

that (1) Defendants' Motion to Dismiss should be granted; and (2) Plaintiffs' Motion to Remand should be rendered moot.

More specifically, Plaintiffs posit the following Objections:

- (1) The Magistrate's Report and Recommendation (R&R) erroneously renders judgment on the merits of the case without first adjudicating whether federal jurisdiction exists.
- (2) The R&R erroneously concludes that proscription against generalized grievances eviscerates both the private cause of action for vote dilution and the statutory grant of standing articulated in the Ohio Corrupt Activities Act (OCAA).
- (3) The R&R erroneously concludes that state action is a prerequisite to any claim related to an injury to one's constitutional rights, including a claim that is not against the state.
- (4) The R&R erroneously abstains from applying the plain language of the term "injury," instead looking to legislative intent without first concluding that the term is ambiguous.
- (5) The R&R erroneously concludes that the Plaintiff's First Amendment Complaint does not allege actual voter fraud, and further erroneously concludes that allegations of actual voter fraud are necessary to state a claim upon which relief can be granted under the OCAA.

Respectfully submitted,

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**MEMORANDUM IN SUPPORT OF PLAINTIFFS' OBJECTIONS TO MAGISTRATES
REPORT AND RECOMMENDATION**

I. Introduction and Issues Presented

Plaintiffs Jennifer Miller and Kim Grant filed their Complaint against Defendants on October 14, 2008. This Complaint was brought under the Ohio Corrupt Activities Act, which provides a private right of action for individuals who are harmed by the conduct of an enterprise's pattern of corrupt activity. In this case, Plaintiffs allege an injury to their constitutional right to cast a vote that is undiluted by illegitimate votes.

In recommending dismissal of Plaintiffs' ("Ms. Miller's") Complaint, The R&R make five erroneous conclusions. The first of these is procedural: the R&R finds that Ms. Miller's Motion to Remand is moot because it concludes that Defendants' ("ACORN's") Motion to Dismiss should be granted. The next four findings address whether Plaintiffs have standing to litigate this matter, and they conclude that Ms. Miller and Mrs. Grant lack such standing.

Consequently, the following issues are before the Court: (1) whether a federal court may rule on a motion to dismiss without first addressing a pending challenge to that court's jurisdiction; (2) whether both a statutory grant of standing and Supreme Court voting rights jurisprudence are voided by the prohibition against generalized grievances; (3) whether a plaintiff may claim an injury to his constitutional rights when litigating against a defendant who is not a state actor; (4) whether the term "injury" pertains to harm to constitutional rights; and (5) whether actual harm is alleged in this case, and whether it must be alleged to maintain an OCAA civil cause of action.

In resolving these issues, this Court should, respectively, reach the following conclusions: (1) It was improper for the R&R to address the merits of this case without first

ruling on Ms. Miller’s Motion to Remand; (2) the prohibition against generalized grievances does not apply to this case because both voting rights cases and the OCAA specifically grant standing to Ms. Miller; (3) the OCAA authorizes Ms. Miller’s claims for an injury to her voting rights even though ACORN is not a state actor; (4) the word “injury” is clear, does not require resort to legislative intent or history for its interpretation, and does encompass impairment of voting rights; and (5) Ms. Miller’s Complaint alleges actual voter fraud, and alleges the threat of such fraud.

Upon reaching these conclusions, this Court must reject the R&R. Upon finding that R&R improperly mooted Ms. Miller’s Motion to Remand, the Court should decide the matter, grant Ms. Miller’s Motion to Remand, return this case to the Warren County Court of Common Pleas, and abstain from consideration of Defendants’ Motion to Dismiss.

II. Standard of Review

This matter is predicated upon the Magistrate’s pretrial order on two dispositive matters: Ms. Miller’s Motion to Remand and ACORN’s Motion to Dismiss. The matter is thus governed by Federal Rule of Civil Procedure 72(b). That provision, in pertinent part, states as follows:

(2) *Objections.* Within 10 days after being served with a copy of the recommended disposition, a party may serve and file specific written objections to the proposed findings and recommendations. A party may respond to another party’s objections within 10 days after being served with a copy. Unless the district judge orders otherwise, the objecting party must promptly arrange for transcribing the record, or whatever portions of it the parties agree to or the magistrate judge considers sufficient.

(3) *Resolving Objections.* The district judge must determine de novo any part of the magistrate judge’s disposition that has been properly objected to. The district

judge may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions.

