

## Compliance with the Help America Vote Act for Provisional Ballots

*Sandusky County Democratic Party v. Blackwell*  
(3:04-cv-7582) and *League of Women Voters of Ohio*  
*v. Blackwell* (3:04-cv-7622) (James G. Carr, N.D. Ohio)

Five weeks before the 2004 general election, Ohio's Democratic Party challenged directives by Ohio's secretary of state on provisional ballots as in violation of the Help America Vote Act (HAVA). The court of appeals agreed with the district court that the state was out of compliance, but the court of appeals agreed with the secretary that provisional ballots should be cast in the correct precincts.

*Subject:* Provisional ballots. *Topics:* Help America Vote Act (HAVA); provisional ballots; voter identification; 42 U.S.C. § 1983; intervention; enforcing orders; presiding remotely; attorney fees.

On September 27, 2004, five weeks before the 2004 general election, the Democratic Parties of Ohio and Sandusky County filed a federal action in the Northern District of Ohio's Toledo courthouse complaining that a directive on provisional ballots by Ohio's secretary of state failed to adequately implement requirements of the Help America Vote Act (HAVA).<sup>1</sup> The plaintiffs sought a preliminary injunction.<sup>2</sup>

Judge James G. Carr drew the case; he was on vacation at the time.<sup>3</sup> Three days after the case was filed, Judge Carr held a telephone conference from Florida.<sup>4</sup> Judge Carr regarded this case as a successful demonstration of presiding over a case remotely.<sup>5</sup> On the day after the teleconference, the plaintiffs filed an amended complaint adding three labor organizations as plaintiffs.<sup>6</sup>

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1. Complaint, *Sandusky Cty. Democratic Party v. Blackwell*, No. 3:04-cv-7582 (N.D. Ohio Sept. 27, 2004), D.E. 1; *Sandusky Cty. Democratic Party v. Blackwell*, 387 F.3d 565, 570 (6th Cir. 2004); see Pub. L. No. 107-252, 116 Stat. 1666 (2002), as amended, 52 U.S.C. §§ 15301-15545; see also William Hershey, *Suit Alleges Voter Impediments*, Dayton Daily News, Sept. 28, 2004, at B1; Mark Niquette, *Suit Aimed at Ballot Rules*, Columbus Dispatch, Sept. 28, 2004, at 1C. See generally Marie Leary & Robert Timothy Reagan, *The Help America Vote Act* (Federal Judicial Center 2012); Symposium, *HAVA @ 10*, 12 Election L.J. 111 (2013). See generally Daniel P. Tokaji, *Public Rights and Private Rights of Action: The Enforcement of Federal Election Laws*, 44 Ind. L. Rev. 113, 118, 149-50 (2010).

2. Preliminary-Injunction Motion, *Sandusky Cty. Democratic Party*, No. 3:04-cv-7582 (N.D. Ohio Oct. 27, 2004), D.E. 2.

3. Interview with Hon. James G. Carr, June 18, 2012.

Tim Reagan interviewed Judge Carr for this report by telephone.

4. *Id.*; see Order, *Sandusky Cty. Democratic Party*, No. 3:04-cv-7582 (N.D. Ohio Oct. 5, 2004), D.E. 9.

5. Interview with Hon. James G. Carr, June 18, 2012.

6. Amended Complaint, *Sandusky Cty. Democratic Party*, No. 3:04-cv-7582 (N.D. Ohio Oct. 1, 2004), D.E. 4; see *Sandusky Cty. Democratic Party v. Blackwell*, 339 F. Supp. 2d 975,

One week after the case began, three voters sought to intervene as defendants to protect “a fair and orderly election process.”<sup>7</sup> Judge Carr granted the motion.<sup>8</sup>

On October 5, ten voting-rights organizations filed another federal action in the Toledo courthouse challenging the same directive as was challenged in the first action and also challenging a directive that would require first-time voters who registered by mail to cast provisional ballots if they did not have proper identification at the polls on election day.<sup>9</sup> On the following day, the plaintiffs filed a motion for a preliminary injunction.<sup>10</sup> As luck would have it, Judge Carr drew this case as well.<sup>11</sup> He denied a motion to consolidate the two cases.<sup>12</sup>

Judge Carr granted the Democratic Parties in the first case a preliminary injunction on October 14, a week and three days after the case began.<sup>13</sup> Judge Carr determined that HAVA creates individual rights enforceable through 42 U.S.C. § 1983, plaintiffs have standing to enforce those rights, and the secretary’s directive conflicted with HAVA.<sup>14</sup> Both the secretary of state<sup>15</sup> and the intervenors<sup>16</sup> appealed.

While his injunction was on appeal, Judge Carr required the secretary to prepare a HAVA-compliant directive; Judge Carr determined, on October 20, that the new directive that the secretary prepared did not comply with

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977 (N.D. Ohio 2004).

