[Cite as *State ex rel. Mackey v. Blackwell*, 2004-Ohio-7004.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

No. 85597

STATE OF OHIO, EX REL., PERRIS J. MACKEY, ET AL.	:	ORIGINAL ACTION
	:	
	:	JOURNAL ENTRY
Relators	:	AND
	:	OPINION
vs.	:	
	:	
J. KENNETH BLACKWELL, ET AL.	:	
	:	
Respondents	:	

DATE OF JOURNALIZATION: DECEMBER 22, 2004

CHARACTER OF PROCEEDINGS: WRIT OF MANDAMUS

JUDGMENT: Dismissed.
Order No. 366362

APPEARANCES:

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MICHAEL J. CORRIGAN, J.:

{¶1} The relators, Perris J. Mackey, Colleen Pirie, and the People of the American Way Foundation, have filed a complaint for a writ of mandamus. The relators seek an order from this court which prevent the respondents, J. Kenneth Blackwell, the Secretary of the State of Ohio, the Cuyahoga County Board of Elections, and Michael Vu, Director of the Cuyahoga County Board of Elections, from invalidating the "provisional ballots" that were cast in the General Election held on November 2, 2004. For the following reasons, we sua sponte dismiss the relators' complaint for a writ of mandamus.

{¶2} In order for this court to issue a writ of mandamus, the relators must establish that: (1) the relators possess a clear legal right to the relief requested; (2) the respondents possess a clear legal duty to perform the requested act; and (3) the relators possess no plain and adequate remedy in the ordinary course of the law. *State ex rel. Bardo v. Lyndhurst* (1988), 37 Ohio St.3d 106, 524 N.E.2d 447; *State ex rel. Westchester Estates, Inc. V. Bacon* (1980) 61 Ohio St.2d 42, 399 N.E.2d 81; *State ex rel. Harris v. Rhodes* (1978), 54 Ohio St.2d 41, 374 N.E.2d 641. Herein, the relators essentially argue that the conduct of the respondents, by refusing to allow the "counting" of provisional ballots,

constitutes a violation of: (1) R.C. 3503.13; (2) "Voting Rights Act (42 U.S.C. § 1971(A)(2)(b))"; (3) the "Help America Vote Act (42 U.S.C. § 15482(A))"(4) the "Equal Protection Clause of the U.S. Constitution, Amendment Fourteen"; and (5) the "Due Process Clause of the United States Constitution, Fourteenth Amendment". The relators have failed to establish what right they possess under R.C. 3503.13 or that the respondents have violated any enumerated duty as required under R.C. 3503.13. Cf. *State ex rel. Jerningham v. Cuyahoga County Court of Common Pleas*, 74 Ohio St.3d 278, 1996-Ohio-117, 658 N.E.2d 723; *State ex rel. Gantt v. Coleman* (1983), 6 Ohio St.3d 5, 450 N.E.2d 1163.

{¶3} In addition, a writ of mandamus will not be issued where there exists a plain and adequate remedy in the ordinary course of the law. R.C. 2731.05; *State ex rel. Hastings Mut. Ins. Co. v. Merillat* (1990), 50 Ohio St.3d 152, 553 N.E.2d 646; *State ex rel. Rhodes v. Van Brocklin* (1988), 36 Ohio St.3d 236, 522 N.E.2d 1088; *State ex rel. Stanley v. Cook* (1946), 146 Ohio State 348, 66 N.E.2d 207. 42 U.S.C. § 1983 provides a cause of action against any person who, while acting under color of state law, violates or abridges rights as guaranteed by the United States Constitution or laws of the United States.

The United States Court of Appeals for the Sixth Circuit, in *Sandusky County Democratic Party v. Blackwell*, (C.A. 6, 2004), 387 F.3d 565, held that:

> "HAVA does not itself create a private right of action. Appellees contend that HAVA creates a federal right enforceable against state officials under 42 U.S.C. § 1983. With respect to the right to cast a provisional ballot under the circumstances described in HAVA § 302(a), we agree."
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> * *
>
> "The rights-creating language of HAVA § 302(a)(2) is unambiguous. That section states that upon making the required affirmation, an '*individual shall be permitted* to cast a provisional ballot.' 42 U.S.C. § 15482(a)(2) (Emphasis added). This language mirrors the rights-

> creating language of Title VI of the Civil Rights Act of 1964 and Education Title IX of the Amendments of 1972, which both state that 'no person . . . shall . . . be subjected to discrimination,' see 42 U.S.C. 2000d; 20 U.S.C. 1681(a), and which both create individual rights enforceable under § 1983, see Gonzaga, 536 U.S. at 284."

Id, at 572.