This rule requires the district judge to whom the case is assigned to make a de novo determination of those portions of the report, findings, or recommendations to which timely objection are made. “De novo review” of a dispositive order, findings, or recommendation by United States Magistrate Judge means that the Court must consider matter anew, the same as if it had not been heard before and as if no decision previously had been rendered.¹

III. Law and Analysis

A. The R&R erroneously fails to adjudicate whether federal jurisdiction exists prior to rendering judgment on the merits of the case.

i. The R&R erred in failing to consider the Motion to Remand.

Before deciding this case court must establish that it has the jurisdiction. Just three years ago, this Court explicitly addressed the matter. Sixth Circuit precedent speaks directly to the matter: in *Stevens v. Taser International, Inc.*, this Court was confronted with a request that it consider the defendants’ motion to dismiss before it considered the plaintiff’s motion to remand, with the defendants taking the position that “if the motion to dismiss is granted, then the motion to remand would be rendered moot.”² This Court disagreed, ruling that “[t]he Court, however, must give priority to motions such as Plaintiff’s Motion to Remand that allege lack of subject matter jurisdiction.”³ In so doing it relied on a firmly rooted axiom

¹ *Abordo v. State of Hawaii*, D.Hawai’i 1996, 938 F.Supp. 656.

² *Stevens v. Taser Intern., Inc.*, Not Reported in F.Supp.2d, 2006 WL 143797, (S.D. Ohio, 2006).

³ *Id.*

established by the United States Supreme Court: “[q]uestions of jurisdiction, of course, should be given priority-since if there is no jurisdiction there is no authority to sit in judgment of anything else.”⁴ The reason underlying this axiom is clear: “[j]urisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.”⁵ Consequently, a federal court must consider a jurisdictional challenge before it may address the merits of a case.⁶

Here, Ms. Miller moved to remand on the grounds that the amount in controversy at issue in this case does not permit federal diversity jurisdiction. In short, that document establishes that (1) the amount in controversy required for federal diversity jurisdiction, \$75,000, is measured as a function of the interest a plaintiff seeks to protect; and (2) where the interest is intangible and difficult to measure, such as Ms. Miller’s right to have an undiluted vote cast and counted, the amount in controversy is less than \$75,000. In such an instance federalism dictates that diversity jurisdiction does not exist, and the matter is appropriate for state court.⁷ This Court must reject the R&R’s conclusion that Ms. Miller’s Motion to Remand is moot.

⁴ *Id.*, citing *Vermont Agency of Natural Res. v. United States*, 529 U.S. 765, 778, 120 S.Ct. 1858, 146 L.Ed.2d 836 (2000) (citing *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 93-102, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998)).

⁵ *Id.*, at 778-79 (citing *Ex parte McCardle*, 7 Wall. 506, 74 U.S. 506, 19 L.Ed. 264 (1869)).

⁶ See *Martin v. Voinovich*, 840 F.Supp. 1175, 1185 (S.D.Ohio 1993) (citing *Gould, Inc. v. Pechiney Ugine Kuhlmann*, 853 F.2d 445 (6th Cir.1988)).

⁷ Plaintiffs’ Motion to Remand.

ii. This matter should be remanded.⁸

The R&R fails to address Ms. Miller’s Motion to Remand, or otherwise address whether the requisite amount in controversy exists in this case. This oversight looms large in light of a critical fact acknowledged by the R&R: Plaintiff and Defendants’ differing interpretations of the Ohio Corrupt Activities Act “presents a unique issue for the Court.”⁹

Ms. Miller agrees: this issue is indeed unique. And it is one of *state* law. As such, it should be interpreted by a state court. At the core of the federal judicial system is the principle that the federal courts are courts of limited jurisdiction.¹⁰ For these reasons, “removal statutes are strictly construed against removal,” unless a party clearly demonstrates that the federal court has jurisdiction.¹¹ Accordingly, courts within the Sixth Circuit have duly noted as follows:

*The Constitution allows federal courts only a limited and special jurisdiction, and powers not given to the federal courts by Congress are reserved to the primary repositories of American judicial power: state courts.*¹²

Further, state courts enjoy “constitutional primacy,”¹³ and notions of comity require “proper respect for state functions.”¹⁴ This reflects “a system in which there is sensitivity to the

⁸ In this section, Plaintiffs’ analysis focuses on structural analysis in favor of remand, and refrains from rehashing the amount in controversy analysis contained in Plaintiffs’ Motion to Remand. Plaintiffs refer the court to that Motion to Remand for that analysis, and instead focus on structural issues here because there are implicated by the Magistrate’s acknowledgement that a complex issue of state law exists in this case.

⁹ R&R, p. 10.

¹⁰ *Chicago, Burlington & Quincy Ry. v. Willard* (1911), 220 U.S. 413, 31 S.Ct. 460, 55 L.Ed. 521.

