

Judge Susan J. Dlott – “Noteworthy Rulings”

1997: Union brought First Amendment challenge seeking preliminary injunction of transit authority’s rejection of union’s wrap-around bus advertisement based on allegedly controversial nature of advertisement and aesthetically displeasing appearance. Dlott determined that transit authority’s rejection of the advertisement was not reasonable, the union had demonstrated a substantial likelihood of success on the merits of its First Amendment claim, and the loss of First Amendment rights constitutes irreparable injury that, in this case, was not outweighed by harm to others or any public interest. The Sixth Circuit affirmed, holding, *inter alia*, that the transit authority had demonstrated an intent to designate advertising space on its buses as a public forum and that the transit authority’s policy of banning controversial advertisements adversely affecting bus ridership was constitutionally invalid under the overbreadth doctrine. *United Food & Commercial Workers Union, Local 1099 v. Southwest Ohio Reg’l Transit Auth.*, No. C-1-97-512 (S.D. Ohio Sept. 15, 1997), *aff’d*, 163 F.3d 341 (6th Cir. 1998).

1998: Public school teacher Bruce Glover claimed that Williamsburg Local School District’s decision not to renew his teaching contract discriminated against him on the basis of his sexual orientation, his gender, and the race of his partner in violation of the Fourteenth Amendment. Glover also claimed that the School Board retaliated against him for exercising his right to free speech in violation of the First Amendment. Finding the School Board members’ testimony explaining Glover’s termination contradictory and not entirely credible, Dlott applied the rational basis level of scrutiny and found that the School Board’s purported reasons for Glover’s nonrenewal were pretextual. Dlott found that Glover failed to produce sufficient evidence to support his claim that the Board’s decision was motivated by his gender or the race of his partner. Dlott also found that although the Board discriminated against Glover on the basis of his sexual orientation, Glover failed to prove that his public complaint about the discrimination was an additional factor in the Board’s decision. *Glover v. Williamsburg Local School Dist.*, 20 F. Supp. 2d 1160 (S.D. Ohio 1998).

1999: Female prisoner who was approximately nine weeks pregnant sought temporary restraining order and preliminary injunction restraining the director of the correctional center where she was held from denying her access to pregnancy termination services absent a court order. Dlott found that the plaintiff was likely to succeed on the merits of her case because the correction center’s denial of access absent a court order bore no logical connection to penological interests and that the plaintiff would suffer irreparable harm if the injunction were not issued. Finally, Dlott held that the public interest was served by issuing the restraining order because the Supreme Court recognized a woman’s right to choose to terminate her pregnancy, and it is in the public interest to uphold that right when it is arbitrarily denied by prison officials absent medical or other legitimate concerns. *Doe v. Barron*, 92 F. Supp. 2d 694 (S.D. Ohio 1999).

2002: Jewish organization and homeless advocacy organization challenged that portion of city ordinance that, during the last two weeks of November, the month of December and the first week of January, prohibited anyone but the City of Cincinnati from erecting a display, exhibit or structure or holding an event, protest, rally or meeting on the main downtown square. The

Judge Susan J. Dlott – “Noteworthy Rulings”

ordinance provided for the issuance of permits on a first come, first served basis, except for the seven-week period reserved for the city’s “exclusive use.” Dlott preliminarily enjoined the enforcement of the “exclusive use” provision as in violation of the First Amendment. *Chabad of Southern Ohio v. City of Cincinnati*, 233 F. Supp. 2d 975 (S.D. Ohio 2002), *aff’d*, 363 F.3d 427 (6th Cir. 2004). The Sixth Circuit Court of Appeals granted a stay of the injunction pending appellate review, No. 4340, 2002 WL 31829493 (6th Cir. Nov. 27, 2002), but Justice Stevens, as Circuit Justice, vacated the stay. 123 S. Ct. 518 (2002).