{¶4} The Supreme Court of Ohio has established that a Section 1983 action provides an adequate remedy at law which renders an action in mandamus unavailable in a state court proceeding. *State ex rel. Carter v. Schotten*, 70 Ohio St. 3d 89, 1994-Ohio-37, 637 N.E.2d 306. See, also, *State ex rel. Hogan v. Ghee*, 85 Ohio St.3d 150, 1999-Ohio-445, 707 N.E.2d 494; *State ex rel. Wilson-Simmons v. Lake Cty. Sheriff's Dept*. (1998), 82 Ohio St.3d 37, 1998-Ohio-597, 693 N.E.2d 789; *State ex rel. Zimmerman v. Tompkins (1996), 75 Ohio St.3d 447, 663 N.E.2d 639; Ohio Academy of Nursing Homes, Inc. v. Barry* (1990), 56 Ohio St.3d 120, 564 N.E.2d 686; *Johnson v. Rodriguez* (C.A. 5, 1997), 110 F.3d 299. It must also be noted that an action brought pursuant to Section 1983 "* * * provides a supplement to any state remedy, and there is no general requirement that state judicial or administrative remedies be exhausted in order to commence an Section 1983 action." *Schotten*, supra, at 91. Finally, an action is presently pending within the United States District Court for the Southern District of Ohio, *Schering v. Blackwell*, Case No. 1:04-CV-755, which addresses the identical issues as presently raised by the relators through their complaint for a writ of mandamus. See Exhibit A as attached to brief captioned "J. Kenneth Blackwell's Brief Demonstrating That A § 1983 Claim Is An Adequate Remedy At Law". Thus, we find that the relators have failed to state a claim upon which relief can be granted. *State ex rel. Peeples v. Anderson*, 73 Ohio St.3d 559, 1995-Ohio-335, 653 N.E.2d 371. See, also, *State ex rel. Kimbro v. Glavas*, 97 Ohio St.3d 197, 2002-Ohio-5808, 777 N.E.2d 257; *State ex rel. Luna v. Huffman* (1996), 74 Ohio St.3d

486, 659 N.E.2d 1279; *State ex rel. Cossett v. Executive State Governors Federalism Summit* (1995), 74 Ohio St.3d 1416, 655 N.E.2d 737.

{¶5} Accordingly, we sua sponte dismiss the relators' complaint for a writ of mandamus. Costs to relators. Clerk of the Eighth District Court of Appeals to serve notice of this judgment upon all parties as provided by Civ.R. 58(B).

Dismissed.

MICHAEL J. CORRIGAN
ADMINISTRATIVE JUDGE

PATRICIA A. BLACKMON, J., CONCURS

SEAN C. GALLAGHER, J., CONCURS IN JUDGMENT ONLY IN PART AND DISSENTS IN PART.

SEAN C. GALLAGHER, J.: CONCURRING IN JUDGMENT ONLY IN PART AND DISSENTING IN PART:

{¶6} I concur in judgment only in part and dissent with respect to portions of the majority decision as outlined below.

{¶7} Relators seek redress on three specific issues involving the invalidating of provisional ballots asserting: 1. Improper use of the electronic voter data base rather than the original voter registration forms as required by R.C. 3503.13; 2. Rejection of provisional ballots based on nonmaterial omissions or errors involving signatures in violation of the Voting Rights Act, H.A.V.A. and the Equal Protection Clause; 3. Rejection of provisional ballots based on nonmaterial omissions or errors involving missing affirmations documents or stickers in violation of the Voting Rights Act, H.A.V.A. and the Equal Protection Clause.

{¶8} With respect to the first request for relief, for the reasons outlined below, I believe petitioners have stated a valid claim under mandamus. I would direct the Secretary of State and the Cuyahoga County Board of Elections to recount all rejected provisional

ballots using the original completed voter registration forms.

{¶9} With respect to the claims raised in the second and third portions of the request for relief, I agree with the majority decision and analysis that there exists a plain and adequate remedy at law, specifically 42 U.S.C., Section 1983.

{¶10} Relators assert that all votes should be counted pursuant to the statutory requirements. They are seeking to have votes that were cast counted pursuant to the statutorily mandated process.

{¶11} A writ of mandamus is proper where the Secretary of State or the election board refuses to count votes. *State ex rel. White v. Franklin County Board of Elections, et al.* (1992), 65 Ohio St.3d 5, 598 N.E.2d 1152. Here, relators claim that the respondent's failure to use either the precinct register or the permanent office record of the board of elections to establish who is an actual registered voter, or the failure to create and maintain a viable electronic voter registration record, is a violation of the legal duty to administer elections in accordance with Ohio law. In effect, votes are not counted and voters are disenfranchised by the failure to follow the requirements of R.C. 3503.13(A), 3503.13(C)and 3503.13(D).