¹¹ *Shamrock Oil & Gas Corp. v. Sheets* (1941), 313 U.S. 100, 61 S.Ct. 868, 85 L.Ed. 1214; 14 Wright, Miller and Cooper, *Federal Practice and Procedure*, section 3721, pp. 533-37; *Marler v. Amoco Oil Co., Inc.* (E.D.N.C., 1992), 793 F.Supp. 656.

¹² *Green v. Union Planters Bank*, Not Reported in F.Supp.2d, 2006 WL 1699463 (W.D.Tenn.). Emphasis added.

legitimate interests of both State and National Government, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activity of the States.”¹⁵

Additionally, the Supreme Court has declared that “when the state law issues are complicated, or state law is unclear or in the process of evolving, comity considerations may weigh toward remand of the state law claims.”¹⁶ Courts within the Sixth Circuit have bolstered this principle, ruling that federal courts should avoid making decisions of state law when few or no federal issues remain and no affirmative need for federal jurisdiction exists.¹⁷ Finally, but perhaps most importantly, “[i]t is particularly appropriate that a state court is given the opportunity to interpret the application of its own laws, *and to resolve any unsettled questions concerning those laws.*”¹⁸ (Emphasis Added).

Here, all roads lead back to the interpretation of a complex *state* statute. As the R&R itself notes, the Plaintiff and Defendants’ differing interpretations of the OCAA presents a unique issue; this is precisely why the matter should be interpreted by a state court. At the very minimum, this Court should ascertain whether it has jurisdiction prior to interpreting novel and

¹³ Id.

¹⁴ Id.

¹⁵ *Pennzoil Company v. Texaco, Inc.*, 481 U.S. 1, 10, 107 S.Ct. 1519, 1525-26, 95 L.Ed.2d 1 (1987).

¹⁶ *Anderson v. Cader Publishing, Ltd.*, Not Reported in F.Supp.2d, 2006 WL 2404508 (E.D.Mich.)

¹⁷ Id.

¹⁸ Id. Emphasis added.

complex state law issues. It was mistaken to describe the jurisdictional issue as “moot,” and this Court should remand this case to the Warren County Court of Common Pleas.

B. The R&R erroneously concludes that federal constitutional standing provisions eviscerate the specific statutory conferral of standing articulated in the Ohio Corrupt Activities Act.

The R&R mistakenly concludes that the proscription on generalized grievances precludes a citizen from (1) vindicating his or her right to vote; and (2) vindicating an injury under the OCAA. Specifically, the R&R indicates that “Plaintiffs * * * have not alleged any particularized injury other than a generalized grievance which is insufficient to state a cause of action.”¹⁹ This conclusion is incorrect for at least two reasons: (1) the United States Supreme Court has specifically ruled that a citizen has standing to vindicate an injury to his voting rights, even where the injury is shared amongst a large class of citizens; and (2) the OCAA statute specifically grants standing to any person who is injured or threatened with injury by a pattern of corrupt activity.

First, the Supreme Court has specifically ruled that voters have standing when their voting rights are impaired. In *Baker v. Carr*, the Court held that an injury to the right of suffrage *confers standing* because there is a “plain, direct and adequate interest in maintaining the effectiveness of [one’s] votes.”²⁰ To this end, there is an extensive history of cases granting

¹⁹ R&R, p. 8.

²⁰ *Baker v. Carr* (1962), 369 U.S. 186, at 208, 82 S.Ct. 691 (in *Baker*, plaintiffs filed suit “on their own behalf and on behalf of all qualified voters of their respective counties, and further, on behalf of all voters of the State of Tennessee.”)

standing to individual voters even where their harm does not differ from that of their neighbors.²¹

Baker concluded with the following important observations:

It would not be necessary to decide whether appellants' allegations of impairment of their votes by the 1901 apportionment will, ultimately, entitle them to any relief, in order to hold that they have standing to seek it. If such impairment does produce a legally cognizable injury, they are among those who have sustained it. They are asserting 'a plain, direct and adequate interest in maintaining the effectiveness of their votes,' not merely a claim of 'the right possessed by every citizen 'to require that the government be administered according to law * * *'. They are entitled to a hearing and to the District Court's decision on their claims. 'The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.'²²

In other words, voting rights claims are differentiated from more general claims regarding the constitutional administration of government. Consequently, the law is clear: when the right to vote is implicated, a citizen may bring a claim, even if that claim would usually be prohibited by the proscription against generalized grievances.