2002: Dlott granted motion for class certification and approved agreement settling class claims of racially discriminatory law enforcement practices. *In re Cincinnati Policing*, 209 F.R.D. 395 (S.D. Ohio 2002). Dlott presided over the five year implementation of that agreement on police-community relations and law enforcement practices, entered into by the City of Cincinnati, the Fraternal Order of Police, and civil rights and community organizations, as well as an agreement between the City and the United States Department of Justice.

2003: After Dlott denied Defendant City of Cincinnati’s motion for summary judgment, transsexual Cincinnati police officer Philecia Barnes tried her case to a jury in February of 2003, claiming employment discrimination in violation of Title VII, 42 U.S.C. § 1983, and Ohio state law. Barnes alleged sex discrimination under Title VII based on her failure to conform to sex stereotypes and that Defendant City of Cincinnati violated her rights under the Equal Protection Clause of the Fourteenth Amendment by demoting her on the basis of her perceived sexual orientation, gender identity, transsexuality, and failure to conform to sex stereotypes. The jury found in favor of Barnes on all of her claims and awarded Barnes compensatory damages and front pay. Dlott denied Defendant City of Cincinnati’s motion for judgment as a matter of law or, in the alternative, for a new trial. *Barnes v. City of Cincinnati*, C-1-00-780 (S.D. Ohio July 25, 2003).

2004: A consortium of several Cincinnati hospitals and health care organizations brought suit against the Hamilton County Board of Commissioners to contest the County’s award to University Hospital of the proceeds of a levy designated for adult indigent healthcare. The Plaintiffs argued that the County’s action in awarding the levy funds solely to University Hospital, without providing them either 1) a share of the levy funds proportionate to the share of adult indigent healthcare that they provide; or 2) the opportunity to competitively bid for the contract, violated the Equal Protection and Due Process clauses of the Constitution. Dlott granted summary judgment, holding that Plaintiffs 1) failed to state a claim under the equal protection clause because Plaintiffs and University Hospital were not similarly situated and the County Defendants had a rational basis for their decision to contract solely with University Hospital; and 2) Plaintiffs had no constitutionally protected property interest in the contract that would support a due process claim. *TriHealth, Inc. v. Hamilton County Bd. of Comm’rs*, 347 F.

Judge Susan J. Dlott – “Noteworthy Rulings”

Supp. 2d 548 (S.D. Ohio 2004), *aff’d*, 430 F.3d 783 (6th Cir. 2005).

2004: Clinics and physicians brought a class action on their own and their patients’ behalfs challenging the constitutionality of an Ohio statute regulating the use and prescription of mifepristone, which is used for inducing medical abortion, and imposing criminal penalties on physicians who violated the regulations. Dlott found that Plaintiffs had a substantial likelihood of success on the merits because the Act failed to include the constitutionally required exception for the life and health of the mother. Dlott granted the Plaintiffs’ motion for preliminary injunction as well as the Plaintiffs’ motion for certification of a defendant class of prosecutors and enjoined defendant state officials from enforcing the Act. *Planned Parenthood Cincinnati Region v. Taft*, 337 F. Supp. 2d 1040 (S.D. Ohio 2004), *aff’d in part, vacated in part*, 444 F.3d 502 (6th Cir. 2006).

2004: The Ohio Democratic Party and two registered Ohio voters sued to restrain election officials from holding hearings on pre-election challenges to voter eligibility. In response to the last minute challenge of approximately 35,000 Ohio voters’ eligibility, Boards of Election had sent or intended to send notices of hearings on the voters’ eligibility. The notices, sent to addresses from which mail had been returned, were sent no more than a week before the election and the hearings were to be held no more than five days before Election Day. Dlott found that, under the circumstances, the timing of and manner in which Defendants intended to send notice and conduct hearings were inadequate under the Due Process Clause and endangered those voters’ fundamental right to vote. Dlott preliminarily enjoined election officials from mandating or enforcing the hearings. Dlott also certified a defendant class of all eighty-eight Ohio county Boards of Elections, and enjoined them from sending further notices or conducting such hearings. *Miller v. Blackwell*, 348 F. Supp. 2d 916 (S.D. Ohio 2004).

