulation by means which sweep too broadly into an area of constitutionally protected freedom. Restrictions on First Amendment rights must be supported by a compelling, governmental interest and must be narrowly drawn to insure that there is no more infringement than is necessary. Firestone v. News-Press Pub. Co., 538 So. 2d 457, 459 (Fla. 1989)

Where the exercise of free press rights conflicts with another fundamental right – the right to cast a ballot in an election free from the taint of intimidation and fraud – both fundamental rights must be protected. These rights are not in conflict; rather, both their objectives can be achieved by granting the news media access to polling places consistent with the access that has been historically available. Voting is one of the most fundamental and cherished liberties in our democratic system of government. If voters

lose faith in the fundamental fairness and integrity of the election process, our democracy will fail. It is only when an election process can withstand the scrutiny of media attention, warts and all, that democracy will thrive.

For the foregoing reasons, this Court should issue a temporary restraining order precluding the Defendants from banning the news media from any and all polling places on Election Day.

Respectfully submitted,

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