This law is the result of a highly sensible policy that warrants extensive rather than restrictive application: denying standing to individual voters effectively curtails the capacity to protect the constitutional right to an undiminished vote, and therefore imperils the right itself. For over half of a century, the U.S. Supreme Court has maintained that voters have a right "to have their expressions of choice given full value and effects by not having their votes impaired, lessened, diminished, diluted and destroyed by fictitious ballots * * *."²³ Several years

²¹ Id., citing FN26. *Smiley v. Holm*, supra, 285 U.S., at 361, 52 S.Ct., at 397 ("citizen, elector and taxpayer' of the state'); *Koenig v. Flynn*, supra, 285 U.S., at 379, 52 S.Ct., at 403 ("citizens and voters' of the state'); *Wood v. Broom*, supra, 287 U.S., at 4, 53 S.Ct., at 1 ('citizen of Mississippi, a qualified elector under its laws, and also qualified to be a candidate for election as Representative in Congress'); cf. *Carroll v. Becker*, supra (candidate for office).

²² *Baker*, supra, at 208, citing support from, respectively, *Coleman v. Miller*, 307 U.S. at 438, 59 S.Ct. at p. 975; *Fairchild v. Hughes*, 258 U.S. 126, 129, 42 S.Ct. 274, 275, 66 L.Ed. 499; *Marbury v. Madison*, 1 Cranch 137, 163, 2 L.Ed. 60.

²³ *U.S. v. Saylor* (1944), 322 U.S. 385, at 386.

ago, the Supreme Court reaffirmed this right, holding in *Bush v. Gore* that “the right of suffrage can be denied by debasement or dilution of the weight of a citizen’s vote just as effectively as by wholly prohibiting the free exercise of the franchise.”²⁴ Clearly, the right to an undiminished and undiluted vote is enshrined in our law.

Unfortunately, by its very nature, vote dilution ostensibly results in an entire community of citizens having a cause of action for the fractional diminution in the value of their votes. Given this, barring vote dilution claims as generalized grievances would have the effect of barring *all* vote dilution claims by individual citizens. Such a preclusion would create an incapacity to police against dilution, and would transitively extinguish of the right itself. Such extinguishment would clearly conflict with the Supreme Court’s careful efforts to define the right itself. Accordingly, this Court must reject the R&R’s conclusion that the plaintiffs have only alleged “a generalized grievance which is insufficient to state a cause of action.”

There is a second reason why the R&R’s generalized grievance analysis is in error: the OCAA itself plainly confers standing upon the plaintiffs. R.C. 2923.34(B) provides that *any person who is injured or threatened with injury by a violation of R.C. 2923.32 of the Revised Code* may institute a civil proceeding in an appropriate court seeking relief from any person whose conduct violated or allegedly violated section 2923.32. (Emphasis added). This injury requirement accomplishes what standing requirements were established to accomplish: “The requirement of standing is not designed to shield agencies and officials from accountability to taxpayers; instead, it denies the use of the courts to those who, while not sustaining a legal

²⁴ *Bush v. Gore* (2000) 531 U.S. 98, at 105, citing *Reynolds v. Sims* (1964), 377 U.S. 533, at 555.

injury, nevertheless seek to air their grievances concerning the conduct of government. The doctrine of standing directs those persons to other forums.”[citation omitted].²⁵

Plaintiffs’ Complaint plainly alleges that they suffice as a person threatened with injury by ACORN’s pattern of corrupt activity. Consequently, they have statutory standing to pursue this matter. Accordingly, this Court must reject the R&R conclusion that Ms. Miller and Mrs. Grant lack standing.

C. The R&R erroneously concludes that state action is a prerequisite to any claim, including a claim not against the state, for an injury to one’s constitutional rights.

There are multiple reasons why, despite the R&R’s conclusions, state action is not a prerequisite to this action. The R&R posits as follows:

“[E]ven if this Court were to find that ‘constitutional injury’ is sufficient under the OCAA to establish standing, Plaintiffs do not allege that Defendant’s conduct amounted to state action. * * * a litigant claiming that his constitutional rights have been violated must first establish that the challenged conduct constitutes state action; where there is no state action, there can be no constitutional violation.* * * constitutional injury is not recognized without state action. In fact the Court was unable to find any analogous case where a plaintiff prevailed in an action against a private entity for a constitutional violation.”²⁶

First, Ms. Miller does not claim that ACORN violated her constitutional rights; instead she only claims that ACORN *injured* her. R.C. 2923.34(B) provides that any person who is *injured or threatened with injury by a violation of R.C. 2923.32 of the Revised Code* may

²⁵ *Save the Lake v. Hillsboro* 158 Ohio App.3d 318, 815 N.E.2d 706, at 708, citing *Elk Grove Unified School Dist. v. Newdow* (2004), 124 S.Ct. 2301, 2309, 159 L.Ed.2d 98, quoting *Allen v. Wright* (1984), 468 U.S. 737, 751, 104 S.Ct. 3315; *Racing Guild of Ohio, Local 304, Serv. Emp. Internatl. Union, AFL-CIO, CLC v. Ohio State Racing Comm.* (1986), 28 Ohio St.3d 317, 321, 28 OBR 386, 503 N.E.2d 1025; *Warth*, supra, at 500.