2004: African-American registered voters sued election officials to restrain them from allowing partisan “challengers” to challenge voter eligibility at the polling places. Dlott found that due to a lack of training on challenge procedures and questionable enforceability of the State’s and County’s policies regarding good-faith challenges and ejection of disruptive challengers from the polling places, there existed a serious risk of delay and voter intimidation at the polls. Dlott enjoined partisan challengers from entering polling places throughout the state of Ohio on Election Day, holding that a challenge procedure under such conditions severely burdened the right to vote and did not justify compelling state interests. Dlott enjoined partisan challengers from entering polling places throughout the state of Ohio on Election Day. *Spencer v. Blackwell*, 347 F. Supp. 2d 528 (S.D. Ohio 2004). The Sixth Circuit granted an emergency stay of Dlott’s injunction pending appeal. *Summit County Democratic Central and Executive Comm. v. Blackwell*, 388 F.3d 547 (6th Cir. 2004).

Judge Susan J. Dlott – “Noteworthy Rulings”

2006: Plaintiffs brought a Fourth Amendment challenge seeking injunctive relief to enjoin the United States from seizing stored personal email communications in the possession of internet service providers. The United States, pursuant to the Stored Communications Act (18 U.S.C. § 2703), had been granted an order *ex parte* to retrieve stored email communications during a criminal investigation. Dlott granted the injunction, declaring certain subsections of 18 U.S.C. § 2703 unconstitutional in that they authorize *ex parte* issuance of searches and seizures without a warrant and on less than a showing of probable cause. Dlott held that holders of personal email accounts have a reasonable expectation of privacy and must be provided notice and an opportunity to be heard on any complaint, motion, or other pleading seeking issuance of an order to retrieve the contents of personal email accounts maintained by an internet service provider. The Sixth Circuit Court of Appeals largely affirmed Dlott’s ruling. *Steven Warshak, et. al., v. United States*, No. 1:06cv357, 2006 WL 5230332 (S.D. Ohio July 21, 2006), *aff’d* 490 F.3d 455 (6th Cir. June 18, 2007) (*reh’g en banc granted, opinion vacated* Oct. 9, 2007).

2009: Plaintiffs claimed that the county coroner’s practice of removing, retaining, and disposing of autopsy specimens without prior notice to the next of kin denied them due process and violated Ohio law. Relying on *Brotherton v. Cleveland*, 923 F.2d 477, 482 (6th Cir. 1991), Plaintiffs claimed that Ohio law granted them a “legitimate claim of entitlement” to their son’s autopsy specimens. However, an Ohio statute defined autopsy specimens as “medical waste” to be disposed of in accordance with federal and state law. Finding it unclear whether Ohio law gave next of kin an interest in a decedent’s autopsy remains, Dlott certified the question to the Supreme Court of Ohio. The Supreme Court of Ohio answered the question in the negative, finding that Ohio law does not give next of kin a protected right in autopsy specimens. Because Plaintiffs did not have a state-created interest or entitlement in their son’s autopsy remains, Judge Dlott concluded that their claim under 42 U.S.C. § 1983 failed as a matter of law. *Albrecht v. Treon, M.D.*, No. 1:06cv274, 2009 WL 1373112 (S.D. Ohio May 14, 2009); *aff’d* 617 F.3d 890 (6th Cir. 2010).

2010: Registered voters in four Ohio counties challenged absentee voting in the state because not all counties followed the same procedures. Specifically, some but not all Ohio counties mail absentee ballot applications to every elector; and some but not all prepay postage to send back the application and ballot. Plaintiffs, who live in counties that do not automatically mail applications or prepay postage, claimed that the inconsistency resulted in a violation of their rights under the Equal Protection and Due Process Clauses of the U.S. Constitution. Dlott disagreed and denied the plaintiffs’ request for injunctive relief, finding that they had failed to show that the Secretary of State violated their right to vote on an equal basis by allowing these different practices. “Not every difference amounts to a constitutional injury,” Dlott concluded. *Vanzant v. Brunner*, No. 1:10cv596 (S.D. Ohio Sept. 27, 2010).

