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JAMES BONINI
CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

08 SEP 26 PM 2:20

U.S. DIST. COURT
SOUTHERN DIST. OHIO
EAST. DIV. COLUMBUS

OHIO REPUBLICAN PARTY, et al.	:	
	:	
Plaintiffs,	:	
	:	**Case No. 2:08 cv 913**
v.	:	
	:	**Judge Smith**
JENNIFER BRUNNER,	:	
Secretary of State of Ohio	:	**Magistrate Judge King**
	:	
Defendant.	:	

PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

For the reasons set forth in Plaintiffs' Memorandum in Support of their Motion for a Temporary Restraining Order and Preliminary Injunction, Plaintiffs' respectfully request this Court to Order preliminary relief pursuant to Rule 65 of the Federal Rules of Civil Procedure.

Respectfully submitted,

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Ohio Republican Party and Larry Wolpert

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing Plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction was served upon the following, by regular U.S. mail, postage prepaid, on this 26th day of September, 2008:

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FILED
JAMES BONINI
CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

08 SEP 26 PM 12:53

U.S. DIST. COURT
SOUTHERN DIST. OHIO
EAST. DIV. COLUMBUS

OHIO REPUBLICAN PARTY, et al.	:	
	:	
Plaintiffs,	:	**Case No. 2:08 cv 913**
	:	
v.	:	
	:	
JENNIFER BRUNNER,	:	**JUDGE SMITH**
Secretary of State of Ohio	:	
	:	**MAGISTRATE JUDGE KING**
Defendant.	:	

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

I. INTRODUCTION

Plaintiffs, the Ohio Republican Party (the "ORP") and Larry Wolpert, file this action to vindicate their rights, and the rights of the ORP's members to vote for presidential electors in a manner: (1) directed by the legislature as granted by Article II, Section 1, Clause 2 of the United States Constitution; undiluted by the votes of ineligible voters, as directed by (2) the Help America Vote Act ("HAVA") and (3) the National Voter Registration Act ("NVRA"); (4) free from intimidation, as set forth in the Voting Rights Act; and (5) subject to the equal protection guarantees of the Fifth and Fourteenth Amendments to the United States Constitution, all secured under 42 U.S.C. § 1983.

Plaintiffs want every eligible voter to have the opportunity to cast a vote as conveniently as possible, consistent with state and federal law. Defendant's recent actions, however, contradict the express intent of Ohio's legislature and, as a result, threaten the integrity of the general election. Through Directive 2008-63 and Advisory 2008-24, Defendant Jennifer Brunner, Ohio's Secretary of State ("Defendant"), plans to allow individuals to cast regular

absentee ballots at circus-like "vote-a-ramas" with no verification of their address, identity, or registration status. These actions fly in the face of Ohio law, HAVA, and the NVRA. Moreover, by barring observers from these "vote-a-ramas," Defendant threatens to dilute the votes of eligible voters and, with no one watching, subjects voters to possible intimidation. Accordingly, Plaintiffs seek injunctive relief directing Defendant to rescind Directive 2008-63, or to direct Defendant to order that all ballots cast pursuant to that Directive be provisional ballots, or in the alternative directing Defendant to rescind Advisory 2008-24, and ordering Defendant to issue new legal guidance that conforms to the Ohio Revised Code.

II. FACTS

Plaintiff Ohio Republican Party is a political committee comprised of several million qualified electors across the state. Plaintiff Larry Wolpert is a qualified elector, a member of the Ohio Republican Party, and currently serves as the Representative to the General Assembly from the 23rd District.

On August 13, 2008, Defendant issued Directive 2008-63. Exh. A. The Directive included three main instructions. First, it ordered all Ohio County boards of election to "expedite processing of voter registrations received during the week immediately preceding the voter registration deadline" in light of the "significant number of new and changed registrations ... generated by voter registration drives conducted."

Second, the Directive instructed the county boards of elections that "there are several days before the 2008 general election during which a person may appear at the board of elections and *simultaneously submit for that election applications to register to vote or to update an existing registration and to request an absentee ballot.*" (emphasis added).

Finally, the Directive ordered that "[b]oards of elections are required to develop

procedures to immediately register the applicant and issue an absentee ballot to the newly registered elector of the county *at the time of registration* . . . ." (emphasis added). Accordingly, Defendant's Directive would allow individuals to register to vote and cast a regular absentee ballot at the same time at numerous locations around the state, not all of which are regular Boards of Elections. These "vote-a-ramas" would last for seven days, starting Tuesday, September 30.