{¶12} "(A) Except as provided in division (C) of this section, registration forms shall consist of original and duplicate cards or loose-leaf pages as prescribed by the secretary of state. When such registration forms have been filled out and filed in the office of the board of elections, the original forms shall be filed together in one file and the duplicate forms shall be filed together in another file. Except as otherwise provided in division (D) of this section, the original forms shall be filed by precincts and shall constitute the precinct register for use in polling places on election day. The duplicate forms shall be filed alphabetically and shall constitute the permanent office record of the board. It shall not be

removed from the office of the board except upon the order of a court." §3503.13. Registration forms, records.

{¶13} The use of electronic records is authorized under R.C. 3503.13 (C)which states:

{¶14} "(C) The board of elections of a county that adopts or has adopted electronic data processing for the registration of qualified electors of the county may use a single registration form complying with the requirements of division (A) of this section. The information contained on the form may be duplicated on punch cards, magnetic tape, discs, diskettes, or such other media as are compatible with the data processing system adopted by the board and may constitute the permanent office record in lieu of the duplicate registration card." §3503.13. Registration forms, records.

{¶15} Further, R.C. 3503.13(D) authorizes the use of the electronic record as a substitute for the original registration forms.

{¶16} "(D) Instead of using the original registration forms as the precinct register in the polling places on election day as provided in division (A) of this section, a board of elections that has adopted electronic data processing may use a legible digitized signature list of voter signatures, copied from the signatures on the registration forms in a form and manner prescribed by the secretary of state, provided that the board continues to record and maintain at the board office the information obtained from the form prescribed under section 3503.14 of the Revised Code, and provided that the precinct election officials have computer printouts at the polls containing any necessary information specified by the secretary of state that would otherwise be available to them on the registration forms." §3503.13. Registration forms, records.

{¶17} The application of both R.C. 3503.13(C) and 3503.13(D) are predicated on

the principle that the electronic records utilized as a substitute for the original forms in R.C. 3503.13(A)are accurate and reflect the actual voter registration forms under R.C. 3503.14.

{¶18} Based on the documentary evidence submitted, the electronic media record of voter registrations compiled by the Cuyahoga County Board of Elections apparently does not accurately reflect the actual voter registration records completed by those who actually registered to vote.

{¶19} I am cognizant that portions of the claims raised here arise directly from the discretionary advice provided by the Ohio Secretary of State to the local election board over how to count the votes. As the Ohio Supreme Court has stated: "Though he is required to advise the boards, the content of his advice is discretionary. Mandamus will not issue to govern how discretion is exercised." *State ex rel. Hodges v. Taft* (1992), 64 Ohio St.3d 1, 591 N.E.2d 1186, citing *State ex rel. Martin v. Corrigan* (1986), 25 Ohio St.3d 29, 494 N.E.2d 1128. Nevertheless, discretionary actions of a board of elections or of the Secretary of State are subject to judicial review under mandamus for fraud, corruption, abuse of discretion or a clear disregard of statutes or applicable legal provisions. *State ex rel. Senn v. Bd. of Elections* (1977), 51 Ohio St.2d 173, 175, 367 N.E.2d 879, 880, (concerning a board of election's decisions on matters of sufficiency and validity of petitions).

{¶20} I do not see the issue raised here as a renewed contest over who was elected president, even if that is in part the intent of some of the relators. While this election is over, the problem remains. The fact that some votes will never be counted is a problem that will evade review if not addressed. The most significant issue raised here is the integrity and accuracy of our voting system. The potential disenfranchisement of voters is a significant issue for all Americans, regardless of political orientation.

{¶21} For there to be an adequate remedy at law, the remedy must be complete, beneficial, and speedy. *State ex rel. Carter v. Schotten,* 70 Ohio St.3d 89, 1994-Ohio-37, 637 N.E.2d 306, citing *State ex rel. Horwitz v. Cuyahoga Cty. Court of Common Pleas, Probate Div.* (1992), 65 Ohio St.3d 323, 328, 603 N.E.2d 1005, 1009; *State ex rel. Liberty Mills, Inc. v. Locker* (1986), 22 Ohio St.3d 102, 488 N.E.2d 883. I do not believe reliance on a 42 U.S.C., Section 1983 action will provide speedy relief for the relators. For that reason, I would direct the Secretary of State and the Cuyahoga County Board of Elections to recount all rejected provisional ballots using the original completed voter registration forms.

{¶22} With respect to the remaining issues raised, I concur in judgment only with the majority opinion.