²⁶ R&R, pp. 9, 10, citing *Flagg v. Yonkers Sav. & Loan Ass’n.*, 396 F.3d 178, at 186 (2nd Cir. 2005); *Mooneyhan v. Hawkins*, No. 96-6135, 1997 U.S. App. Lexis 30223, at 23, 24 (6th Cir. 2007).

institute a civil proceeding in an appropriate court seeking relief from any person whose conduct violated or allegedly violated section 2923.32. (Emphasis added).

Here, Ms. Miller is entitled to institute a civil action because she is threatened with injury by a violation of R.C. 2923.32. Specifically, her Complaint alleges that ACORN's pattern of forgery and tampering with records threatens her capacity to cast an undiluted and undiminished vote in future elections.²⁷ Her Complaint then chronicles a detailed description of precise incidents of forgery and tampering with records that constitute incidents of corrupt activity.²⁸ Finally, Ms. Miller's Complaint alleges, with supporting factual allegations, that Defendants' continued participation in the electoral process poses a perpetual and continuous threat to her right to cast an undiminished, undiluted vote.²⁹ These allegations are sufficient to articulate a viable claim under the Ohio Corrupt Activities Act.

Given that Ms. Miller has a viable claim under the plain language of the OCAA, the next question is whether the absence of state action precludes her action in this case. First, it must be noted that the statute only requires (1) that the plaintiff be injured or threatened with injury; and (2) that the injury be caused by a violation of R.C. 2923.32. As noted earlier, this much is alleged in Plaintiffs' Complaint, and this alone allays the need to resort to state action analysis.

Secondly, state action is not a prerequisite in *every action* related to a constitutional right. This is neither a Section 1983 claim, nor a claim for declaratory and injunctive relief to enjoin the existence or enforcement of a government law or policy. This is an

²⁷ See Plaintiffs' First Amended Complaint, Paragraphs 49-54.

²⁸ Id., at Paragraphs 56-110.

²⁹ Id., at Paragraphs 125 and 126. Also see Paragraphs 116, 117, 120, 121, 123.

OCAA claim. If this Court merely finds that Ms. Miller’s Complaint alleges that she is *threatened with injuries* due to ACORN’s pattern of corrupt activity, then the type of injury is not pertinent to OCAA analysis.³⁰ Hence, state action is *not a necessary condition* to maintain a cause of action in *any* case where there is an injury to a plaintiff’s constitutional rights. It is merely a sufficient condition.³¹ The plain language of the OCAA, in only requiring an injury settles the matter.

Thirdly, the R&R expressed a misplaced concern that applying the plain language of the OCAA so as to cover constitutional injuries would create a fundamentally flawed result by permitting a civil action against a private party for injuring the constitutional rights of another. This concern is alleviated through recognition that such a concept is already ingrained in our law, and in a statute cited in the R&R itself: 18 U.S.C. 241.

The existence of 18 U.S.C. 241 demonstrates that the OCAA is not the only statute that authorizes a private cause of action against private parties who have injured another’s constitutional rights. 18 U.S.C. 241 has, since 1866, provided a cause of action against non-state actors who have interfered with one’s constitutional rights. That statute states, in pertinent part:

§ 241. Conspiracy against rights. If two or more persons conspire to injure, oppress, threaten, or intimidate any person in any State, Territory, Commonwealth, Possession, or District in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or

³⁰ See Section D, *Infra*, for analysis on the scope of “injury.”

³¹ This can be illustrated through a simple example: one is “injured” when his property is taken without compensation, whether by a private actor or a state actor. While he has a constitutional right to not have his property taken for public use, by a state action without just compensation, this constitutional right does not preclude him from maintaining a private cause of action (nuisance, trespass, etc.) against a private party for infringement upon his property rights.

hinder his free exercise or enjoyment of any right or privilege so secured-- They shall be fined under this title or imprisoned not more than ten years, or both* * *.

On its face, this statute clearly authorizes a cause of action against a private actor where that private actor violates the constitutional rights of another.