Several county boards of election sought legal opinions from their respective Prosecuting Attorneys to determine whether Directive 2008-63 facially violated Ohio's Revised Code. The Prosecuting Attorneys for Holmes, Miami and Madison Counties informed their respective election boards that Directive 2008-63 violated Ohio law and should not be followed. Ex. B, C, and D.

On September 11, 2008, after these legal opinions were issued, Defendant issued Directive 2008-92. In that Directive, she reiterated that boards of elections were required "to follow this and all previous directives . . . unless subsequently and specifically superseded, revoked, or replaced by a subsequent directive of the Secretary of State . . . ."

The next day, September 12, 2008, two Ohio electors, Rhonda L. Colvin and C. Douglas Moody, filed a petition for Writ of Mandamus in the Ohio Supreme Court seeking rescission of Directive 2008-63. The petition asserted only state law claims and is currently pending before the Ohio Supreme Court.

In addition to these state law concerns, a separate report asserted that Defendant was violating federal law. In early September, the Ohio State University's Moritz College of Law published a study concluding the state of Ohio does not currently attempt to perform the computer verification required by HAVA. Nathan Cemenska and Sarah Cherry, *Key Questions*

for Key States, A project of *Election Law@Moritz* at The Ohio State University Moritz College of Law and the JEHT Foundation, Sept. 3, 2008, at 11 (available at http://moritzlaw.osu.edu/electionlaw/maps/documents/50QsforExecutiveSummarywithlinks.pdf) ("Ohio State Study").

On September 23, 2008, Defendant issued Advisory 2008-24, which advised county boards of election that they are "not required to allow election observers during the 35-day in-person absentee voting period immediately preceding Election Day." The Advisory reasoned that Ohio's legislature had failed to expressly authorize the presence of observers at these "vote-a-ramas." Defendant's Advisory did not mention that Ohio's legislature had never contemplated or expressly authorized the creation of these "vote-a-ramas."

II. LAW AND ARGUMENT

Pursuant to Rule 65(b), a court can grant a temporary restraining order to prevent immediate and irreparable injury, loss, or damage to a plaintiff. The order may be issued without prior notice to the adverse party or his attorney. Rule 65(a) further authorizes the granting of a preliminary injunction after notice to other parties in the action. *See In Re Eagle-Picher Indus., Inc.*, 963 F.2d 855, 859 (6th Cir. 1995) (setting out standards).

Both plaintiffs have standing in this case. To satisfy the standing requirements of Article III, a plaintiff must show: "(1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Sandusky County Democratic Party v. Blackwell*, 387 F.3d 565, 573 (6th Cir. 2004) (citations omitted). "An association has standing to bring suit on behalf of its members when its members would

otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." Id. Here, Larry Wolpert has standing as an elector who has legitimate concerns that his ballot may be diluted if ineligible voters cast regular absentee ballots. See *Purcell v. Gonzalez*, 549 U.S. 1, 7 (2006); *Crawford v. Marion County Election Bd.* 128 S.Ct. 1610, 1620 (2008). Similarly, the ORP has standing to assert the rights of its members who will vote in the November, 2008 general election, and who are concerned that ineligible voters may dilute the value of their votes. The ORP's concerns "are not speculative or remote; they are real and imminent." *Sandusky County*, 387 F.3d at 573.

A. The Court Should Issue A Temporary Restraining Order And Preliminary Injunction Because There Is A Substantial Likelihood That The Plaintiff Will Succeed On The Merits Of Its Claims Against Defendant.

Defendant's recent actions contradict the express intent of Ohio's legislature and federal law. Through Directive 2008-63 and Advisory 2008-24, Defendant plans to allow individuals to cast regular absentee ballots at circus-like "vote-a-ramas" with no verification whatsoever of their address, identity, or registration status. These actions violate Ohio law, and, as a result, Article II of the Constitution. These actions also increase the risk that ineligible voters may cast absentee ballots, in violation of HAVA and the NVRA. Moreover, by barring observers from these "vote-a-ramas," Defendant threatens to dilute the votes of eligible voters and, with no one watching, subjects voters to possible intimidation in violation of the Voting Rights Act.

