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ADVISORY NO. 2006-10
November 7, 2006

To: All County Boards of Elections

RE: Media Access to Polling Place

Questions have arisen around the state regarding media access to polling places to take pictures or shoot footage of voters and voting equipment. The courts have required election officials to allow the media "to have reasonable access to any polling place for the purpose of news-gathering and reporting so long as [they] do not interfere with poll workers and voters as voters exercise their right to vote." This means that poll workers should consider the following factors when they decide whether or not to allow media access to their polling place.

1. the length of time the media intends to be inside the polling place,
2. the length of voter lines,
3. the layout of the polling location, and
4. whether voter secrecy may be compromised.

Consult with your county prosecutor if your election officials think there are any other reasons to believe that media access will cause interference with the conduct of the election or voter secrecy.

A more detailed analysis for this special notice follows below:

R.C. 3501.35 provides in pertinent part that

"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."

In *Beacon Journal Publishing Company v. Blackwell*, 389 F.3d 683 (6th Cir. 2004) (copy attached), the United States Court of Appeals for the Sixth Circuit interpreted this provision as requiring election officials to allow the media "to have reasonable access to any polling place for the purpose of news-gathering and reporting so long as [they] do not interfere with poll workers and voters as voters exercise their right to vote."

In applying the above statutory provision as it has been interpreted by the Sixth Circuit, local election officials must make an individualized assessment of the particular circumstance at the polling location to which the media seeks access, with the goal of striking a balance between the constitutional rights of the media with the constitutional rights of voters. Factors to consider in

making a decision whether to allow media access to a particular polling location include but are not limited to (i) the length of time the media intends to be inside the polling place, (ii) the length of voter lines, (iii) the layout of the polling location and (iv) whether voter secrecy may be compromised.

You should consult with your county prosecutor regarding the proper application of the above statutory provision as it has been interpreted by the Sixth Circuit.

Please direct further questions to the Elections Division at (614) 466-2585.

Sincerely,

Monty Lobb
Assistant Secretary of State

Attachment

LEXSEE 389 F3D 683

Beacon Journal Publishing Company, Inc., et al., Plaintiffs-Appellants, v. J. Kenneth Blackwell, et al., Defendants-Appellees.

No. 04-4313

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

389 F.3d 683; 2004 U.S. App. LEXIS 22769

November 2, 2004, Decided
November 2, 2004, Filed

SUBSEQUENT HISTORY: US Supreme Court certiorari dismissed by *Blackwell v. Beacon Journal Publ'g Co., 2005 U.S. LEXIS 2756 (U.S., Mar. 18, 2005)*

DISPOSITION: District court's order denying motion for temporary restraining order and preliminary injunction vacated.

LexisNexis(R) Headnotes

JUDGES: [1]** Before: KEITH, CLAY, and COOK, Circuit Judges.

OPINIONBY: CLAY

OPINION:

[*684] ORDER

CLAY, Circuit Judge. Plaintiffs-Appellants, the Beacon Journal Publishing Company, which publishes the daily newspaper The Beacon Journal (the "Beacon Journal"), and the Beacon Journal's Deputy Metro Editor M. Charlene Nevada, move this Court for emergency injunctive relief from the district court's order denying their motion for a temporary restraining order and a preliminary injunction. Plaintiffs brought suit under *42 U.S.C. § 1983* alleging that the manner in which Defendants J. Kenneth Blackwell, the Ohio Secretary of State, and the Summit County Board of Elections, interpret and intend to enforce Ohio Revised Code § 3501.35 would have the effect of abridging their First Amendment rights. For the reasons that follow, we **VACATE** the district court's order.

Ohio Revised Code § 3501.35 provides in pertinent part:

> No person shall loiter or congregate within the area between the polling place and the small flags of the United States placed on the thoroughfares and walkways leading to the polling place....
>
> ...
>
> No person, **[**2]** 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.

Ohio Revised Code § 3501.35 (Anderson 2002). On October 20, 2004, Defendant Blackwell issued a directive advising all Ohio Boards of Elections that the statute's prohibition applies to *"anyone." See* Directive No. 2004-40. Plaintiffs allege that on October 29, 2004, they were denied access to a polling place where early voting was held. In addition, Defendant Blackwell's attorney Keith Scott represented to Plaintiffs that Blackwell's directive applied to reporters and photographers. Finding that Ohio and Summit County "have a compelling interest in making sure that voters vote freely and without intimidation," the district court denied Plaintiffs' request to restrain or enjoin Defendants from enforcing Blackwell's directive.

A district court's decision to deny a temporary restraining order -- where, as here, that denial amounts to the denial of injunctive relief -- is reviewed by this Court for abuse of discretion. *Procter & Gamble Co. v.*

Bankers Trust Co., 78 F.3d 219, 227 (6th Cir. 1996). **[**3]** While clearly erroneous fact-finding constitutes abuse of discretion, so, too, does the improper application of **[*685]** governing law. *Blue Cross & Blue Shield Mut. v. Blue Cross and Blue Shield Ass'n, 110 F.3d 318, 322 (6th Cir. 1997).* The district court's decision in this case is of the latter sort. While we may assume, without deciding, that Ohio's interest in ensuring orderly elections is compelling, our evaluation of Defendants' proposed course of action may not cease with that conclusion. Instead, Defendants bear the burden of demonstrating that their application of § 3501.35's blanket prohibition to members of the press -- whose objective, far from interfering with the right to vote, is rather to report the news of the day to their fellow Ohio citizens -- is necessary to further the state's aforementioned interest and "narrowly drawn to achieve that end." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45, 74 L. Ed. 2d 794, 103 S. Ct. 948 (1983).* Defendants have made no such showing. Indeed the district court's fear of "turmoil that could be created by hordes of reporters and photographers" is purely hypothetical and cannot, therefore, support Defendants' **[**4]** proposed restriction of the First Amendment's guarantee that state conduct shall not abridge "freedom . . . of the press." U.S. Const. amend. I. This Court has recently observed that "democracies die behind closed doors." *Detroit Free Press v. Ashcroft, 303 F.3d 681, 683 (6th Cir. 2002).* It is for this reason that the public "deputizes the press as the guardians of their liberty." Id.

With these principles in mind, we find that Plaintiffs present a strong likelihood of success on the merits of their challenge to Defendants' enforcement of Blackwell's directive. Because we find the district court failed to interpret and apply § 3501.35 consistent with the First Amendment, but instead interpreted and applied the statute overly broadly in such a way that the statute would be violative of the First Amendment, we therefore **VACATE** the district court's order, and we order that Defendants immediately and forthwith permit Plaintiffs to have reasonable access to any polling place for the purpose of news-gathering and reporting so long as Plaintiffs do not interfere with poll workers and voters as voters exercise their right to vote.

IT IS SO ORDERED.

DISSENTBY: COOK

DISSENT:

COOK, **[**5]** Circuit Judge, dissenting. We review a denial of injunctive relief for abuse of discretion. *Blue Cross & Blue Shield Mut. v. Blue Shield Ass'n, 110 F.3d 318, 322 (6th Cir. 1997).* The district court's determination will be disturbed only if the district court relied upon clearly erroneous findings of fact, improperly applied the governing law, or used an erroneous legal standard. Id. Despite the potential merit of the Beacon-Journal's First Amendment claim, I cannot conclude that the district court abused its discretion in denying injunctive relief under the circumstances. I respectfully dissent.