7. Intervention Motion, *Sandusky Cty. Democratic Party*, No. 3:04-cv-7582 (N.D. Ohio Oct. 4, 2004), D.E. 8.

8. Order, *id.* (Oct. 7, 2004), D.E. 12.

9. Complaint, *League of Women Voters of Ohio v. Blackwell*, No. 3:04-cv-7622 (N.D. Ohio Oct. 5, 2004), D.E. 1; see Laura A. Bischoff, *Blackwell Sued Again on Vote Order*, *Dayton Daily News*, Oct. 6, 2004, at 3B; Scott Hiaasen, *Second Lawsuit Challenges Ohio Provisional Voting Rules*, *Cleveland Plain Dealer*, Oct. 6, 2004, at B3.

10. Preliminary-Injunction Motion, *League of Women Voters of Ohio*, No. 3:04-cv-7622 (N.D. Ohio Oct. 6, 2004), D.E. 8.

11. Docket Sheet, *id.* (Oct. 5, 2004); Interview with Hon. James G. Carr, June 18, 2012.

12. Order, *League of Women Voters of Ohio*, No. 3:04-cv-7622 (N.D. Ohio Oct. 7, 2004), D.E. 9.

13. *Sandusky Cty. Democratic Party v. Blackwell*, 339 F. Supp. 2d 975 (N.D. Ohio 2004); *Sandusky Cty. Democratic Party v. Blackwell*, 387 F.3d 565, 571 (6th Cir. 2004); see William Hershey, *Judge Overturns Blackwell Directive*, *Dayton Daily News*, Oct. 15, 2004, at 1B; Mark Niquette, *Provisional Balloting Broadened by Judge*, *Columbus Dispatch*, Oct. 15, 2004, at 1A; Diane Suchetka, *U.S. Judge Rejects State’s Ballot Edict*, *Cleveland Plain Dealer*, Oct. 15, 2004, at A1.

14. *Sandusky Cty. Democratic Party*, 339 F. Supp. 2d at 981; see *Sandusky Cty. Democratic Party v. Blackwell*, 340 F. Supp. 2d 810 (N.D. Ohio 2004) (denying a motion to stay the injunction).

15. Docket Sheet, *Sandusky Cty. Democratic Party v. Blackwell*, No. 04-4265 (6th Cir. Oct. 15, 2004); Notice of Appeal, *Sandusky Cty. Democratic Party v. Blackwell*, No. 3:04-cv-7582 (N.D. Ohio Oct. 14, 2004), D.E. 27; see Joe Hallett & Mark Niquette, *Blackwell Vows to Fight Ruling*, *Columbus Dispatch*, Oct. 16, 2004, at 3B.

16. Docket Sheet, *Sandusky Cty. Democratic Party v. Blackwell*, No. 04-4266 (6th Cir. Oct. 15, 2004); Notice of Appeal, *Sandusky Cty. Democratic Party*, No. 3:04-cv-7582 (N.D. Ohio Oct. 14, 2004), D.E. 28.

HAVA.<sup>17</sup> This was one of five orders Judge Carr issued while his injunction was on appeal;<sup>18</sup> in addition, he discussed with the secretary's attorney the judge's option to enforce his orders with contempt proceedings with the possible assistance of the U.S. Marshal.<sup>19</sup>

Also on October 20, Judge Carr approved in the second case the secretary's directive on provisional ballots for first-time voters.<sup>20</sup> His injunction in the first case already resolved the other matters in the second case.<sup>21</sup> The plaintiffs appealed, but the court of appeals agreed that these other matters were resolved in the first case.<sup>22</sup>

On October 23, the court of appeals affirmed Judge Carr's finding in the first case that the secretary's directive violated HAVA but reversed Judge Carr's holding that "HAVA requires that a voter's provisional ballot must be counted as a valid ballot if it is cast anywhere in the county in which the voter resides, even if it is cast outside the precinct in which the voter resides."<sup>23</sup> Three days later, the appellate court issued a longer opinion explaining its holding that

ballots cast in a precinct where the voter does not reside and which would be invalid under state law for that reason are not required by HAVA to be considered legal votes.

To hold otherwise would interpret Congress's reasonably clear procedural language to mean that political parties would now be authorized to marshal their supporters at the last minute from shopping centers, office buildings, or factories, and urge them to vote at whatever polling place happened to be handy, all in the effort to turn out every last vote regardless of state law and historical practice. We do not believe that Congress quietly

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17. *Sandusky Cty. Democratic Party v. Blackwell*, 340 F. Supp. 2d 815 (N.D. Ohio 2004); see Scott Hiaasen & Bill Sloat, *Provisional Ballots OK'd for Now*, *Cleveland Plain Dealer*, Oct. 21, 2004, at B3; Mark Niquette, *Judge Blasts Blackwell*, *Columbus Dispatch*, Oct. 21, 2004, at 1A.