1. Directive 2008-63 Requires County Boards of Elections to Take Actions That Are Inconsistent With Ohio Law and Therefore Violate Article II, Section 1, Clause 2 of the U.S. Constitution.

Directive 2008-63 ("the Directive") requires county boards of elections to violate Ohio election law. Article II, Section 1, Clause 2 of the United States Constitution requires each state's legislature to determine the manner in which presidential electors are chosen. The

Directive's requirements are contrary to election laws set forth by the Ohio Legislature; therefore, the Directive violates Article II, Section 1, Clause 2 of the United States Constitution.

a. Only The Ohio Legislature Has The Power To Determine The Method Of Selecting Presidential Electors Are Chosen And Directive 2008-63 Contradicts Ohio Law In Violation Of The United States Constitution

Ohio Revised Code Chapter 3509 sets forth the laws governing absent voter's ballots. Under the Ohio Revised Code § 3509.01 and § 3509.02(A), "[a]ny qualified elector may vote by absent voter's ballots at an election," and "[t]he board of elections of each county shall provide absent voter's ballots for use at every primary and general election, or special election." Ohio Revised Code § 3501.01(N) defines "elector" or "qualified elector" as a "person having the qualifications provided by law to be entitled to vote." The four requirements to be considered a qualified elector are set forth in Ohio Revised Code § 3503.01:

1. The person is a citizen of the United States who is eighteen years old;
2. The person is a resident of the State of Ohio for thirty days immediately preceding the election at which the citizen offers to vote;
3. The person is a resident of the county and precinct in which the citizen offers to vote; and
4. The person has been registered to vote for thirty days.

Additionally, pursuant to Ohio Revised Code § 3509.04(B), an election officer may not deliver an absent voter's ballot to a person who has not made a written application to the county board of elections for an absent voter's ballot and provided the county board of elections with a statement that the person requesting a ballot is a qualified elector. See Ohio Revised Code §3509.03(G). Ultimately, according to Ohio Revised Code § 3509.07, if an election official finds that an absent voter is not a qualified elector, the absent voter's ballot will be rejected.

b. Directive 2008-63 Violates Election Laws Established By The Ohio Legislature and the Ohio Constitution

The Directive mandates that county boards of elections violate Ohio law in three ways:

i. *The Directive unlawfully encourages a person to appear at the board of elections and simultaneously submit an application to register to vote and request an absent voter's ballot.*

Only a qualified elector may vote absentee in an election according to Ohio Revised Code § 3509.02(A). Moreover, only a qualified elector may even receive an absentee voter's ballot pursuant to Ohio Revised Code § 3509.04(B). Section 3509.04(B) requires the person requesting an absentee ballot to provide information according to R.C. § 3509.03. The person requesting an absentee ballot must assert, under R.C. § 3509.03(G), that he or she is a "qualified elector"—meaning that the requesting person has fulfilled the requirements to be a qualified elector under R.C. § 3503.01 and the identical language of Article V, Section 5 of the Ohio Constitution. Section 3503.01 explicitly requires a person to be registered to vote for thirty days before being considered a qualified elector. Since a person must already be a qualified elector prior to applying for an absentee ballot, the Directive is in conflict with the thirty day requirement under R.C. § 3503.01. The provision enabling a person to appear, submit an application, register to vote, and request an absentee ballot violates Ohio election law.[1]

ii. The Directive enables a citizen to falsely attest that he is a qualified elector or voter.

[1] The problems caused by simultaneous registration and absentee balloting are exacerbated by another recent decision by the Defendant. In Advisory 2008-24, issued on September 23, 2008, Defendant declared that observers associated with parties or candidates need not be permitted to observe the simultaneous registration/absentee balloting process contemplated by Directive 2008-63. This Advisory is inconsistent with the Legislature's policy finding that such observers are a valuable and appropriate check that ensures the legitimacy of the state's election system. R.C. 3505.21, for example, contemplates that such partisan observers should be permitted to monitor the casting of ballots. Defendant's declaration that there should be no monitoring of the simultaneous registration/absentee balloting process that she has encouraged only reinforces the impropriety of that process.