In application, Section 241 prohibits private actors from interfering with another's constitutional rights. In *Wilkins v. U.S.*, the Fifth Circuit Court of Appeals confronted a case set in 1960's Alabama, and featured intimidation of peaceably assembled African-Americans by the Ku Klux Klan. The Court noted that "in the case now before us, we are dealing with the acts of private individuals."³² Specifically, the court was adjudicating whether Klan members could be held liable under Section 241 for interfering with the constitutional rights of African Americans to assemble and petition through participation in a civil rights march.³³

The Court observed that, "since *Cruikshank*, it has been well settled that the right to vote in elections for the selection of federal officials, in accordance with applicable state law, is a right secured by the federal Constitution. Conspiracies to injure, oppress, *threaten*, or intimidate any citizen in the exercise of or for having exercised this right are in violation of 18 U.S.C. 241."³⁴ This analysis demonstrates the very thing that the R&R denies: a private party may bring a cause of action against another private party who has injured its constitutional rights.

³² *Wilkins v. U.S.*, 376 F.2d 552, at 560 (5th Cir. 1967).

³³ *Wilkins*, supra, at 561.

³⁴ *Wilkins*, supra, at 561, citing *United States v. Cruikshank*, 92 U.S. 542 (23 L.Ed. 588), *United States v. Classic*, 313 U.S. 299, 61 S.Ct. 1031, 85 L.Ed. 1368; *Ex parte Yarbrough*, 110 U.S. 651, 4 S.Ct. 152, 28 L.Ed. 274; *United States v. Mosley*, 238 U.S. 383, 35 S.Ct. 904, 59 L.Ed. 1355; *United States v. Saylor*, 322 U.S. 385, 64 S.Ct. 1101, 88 L.Ed. 1341; *Fields v. United States*, 4 Cir., 1955, 228 F.2d 544; *Crolich v. United States*, 196 F.2d 879 (5th Cir. 1952), cert. denied, 344 U.S. 830, 73 S.Ct. 36, 97 L.Ed 646 (1952).

This conclusion is further supported by a myriad of earlier United States Supreme Court cases, under which, as explained in *United States v. Guest*,³⁵ the prohibitions and remedies of s 241 have been declared to apply, without regard to whether the alleged violator was a government officer, to interferences with the right to vote in a federal election³⁶ or primary election,³⁷ the right to discuss public affairs or petition for redress of grievances,³⁸ the right to be protected against violence while in the lawful custody of a federal officer,³⁹ and the right to inform of violations of federal law.⁴⁰

These holdings demonstrate that there is significant historical precedent in support of the conclusion that a statute may authorize a private cause of action against a private party who has violated the constitutional rights of another. Consequently, the plain language of the OCAA, which requires only an injury caused by a pattern of corrupt activity, must be interpreted to apply to injuries to constitutional rights even where there is no state action. Accordingly, the R&R's conclusion that there is no injury, and hence no standing, because there is no state action must be rejected by this Court.

³⁵ *United States v. Guest*, 383 U.S. 745, 758,

³⁶ *Ex parte Yarbrough*, 110 U.S. 651, 4 S.Ct. 152, 28 L.Ed. 274,

³⁷ *United States v. Classic*, 313 U.S. 299, 61 S.Ct. 1031, 85 L.Ed. 1368.

³⁸ *United States v. Cruikshank*, 92 U.S. 542, 552, 23 L.Ed. 588, cf. *Hague v. CIO*, 307 U.S. 496, 512-513, 59 S.Ct. 954, 962-963, 83 L.Ed. 1423 (opinion of Roberts, J.); *Collins v. Hardyman*, 341 U.S. 651, 663, 71 S.Ct. 937, 942, 96 L.Ed. 1253 (dissenting opinion).

³⁹ *Logan v. United States*, 144 U.S. 263, 12 S.Ct. 617, 36 L.Ed. 429.

⁴⁰ *In re Quarles and Butler*, 158 U.S. 532, 15 S.Ct. 959, 39 L.Ed. 1080.

D. The R&R erroneously abstains from applying the plain language of the term “injury,” instead looking to legislative intent without first concluding that the term is ambiguous.