Judge Susan J. Dlott – “Noteworthy Rulings”

2010-2012: In an election dispute that garnered national attention, Chief Judge Dlott relied on *Bush v. Gore*, 531 U.S. 98, 104 (2000), to hold that the Hamilton County, Ohio, Board of Elections violated provisional voters’ rights to equal protection during the November 2010 election. *Hunter v. Hamilton Cnty. Bd. Of Elections*, No. 1:10cv820. Dlott’s ruling changed the outcome of the election for Hamilton County Juvenile Court Judge: the Board counted an additional 286 provisional ballots and candidate Williams, who had been declared the winner by a margin of 23 votes, lost to candidate Hunter by 74 votes.

The dispute centered on the Board’s decision to count some, but not all, provisional ballots miscast because of poll-worker error. Specifically, the Board counted “wrong precinct” provisional ballots cast at the Board’s headquarters because the staffer gave the voter the wrong ballot, but it refused to count “wrong precinct” provisional ballots cast at polling locations without considering whether poll-worker error was to blame. Plaintiffs, candidate Hunter, and the Northeast Ohio Coalition for the Homeless moved for a preliminary injunction that would prohibit the Board from rejecting provisional ballots miscast due to poll-worker error. Dlott granted the motion, noting that “[t]he right to vote includes the right to have one’s vote counted on equal terms with others.” *Hunter v. Hamilton Cnty. Bd. Of Elections*, 2010 WL 4878957 (S.D. Ohio Nov. 22, 2010).

The case is unique not only because of its application of the *Bush v. Gore* equal protection standard but also because of its procedural history. Candidate Williams challenged the Board’s ballot-investigation procedure in the Ohio Supreme Court. *See State ex rel. Painter v. Brunner*, 128 Ohio St. 3d 17 (2011). The Ohio Court held that there was no provision in Ohio law for counting provisional ballots miscast due to poll-worker error, and the Board appealed to the Sixth Circuit Dlott’s order enforcing the preliminary injunction. However, the Sixth Circuit, in an opinion referred to as “the most significant application of *Bush v. Gore* in the decade since that precedent was decided,” agreed with Dlott that the plaintiffs had shown a strong likelihood of success on the merits of their equal protection claim. *Hunter v. Hamilton Cnty. Bd. Of Elections*, 635 F.3d 219 (6<sup>th</sup> Cir. 2011), *reh’g and reh’g en banc denied* March 29, 2011.

The Sixth Circuit remanded the case for additional fact-finding on which ballots had been miscast due to poll-worker error. Dlott then held a three-week evidentiary hearing during which Board staff, poll-workers, and voters testified. Under Ohio law, poll workers are required to direct provisional voters to the correct precinct. Evidence at the hearing showed that poll workers in multi-precinct locations did not reliably direct voters to the correct precinct table within that location. Accordingly, Dlott held that provisional ballots cast at the correct multi-precinct voting location but at the wrong table - so called, “right church, wrong pew” ballots were substantially similar to the “wrong precinct” ballots case at the Board headquarters that the Board already had counted. Dlott held that the Board had failed to justify its decision to treat these similar groups of ballots differently and ordered the Board to count otherwise valid right location, wrong precinct provisional ballots. *Hunter*, 850 F. Supp.2d 795 (S.D. Ohio 2012).

### Judge Susan J. Dlott – “Noteworthy Rulings”

The Board appealed Judge Dlott’s order and filed a motion in the Sixth Circuit requesting a stay of that order. Finding that the remedy ordered by Judge Dlott “appear[ed] to have been crafted in the least intrusive manner possible,” the Sixth Circuit denied the Board’s motion to stay. The Board voluntarily dismissed its appeal, valid “right-church, wrong-pew” ballots were counted, and Hunter won the contested seat on the Juvenile Court.