When a person requests an absentee voter's ballot, he or she must attest that, as of the time of the request, he or she is a "qualified voter." R.C. § 3509.03(G). The attestation on Ohio's current Application for Absent Voter's Ballot (Form No. 11-A Prescribed by the Secretary of State (08-08)) reads: "I hereby declare, under penalty of election falsification, I am a qualified voter and the statements above are true to the best of my knowledge and belief. I understand that if I do not provide the requested information, my application cannot be processed." An "elector" or "qualified elector" is "a person having the qualifications provided by law to be entitled to vote." R.C. § 3501.01(N). A "voter" is "an elector who votes at an election." R.C. § 3501.01(O). Since a voter is an elector who actually votes, a "qualified voter" must mean a "qualified elector" who is exercising their right to vote. Therefore, a person cannot be a "qualified voter" without already being a "qualified elector."

Under the Directive, a person may appear at the board of elections office and simultaneously submit an application to register to vote and to request an absentee ballot. The process described in the Directive requires that the person swear or attest to being a qualified elector or qualified voter under Ohio law to request an absent voter's ballot. Any person who attests to being a qualified voter while simultaneously registering to vote is making a false assertion. The Directive, therefore, contravenes Ohio law because a person cannot be a qualified elector or qualified voter unless the person has been registered to vote in Ohio for thirty days.

iii. The Directive requires county boards of elections to issue an absent voter's ballot to applicants who officials know are not qualified electors.

A person may not receive an absent voter's ballot unless he or she is a qualified elector. Ohio Constitution Article V, Section 5; R.C. § 3509.04(B). It is impossible for a person to simultaneously submit an application to register to vote and request an absentee ballot because,

under R.C. § 3503.01, a person cannot request an absentee voter's ballot until the person has been a registered Ohio voter for thirty days. When a county board of elections simultaneously receives a person's voter registration application and application for an absent voter's ballot, the board can know with certainty that the person is not a qualified elector permitted to receive an absent voter's ballot under Ohio election law. Therefore, the Directive violates Ohio election law by ordering county boards of elections to knowingly violate state law.

iv. Directive 2008-63 Circumscribes The Power Vested In The Ohio Legislature By The United States Constitution By Allowing Unqualified Electors To Receive An Absent Voter's Ballot

The Directive violates Article II, Section 1, Clause 2 of the United States Constitution because Article II vests the power to select the method by which a state's presidential electors are chosen solely in the state's legislature. The Ohio Legislature has explicitly defined who qualifies as an elector and does not consider an individual a "qualified elector" until thirty days after the person has been registered to vote in Ohio. The Ohio Legislature has also expressly forbidden absent voter's ballots from being issued to people who are not qualified electors under Ohio election law. The Directive circumscribes the Ohio Legislature's power by directing county boards of elections to issue absent voter's ballots to people who have not been registered to vote in Ohio for a period of at least thirty days.

Circumscription of a state legislature's power in the area of determining presidential electors is expressly prohibited by the United States Supreme Court. Presidential electors are chosen based on the methods adopted by each state's legislature, including the determination of the manner in which citizens can vote. In *Bush v. Palm Beach County Canvassing Board*, the Supreme Court reversed the Florida Supreme Court's attempt to change Florida's statutory rules for selecting Florida's presidential electors, stating specifically that "[t]here are expressions in

the opinion of the Supreme Court of Florida that may be read to indicate that it construed the Florida Election Code without regard to the extent to which the Florida Constitution could, consistent with Art. II, §1, cl. 2, 'circumscribe the legislative power.'" 531 U.S. 70, 77 (2000).

Bush v. Palm Beach cited with approval *McPherson v. Blacker*, 146 U.S. 1 (1892), which rejected a challenge to the Michigan state legislature's delegation of the selection of presidential electors to a popular vote. The plaintiff in that case contended that Article II, Section 1, Clause 2 required the legislature to directly choose the presidential electors, without delegating the decision to a popular vote. *McPherson* took a more expansive view of the legislature's ability to direct the manner of selecting presidential electors:

> The constitution does not provide that the appointment of electors shall be by popular vote, nor that the electors shall be voted for upon a general ticket, nor that the majority of those who exercise the effective franchise can alone choose the electors. It recognizes that the people act through their representatives in the legislature, and leaves it to the legislature exclusively to define the method of effecting the object.