There are myriad reasons why the term “injury,” as used in the OCAA, must be interpreted so as to include injuries to constitutionally-protected rights: (1) the plain meaning of the word contemplates impairments of rights; (2) the scope of OCAA injuries is deliberately broader than the scope of injuries specified in the federal RICO statute; (3) impairment of constitutional rights is not specifically excluded from the term’s definition; and (4) Ohio cases have affirmed that the plain language of the OCAA trumps any attempt to narrow the statute through allusion to legislative intent. The R&R instantly, and quite mistakenly, turns to the intent of the Georgia legislature, and then to omissions of the Ohio legislature, to ascertain the plain meaning of the *Ohio* Corrupt Activities Act. Specifically, the R&R reports as follows:

[C]ourts interpreting the same language in other state RICO statutes have concluded that by removing the business or property limitation in the federal statute, the state meant to authorize recovery for personal injuries * * *. Moreover, there is nothing in the OCAA’s text or legislative history * * * to authorize recovery for interference with the right to an undiluted vote.⁴¹

This interpretive methodology improperly skips an important step: it fails to construe the plain language of the OCAA, or in the alternative, to designate it as ambiguous.

The plain meaning of the word “injury” dictates that it includes impairment of constitutional rights. The Ohio Supreme Court characterizes the proper methodology for interpreting and applying Ohio statutes: “[t]he object of judicial investigation in the construction of a statute is to ascertain and give effect to the intent of the lawmaking body which enacted it. * * * *But the intent of the lawmakers is to be sought first of all in the language employed, and if words be free from ambiguity and doubt, and express plainly, clearly, and distinctly the sense of*

⁴¹ R&R, p. 8.

the lawmaking body, there is no occasion to resort to other means of interpretation. The question is not what did the general assembly intend to enact, but *what is the meaning of that which it did enact.*⁴² (Emphasis added). Further, “(i)n determining the legislative intent of a statute it is the duty of this court to give effect to the *words used* in a statute * * *.”⁴³ (Emphasis added).

Further, Ohio’s codified cannons of statutory construction indicate that where the statute reads “injury,” any injury should qualify, rather than just the Defendants’ chosen scope of injuries. R.C. 1.42 mandates that “words and phrases shall be * * * construed according to the rules of * * * common usage.” These rules include an understanding that courts may not insert words into the statute.⁴⁴ In light of this statute and the aforementioned Ohio precedent, when interpreting, constructing, and applying Ohio statutes, Courts may not ignore the plain meaning of words used under the auspices of statutory interpretation.⁴⁵

The dispute here is the interpretation of the word “injury” within the sentence “[a]ny person who is injured or threatened with injury by a violation of section 2923.32 of the Revised Code may institute a civil proceeding * * * seeking relief from any person whose conduct violated or allegedly violated section 2923.32 of the Revised Code * * *.”⁴⁶ Black’s Law Dictionary defines an injury as “the violation of another’s legal right,” “a wrong or

⁴² *Beau v. Lindley* (1978), 56 Ohio St.2d 310, 383 N.E.2d 907, 10 O.O.3d 438, citing *Slingluff v. Weaver* (1902), 66 Ohio St. 621, 64 N.E. 574. Emphasis added.

⁴³ *Columbus-Suburban Coach Lines v. Pub. Util. Comm.*, 20 Ohio St.2d 125, at 127, 254 N.E.2d 8.” *Wheeling Steel Corp. v. Porterfield* (1970), 24 Ohio St.2d 24, 28, 263 N.E.2d 249, 251. Emphasis added.

⁴⁴ See, inter alia, *State v. Patterson* (1998), 128 Ohio App.3d 174, 714 N.E.2d 409; *Ohio State Boxing Comm. V. Adore, Ltd* (1996), 110 Ohio App.3d 288, 673 N.E.2d 1016.

⁴⁵ See *Glouster Community Bank v. Winchell* (1995), 102 Ohio App.3d 256, 659 N.E.2d 330.

⁴⁶ R.C. 2923.34(B).

injustice,” and *the* “violation of a legal right.”⁴⁷ Given the U.S. Supreme Court has determined the dilution or debasement of one’s vote to violate his or her constitutional right of suffrage, the harms alleged in this case plainly amount to an “injury” under the OCAA.

The Ohio Revised Code is replete with statutes that narrows the scope of qualifying injuries with qualifying descriptors such as, *inter alia*, “physical,” “serious physical,” “irreparable,” and “bodily.” The Ohio General Assembly, when drafting the Ohio Corrupt Activities Act, could have simply added the qualifying term “personal” if it wished to restrict the scope of injuries within the act’s purview. Despite having deliberately modified the term “injury” in other statutes, and despite modifying the scope of qualifying injuries from that of the Federal RICO statute, the Ohio General Assembly refrained from narrowing the scope of the term “injury.” This abdication must be viewed as deliberate, and deserves absolute deference. Further, reading “injury” to mean “business, property, and personal injury” would violate the statutory canon, noted above, against inserting additional words into a statute.