18. See also *Sandusky Cty. Democratic Party*, 340 F. Supp. 2d 810 (2004) (denial of motions to stay the injunction during the appeal); Order, *Sandusky Cty. Democratic Party*, No. 3:04-cv-7582 (N.D. Ohio Oct. 22, 2004), D.E. 44 (ordering, to ensure full compliance with the court's prior orders, forthwith electronic service of directives on county boards of elections); Order, *id.* (Oct. 18, 2004), D.E. 39 (ordering the preparation of a HAVA-compliant directive in response to a representation by counsel during a teleconference that the secretary had not intended to prepare one); Order, *id.* (Oct. 18, 2004), D.E. 38 (providing a four-hour extension of time to comply with the injunction).

19. Interview with Hon. James G. Carr, June 18, 2012.

20. *League of Women Voters v. Blackwell*, 340 F. Supp. 2d 823 (N.D. Ohio 2004); see Daniel P. Tokaji, *HAVA in Court: A Summary and Analysis of Litigation*, 12 *Election L.J.* 203, 207 (2013).

21. *League of Women Voters*, 340 F. Supp. 2d at 824–25, 831.

22. Order, *League of Women Voters v. Blackwell*, No. 04-4293 (6th Cir. Oct. 27, 2004), D.E. 12, filed as Information, *League of Women Voters of Ohio v. Blackwell*, No. 3:04-cv-7622 (N.D. Ohio Nov. 2, 2004), D.E. 31.

23. *Sandusky Cty. Democratic Party v. Blackwell*, 386 F.3d 815 (6th Cir. 2004); see John F. Hagan & Bill Sloat, *Court Won't Allow Voting in Wrong Precincts*, *Cleveland Plain Dealer*, Oct. 24, 2004, at A1; Mark Niquette, *Election Officials Happy Now That Provisional-Ballot Issue Is Put to Bed*, *Columbus Dispatch*, Oct. 25, 2004, at 1A.

worked such a revolution in America's voting procedures, and we will not order it.<sup>24</sup>

On the day of the court of appeals' second ruling, Judge Carr ordered the secretary to issue by 3:00 p.m. a directive to county election officials that complied with HAVA and the court of appeals' rulings.<sup>25</sup> The order included a requirement that a notice be posted at polling places: "Your vote, including a vote cast by provisional ballot, will count ONLY if you are voting in the precinct in which you reside. If you do not know whether your correct precinct is located at this polling place, please ask a poll worker now for assistance."<sup>26</sup> Judge Carr saw no such notice at his polling place when he voted.<sup>27</sup>

On December 29, Judge Carr and the parties agreed to make the injunction permanent.<sup>28</sup> On March 3, 2005, Judge Carr awarded the plaintiffs \$64,613.14 in attorney fees and costs.<sup>29</sup> The court of appeals affirmed the award.<sup>30</sup> Settlement of fees and costs in the appeal brought the case to a close on January 2, 2007.<sup>31</sup>

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24. *Sandusky Cty. Democratic Party v. Blackwell*, 387 F.3d 565, 568 (6th Cir. 2004); see Edward B. Foley, *The Future of Bush v. Gore?*, 68 Ohio St. L.J. 925, 993 (2007); Edward B. Foley, *The Promise and Problems of Provisional Voting*, 73 Geo. Wash. L. Rev. 1193, 1197–98 (2005); Daniel P. Tokaji, *Early Returns on Election Reform: Discretion, Disenfranchisement, and the Help America Vote Act*, 73 Geo. Wash. L. Rev. 1206, 1229–30, 1243–44 (2005); Daniel P. Tokaji, *Election Law in a Nutshell* 185–86 (2013); Tokaji, *supra* note 20, at 207; see also Daniel P. Tokaji, *Voter Registration and Election Reform*, 17 Wm. & Mary Bill Rts. J. 453, 494 (2008) (arguing that it is "especially important that courts be generous in finding a private right of action and standing in cases alleging that rights protected by HAVA and other federal election laws have been violated").

25. Order, *Sandusky Cty. Democratic Party v. Blackwell*, No. 3:04-cv-7582 (N.D. Ohio Oct. 26, 2004), D.E. 46.

26. *Id.* at 3.

27. Interview with Hon. James G. Carr, June 18, 2012.

28. Stipulated Order, *Sandusky Cty. Democratic Party*, No. 3:04-cv-7582 (N.D. Ohio Dec. 29, 2004), D.E. 53.

29. *Sandusky Cty. Democratic Party v. Blackwell*, 361 F. Supp. 2d 688 (N.D. Ohio 2005).

30. *Sandusky Cty. Democratic Party v. Blackwell*, 191 F. App'x 397 (6th Cir. 2006).

31. Settlement Notice, *Sandusky Cty. Democratic Party*, No. 3:04-cv-7582 (N.D. Ohio Jan. 2, 2007), D.E. 71.