146 U.S. at 27.

Recently, the Libertarian Party of Ohio was given access to the November 2008 general election ballot. *See Libertarian Party of Ohio v. Brunner*, No. C2-08-555, 2008 U.S. Dist. LEXIS 64375, at *1 (S.D. Oh. July 17, 2008). In *Libertarian Party of Ohio*, Secretary of State Brunner had issued Directive 2007-09 outlining methods for minor political parties to gain ballot access. *Id.* at *6. The court held that Directive 2007-09 was unconstitutional, noting that the United States Constitution requires state legislatures, not executive officers such as the Secretary of State, to determine the method of elections. *Id.* at *4. In concluding that Directive 2007-09 was unconstitutional, the court cited *Bush v. Gore* for the proposition that "a significant departure from the legislative scheme for appointing Presidential electors presents a federal constitutional question." 531 U.S. 98, ## (2000) (citing *McPherson v. Blacker*, 146 U.S. at 27).

In addition to recognizing a federal constitutional question, the court held that Article II, Section 1, Clause 2 provides "no role on the part of the executive branch of state government as to the election of President...." *Libertarian Party of Ohio*, 2008 U.S. Dist. LEXIS 64375, at *9. Moreover, the court held that Article II, Section 1, Clause 2 was not "susceptible to more than one interpretation" and that Directive 2007-09 infringed on the Ohio Legislature's authority under Article II. *Id.* at *9-10.

The combined holdings of both *Bush* cases, *McPherson,* and *Libertarian Party of Ohio* establish that if the Secretary of State issues a directive that conflicts with Ohio election law and imposes a structure not approved by the Ohio Legislature, the Secretary's directive is unconstitutional. Absent evidence that the Ohio Legislature specifically delegated authority to the Secretary of State to direct the manner in which Ohio voters select electors to vote for President, the Secretary of State has no authority to alter established Ohio election law.

The circumstances of this case are strikingly similar to the circumstances in *Libertarian Party of Ohio* except that, in this case, the Secretary's Directive appears to create a new rule for individuals to receive an absent voter's ballot. The Directive's orders bear no resemblance to any existing Ohio election law and, in fact, directly contradict Ohio election law. Under these circumstances, the Secretary of State's Directive has infringed upon the Ohio Legislature's recognized exclusive authority to determine the manner in which Ohio selects electors to vote for President, and is therefore unconstitutional under Article II, Section 1, Clause 2 of the United States Constitution.

2. Defendant's "Same Day Registration" Scheme Violates HAVA

Directive 2008-63 created a "same day registration" scheme that violates HAVA. Plaintiffs have a cause of action under these circumstances since "HAVA creates a federal right

enforceable against state officials under 42 U.S.C. § 1983." *Sandusky County*, 387 F.3d at 572.

a. Defendant's "Same Day Registration" Scheme Undermines HAVA's Identity Verification Requirements

HAVA requires that states create a computerized statewide voter registration list that contains the name and registration information of every legally registered voter. *See* 42 U.S.C. 15483(a). HAVA also requires that states verify a prospective voter's registration information. *See id.* § (a)(5)(A). Under HAVA, "an application for voter registration for an election for Federal office *may not be accepted or processed* by a State unless the application includes [the applicant's driver's license number or the last four digits of the applicant's social security number." *Id.* (emphasis added). States must also "determine whether the information provided by an individual is sufficient to meet the requirements of [HAVA], in accordance with State law." *Id.*

Ohio law, in turn, requires that election officials verify the registration information before modifying an existing registration. The Secretary of State must adopt rules that "[r]equire any updated voter registration information to be verified by the Secretary of State or a board of elections before the information is added to the statewide voter registration database for the purpose of modifying an existing voter registration." Ohio Rev. Code 3503.09(B)(2).

According to publicly available information, including a study conducted by The Ohio State University, Moritz College of Law, Defendant currently does not even attempt to perform HAVA matches. *See* Ohio State Study. By itself, this failure violates HAVA's express mandate.

Moreover, even if Defendant were otherwise complying with HAVA, her same day registration/absentee voting scheme would preclude her from verifying the registration information of prospective voters before they cast their ballots. Under Defendant's plan, an applicant would receive a regular absentee ballot immediately after registering to vote, even

though the applicant's registration information had not been verified, and even though there would be no time to verify that information. Ohio law requires that applicants register thirty days prior to voting *precisely so that* election officials will have the opportunity to verify their information and that applicants can correct any errors. Ohio Rev. Code 3503.01

Defendant's last-minute issuance of an Advisory barring observers from monitoring the "vote-a-ramas" further undermines HAVA's mandates. Advisory 2008-24. This latest Advisory removes the best opportunity for the political parties and candidates to identify any voters who may be ineligible to cast a ballot, rendering impotent both HAVA's and Ohio law's anti-fraud provisions.