Thirdly, although patterned after Federal RICO law, the Ohio Corrupt Activities Act obviously and deliberately broadens the scope of the term “injury.”⁴⁸ While Federal RICO law only confers standing on private plaintiffs who have sustained injury to their business or property,⁴⁹ R.C. 2923.34 conversely applies to “[a]ny person who is injured or threatened with injury by a violation of section 2923.32 of the Revised Code.” While the R&R discussion of

⁴⁷ Black’s Law Dictionary (8th Ed. 2004).

⁴⁸ In *Iron Workers Local Union No. 17 Insurance Fund et al. v. Philip Morris et al.*, the defendants argued that the injury allegedly suffered by the plaintiffs in a civil RICO action was “too remote”, thereby warranting dismissal under Fed. Civ. R. 12(B)(6).⁴⁸ The court resolutely disagreed, concluding that the injury (and standing) provisions of the OCAA are significantly more liberal than those found in the federal RICO statute: “While somewhat similar to federal RICO, the Ohio Pattern of Corrupt Activity Act has significantly different and more liberal standing provisions.”

⁴⁹ 18 U.S.C. 1964(c).

“injury” concludes that it means “business, property, and personal injuries only,” the cases that are cited to support this position note that personal injuries are *within their purview*, not that injuries to voting rights are *excluded*.⁵⁰

Fourth and finally, while, as the R&R notes, no Ohio court may have ever specifically authorized a voting rights injury under the OCAA, no Ohio court has ever placed such a limitation on the conception of injury. To the contrary, arguments in favor of such limitations are rejected by Ohio courts. In *State v. Grimm*, for instance, the defendants opined that, as a matter of policy, the Ohio Corrupt Activities Act was not intended to apply to a case like theirs.⁵¹ The court responded by noting that “[w]hile we recognize that the statute may have been enacted to address activities more readily associated with ‘organized crime,’ *our review must focus on whether the elements of the statute have been satisfied by the evidence presented.*”⁵² (Emphasis added). Such is the case here. Defendants, and perhaps even the Magistrate, may be uneasy with this statute’s application. However, it applies. And only a change in the language of the statute itself could alter that conclusion.

E. The R&R erroneously concludes that the Plaintiff’s First Amendment Complaint does not allege actual voter fraud, and further erroneously concludes that allegations of actual voter fraud are necessary to state a claim upon which relief can be granted under the OCAA.

The R&R states that “Although Plaintiffs have alleged that ‘potential illegal votes’ have ‘the capacity to dilute the votes of Plaintiffs’ and others,’ Plaintiffs have not alleged

⁵⁰ See, for example, *Reaugh v. Inner Harbor Hosp., Ltd.* (1994), 447 S.E.2d 617.

⁵¹ *State v. Grimm* (1995), 102 Ohio App.3d 356, 657 N.E.2d 318.

⁵² *Id.*

any instances of voter fraud.”⁵³ The R&R is mistaken to the extent that it relies upon this observation as a basis for dismissal because (1) Plaintiffs do allege instances of actual voter fraud; and (2) even if Plaintiffs had not alleged actual voter fraud, no such showing, or even allegation, is necessary, because the *threat* of injury is actionable under the OCAA.

First, Ms. Miller’s Complaint does allege actual voter fraud. To demonstrate the very real nature of the threat of vote dilution, Paragraph 124 of Ms. Miller’s Complaint chronicles the different types of vote fraud that have occurred in the past.⁵⁴ Meanwhile, the predicate acts identified as the Pattern of Corrupt Activity are saturated with instances of the casting of actual unlawful votes. Consequently, the Complaint clearly alleges “instances of voter fraud.”

However, no actual showing of voter fraud is necessary in order for the Plaintiffs to prevail in this case: The OCAA clearly grants standing to a plaintiff who is “injured *or threatened with injury.*” (Emphasis added). Throughout their complaint, Plaintiffs (1) allege that they are threatened with injury to the value of their votes; and (2) allege facts that demonstrate a threat to the value of their votes.⁵⁵ Accordingly, Plaintiffs have adequately alleged both voter fraud and, more importantly, the threat of voter fraud. Accordingly R&R conclusions to the contrary must be rejected by this Court.

⁵³ R&R, p. 10.

⁵⁴ Plaintiffs’ First Amended Complaint, Paragraph 124.

⁵⁵ Plaintiffs’ First Amended Complaint, Paragraphs 52, 53, 21, 119-128, 43-110.

IV. CONCLUSION

For the foregoing reasons, this Court should reject the Magistrate's Report and Recommendation granting Defendants' Motion to Dismiss and mooted Plaintiffs' Motion to Remand. Accordingly, this matter should be remanded to the Warren County Court of Common Pleas.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing was served upon the following this 15th day of May, 2009:

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