Accordingly, Defendant's actions violate both the letter and spirit of HAVA. "The fact that HAVA section 303(b) requires states to obtain the applicant's identification numbers before accepting a registration application and also to 'determine whether the information provided ... is sufficient to meet [that] requirement[]" indicates that Congress deemed the identification numbers material to determining eligibility to register and to vote. *Florida State Conference of the NAACP v. Browning*, 522 F.3d 1153, 1174 (11th Cir. 2008).

b. *Plaintiffs Have a Cause of Action under HAVA and Section 1983*

Plaintiffs have a private right of action to bring this HAVA claim in conjunction with 42 U.S.C. § 1983. *See Sandusky County,* 387 F.3d at 572. Although HAVA does not create a private right of action, "HAVA creates a federal right enforceable against state officials under 42 U.S.C. § 1983." *Id.* Section 1983, in turn, provides a cause of action against any person who, acting under color of state law, abridges rights created by the Constitution or the laws of the United States. *See Maine v. Thiboutot,* 448 U.S. 1, 4-8 (1980). Three factors guide the inquiry into whether Congress intended to create a right:

> First, Congress must have intended that the provision in question benefit the plaintiff. Second, the plaintiff must demonstrate that the right assertedly protected by the statute is not so "vague and amorphous" that its enforcement would strain judicial competence. Third, the statute must unambiguously impose a binding obligation on the States. In other words, the provision giving rise to the asserted right must be couched.

Sandusky County, 387 F.3d at 572. In *Sandusky County*, the Sixth Circuit held that an individual had a right to enforce HAVA's provisional ballot requirement. *Id.*

Here, Plaintiffs have a right to enforce HAVA's verification requirement to ensure that their votes are not diluted by the votes of ineligible voters. HAVA's obligations are plainly concrete and binding upon the States. Those obligations are also designed to benefit individual voters. Through HAVA, "Congress deemed the identification numbers material to determining eligibility to register and to vote." *Florida State Conference*, 522 F.3d at 1174. Moreover, the Supreme Court has repeatedly held that voters have an interest in ensuring that their elections are open, honest, and free from dilution:

> Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy. Voter fraud drives honest citizens out of the democratic process and breeds distrust of our government. Voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised. "[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise."

Purcell v. Gonzalez, 549 U.S. 1, 7 (2006) (emphasis added). *See also Crawford v. Marion County Election Bd.* 128 S.Ct. 1610, 1620 (2008) ("public confidence in the integrity of the electoral process has independent significance, because it encourages citizen participation in the democratic process. As the Carter-Baker Report observed, the "electoral system cannot inspire public confidence if no safeguards exist to deter or detect fraud or to confirm the identity of voters"). Absent the ability to bring this HAVA claim, Defendant will continue to circumvent Congress' express statutory intent.

3. The Defendant's Same Day Registration Scheme Violates the NVRA By Allowing Unqualified Electors To Receive An Absent Voter's Ballot

The NVRA works in tandem with HAVA. Under Section 8, Ohio may not remove the name of a registrant from the official list of eligible voters except, *inter alia*, "as provided by State law, by reason of criminal conviction or mental incapacity." 42 U.S.C. 1973gg-6(a)(3)(B). Section 8 also requires Ohio election officials to determine and ensure the eligibility of voters before registering them to vote. 42 U.S.C. § 1973gg-6(a)(1).

Ohio law, in turn, mandates that a person convicted of a felony under the laws of any state or the United States is incompetent to be an elector unless and until the conviction is reversed or annulled, or such person is granted parole, judicial release, or a conditional pardon or is released under a non-jail community control sanction or a post-release control sanction. Ohio Rev. Code 2961.01. Furthermore, Ohio law mandates that the registration of a registered elector shall be canceled upon the occurrence of the conviction of the registered elector of a felony under the laws of any state or the United States as provided in section 2961.01 of the Revised Code. Ohio Rev. Code 3503.21(A)(3).

Because her "vote-a-ramas" permit simultaneous voter registration and receipt of absentee ballots, Defendant violates the NVRA. Her plan renders the state unable to timely confirm the eligibility of applicants by verifying that they are not convicted felons and thus incompetent to be qualified electors before adding their names to the official list of eligible voters in Ohio, as required by 42 U.S.C. § 1973gg-6(a)(1).

Under Defendant's plan, an applicant would receive a regular absentee ballot at the same time as registering to vote, even though the applicant's registration information has not been verified and even though there is no time to verify that information or to verify that the applicant is not a convicted felon and thus incompetent to be an elector. Ohio law requires that applicants

register to vote thirty days prior to election day, precisely so that election officials will have the opportunity to verify their information and to confirm that applicants are qualified, eligible electors. Accordingly, the Defendant's actions violate both the letter and spirit of the NVRA.

3. The Defendant's Conduct Violates the Voting Rights Act by Increasing the Likelihood That Voters Will Be Intimidated and That the Rights of Minority Voters Will be Denied.

Defendant's Advisory 2008-24 violates Section 2 of the Voting Rights Act ("VRA"), which prohibits the enforcement of any voting qualification or prerequisite to voting or any standard, practice, or procedure that results in the denial or abridgement of the right to vote on account of race or color. 42 U.S.C. 1973. Section 2 of the VRA was designed to ensure that voters are able to exercise their franchise free from intimidation, coercion, or threats and to guarantee that minority voters in particular are afforded an opportunity to fully and meaningfully participate in the political and electoral process.

By preventing observers from monitoring the voting process, this Advisory increases the possibility that voters will suffer intimidation while attempting to exercise their franchise. As Defendant herself stated in an earlier Directive, "Poll observers play an important role in assuring the public that election processes are open and transparent, affecting public trust of the process, and thus, the potential for future participation in the democratic process." Directive 2008-29 (Feb. 25, 2008). This Advisory would unreasonably prohibit Plaintiff from ensuring that the rights of voters are protected, and in particular, that minority voters are provided an opportunity to fully participate in the electoral process.

For example, voters who support candidates of a particular party may face undue pressure if large numbers voters support candidates of another political party. These voters, including minority voters, may fear undue pressure if they vote for the candidate of their choice. At one

time in this country, voting was routinely a public act, where citizens went to the polling place and announced their vote in front of all their neighbors as witnesses. This system was correctly replaced by the secret ("Australian') ballot, which enabled citizens to exercise the franchise without fear of intimidation. Without election observers on hand to ensure that intimidation does not occur, and that friends and neighbors are not 'policing' voters casting absentee ballots in these very public locations, there is a real risk that the secrecy of the ballot will be diminished and some voters will feel unable to vote against the wishes of onlookers.

Finally, there is no legitimate governmental interest in enforcement of the latest directive in violation of the VRA. On the contrary, the Advisory only serves to encourage and increase the likelihood of intimidation, threats and coercion of voters in the polling place.

5. Defendant's Actions Have Created Disparate Enforcement of the Law Across the State in Violation of the Plaintiff's Equal Protection Rights.

As set forth in the Complaint, the county boards of elections are receiving divergent and contradictory instructions from their respective Prosecuting Attorneys and from the Office of the Secretary of State. As a result, there will be inconsistent implementation (or rejection) of the procedures regarding same day registration and absentee ballot requests described in 2008-63.

Because Directive 2008-63 contravenes the language of the Revised Code, it creates demonstrable confusion at the county board of election level. This confusion will inevitably lead to a split among counties as to whether to allow people to simultaneously register to vote and receive an absentee ballot. For those persons who reside in counties that choose to follow the language of the Ohio Code, as opposed to the Secretary of State's Directive, they will be deprived of the ability to vote on equal terms as a person similarly situated in another county. This disparate treatment is a substantial burden on the fundamental right to vote. *See League of Women Voters of Ohio v. Blackwell*, 432 F. Supp. 2d. 723, 727 (N.D. Ohio 2005) (citing *United*

States v. Mosley, 238 U.S. 383, 386 (1915)). This disparate treatment violates Plaintiff's right to equal protection of the laws.

Further, because Directive 2008-63 unlawfully allows people to request a ballot when they ordinarily would be time-barred from doing so, it impermissibly expands the franchise from qualified electors to non-qualified electors. In providing a mechanism for these invalid ballots to be cast, the Secretary of State inappropriately dilutes the votes of qualified electors. Indeed, "[t]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Purcell v. Gonzalez*, 549 U.S. 1, 7 (2006) (quoting *Reynolds*, 377 U.S. at 555); *see also League of Women Voters*, 432 F. Supp.2d at 728 (citing *Ury v. Santee*, 303 F. Supp. 119 (N.D. Ill. 1969)).

B. The Court Should Issue a Temporary Restraining Order and Preliminary Injunction Because Larry Wolpert, the Ohio Republican Party, and Its Members, Will Suffer Irreparable Harm If the Court Does Not Grant Interlocutory Relief

Defendant's conduct more than justifies injunctive relief. Without an Order, Plaintiff will suffer the impingement of their voting rights, which constitutes irreparable harm. See, e.g., Elrod v. Burns, 427 U.S. 347, 373 (1976). As the Supreme Court has held, "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." Wesberry v. Sanders, 376 U.S. 1,17 (1964). Abridgment of the Constitution, including the violations of the Equal Protection Clause of the 14th Amendment, constitute irreparable injury for which interlocutory relief is appropriate. Williams v. Rhodes, 393 U.S. 23 (1968); Bullock v. Carter, 405 U.S. 134 (1972).

Moreover, injunctive relief would be in the public interest. Given the weighty interest the public has in free, open, and fair elections, this factor weighs heavily in favor of granting

injunctive relief. In *Crawford v. Marion County Election Board*, 128 S.Ct. 1610 (2008), the Supreme Court recognized the interests in preventing voter fraud, in maintaining public confidence in the electoral process, and in election modernization, to be legitimate and important considerations. All three of these interests are implicated here. By granting injunctive relief, the Court can ensure that the State of Ohio will have the opportunity to verify the eligibility of all newly-registered voters and thus will be able to prevent the ballots of unqualified voters from being counted alongside the ballots of qualified electors. Similarly, by protecting the ballots of qualified electors from vote dilution, and by demonstrating that the Secretary of State adheres to the rule of law, the public's confidence in the electoral system as a whole will be strengthened. Lastly, by granting the present injunction, and thus granting the State of Ohio the opportunity to conduct HAVA matches for new registerees, the state's electoral system will be in compliance with federal requirements. Ohio voters will benefit from a modern and robust election system.

Finally, no other party will be harmed if this Court grants the requested injunctive relief. Indeed, if Plaintiff's requested relief is granted, not a single qualified voter will lose his or her franchise; those who seek to register to vote may still do so, and those who wish to request absentee ballots may also do so -- as contemplated by the legal regime enacted by the Legislature. An order preventing the Defendant from violating the existing election law will harm no one who possesses the right to vote.

For the reasons set forth above, this Court should enjoin the enforcement of Defendant's Directives. As an alternative, this Court should order that any ballots cast pursuant the Directives be provisional ballots. This order would allow individuals to cast ballots and give election officials time to verify those individuals' eligibility. Such an order would be entirely consistent with HAVA's purposes:

> "HAVA's provisional voting section is designed to recognize, and compensate for, the improbability of "perfect knowledge" on the part of local election officials. "If a person presents at a polling place and seeks to vote, and if that person would be allowed to vote by an honest election worker with perfect knowledge of the facts and law, then the person's vote should count." But because any given election worker may not in fact have perfect knowledge, the person who claims eligibility to vote, but whose eligibility to vote at that time and place cannot be verified, is entitled under HAVA to cast a provisional ballot."

Sandusky County, 387 F.3d at 573. *See also State ex. Rel. Mackey v. Blackwell*, 834 N.E.2d 346 (Ohio 2005) ("Unlike regular ballots, which are cast and then immediately counted, provisional ballots are paper ballots sealed in envelopes for subsequent review. After the election, officials must determine whether provisional ballots will be counted"). Provisional ballots also would preserve the status quo during the pendency of this litigation.

As a final alternative, this Court should allow observers to be present during this process. Such observers would prejudice no one and would help protect voters from improper conduct in a manner consistent with the Voting Rights Act.

III. CONCLUSION

Plaintiffs respectfully request that the Court grant its Motion and issue an appropriate remedy.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing Plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction was served upon the following, by regular U.S. mail, postage prepaid, on this 23rd day of June, 2008:

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