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

OHIO REPUBLICAN PARTY, et al.	:	
	:	
Plaintiffs,	:	
	:	**Case No. 2:08CV913**
v.	:	
	:	**JUDGE SMITH**
JENNIFER BRUNNER,	:	
Secretary of State of Ohio,	:	**MAGISTRATE JUDGE KING**
	:	
Defendant	:	

MEMORANDUM OF DEFENDANT JENNIFER BRUNNER, SECRETARY OF STATE OF OHIO, IN OPPOSITION TO PLAINTIFFS' RENEWED MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

I. Introduction

Since the passage of the Help America Vote Act ("HAVA") in 2002, the Ohio General Assembly and Ohio Secretaries of State from both major political parties have worked diligently to implement its requirements. The Plaintiffs have produced no evidence of any weight or substance to support their claim that Defendant Secretary of State Brunner is not processing new voter registrations through the Ohio Bureau of Motor Vehicles and the Social Security Administration, as required by HAVA. The Plaintiffs have been unable to support that claim with evidence, because the claim is simply untrue. Secretary of State Brunner, building on a system first established by her Republican predecessor, has fully and continuously implemented the requirements of HAVA Section 303, codified at 42 U.S.C. § 14583(a)(1)(A). Section 303 requires states to establish and maintain a "single, uniform, official, centralized, interactive computerized statewide voter registration list defined, maintained, and administered at the State

level that contains the name and registration information of every legally registered voter in the State and assigns a unique identifier to each legally registered voter." In Ohio, that registration list is referred to as the Statewide Voter Registration Database" ("SWVRD").

This Court has already rejected the HAVA claims raised in Plaintiffs' motion once. Plaintiffs' allegation that Secretary Brunner is not complying with HAVA's electronic database requirement was part of the Plaintiffs request for an order from this Court that would have disenfranchised thousands of qualified Ohio voters who chose to both register and vote an absentee ballot on the same day during the first week of October. Between this Court, Sixth Circuit Court of Appeals and the Ohio Supreme Court, all of Plaintiffs' legal theories were rejected and discredited. Now, Plaintiffs have filed a second motion for temporary restraining order that simply expands upon the HAVA-related claims Plaintiffs made in last week's TRO, asking this Court to compel the Secretary of State to comply with HAVA. No injunction is needed, because the Secretary has already ensured that Ohio's voter verification system meets or exceeds federal requirements.

Rather than renewing this aspect of last week's request for an injunction, Plaintiffs could have simply asked Defendant about the central tenet of their "renewed" motion, namely that the Ohio Secretary of State has failed to comply with relevant provisions of HAVA relating to the SWVRD. Had Plaintiffs done so, they undoubtedly would not have filed their renewed motion for a TRO, which needlessly involves this Court in a groundless proceeding designed, to create doubt in the minds of voters about the fairness of Ohio's election by conjuring the specter of non-existent voter fraud and to produce chaos in the administration of the upcoming election in all 88 boards of elections.

II. Relevant Facts: A Brief Review Of The Relevant Issues Already Presented To This Court

This Court already once denied Plaintiffs' request for injunctive relief against the Secretary on the same grounds it now presents in its renewed motion for TRO. It again seeks an injunction so narrowly restrictive of effective election administration that the basic provisions of HAVA for maintaining the consistency of information in Ohio's voter database. Furthermore, the order might result in the disenfranchisement of voters who have properly registered to vote but have not updated their address information with the Ohio Bureau of Motor Vehicles. Such a purpose was expressly *not* intended by HAVA. *See* Proposed Order (Doc. 36-7); see also HAVA Plaintiffs' allegation that Secretary Brunner is not complying with HAVA's electronic database requirement was raised in Plaintiffs' original request for injunctive relief. Compl. for TRO and Prelim. & Perm. Injunction (Doc. 2) ¶¶42-48. The issue was then discussed at several points during oral argument on that motion. *See* Transcript of Oral Argument at 12.11 – 13.9; 18.25 – 19.15; 37.12 – 38.15; 47.5 – 49.11. Counsel for Plaintiffs, Mr. Todd, stated:

> We would like to point out that the Secretary's actions here are exacerbated by her failure … and the office's failure for over six years now to implement the federally mandated database that would allow registration for all individuals in Ohio on a realtime basis. … That database doesn't exist, Your Honor, in our State.

Id. at 12.11-18. Later, the Court asked Mr. Todd to "expand on" the allegation "that Ohio has failed to follow and provide for a statewide computerized program." Id. at 18.25 – 19.2. This Court also engaged Counsel for the Secretary on this issue, asking, for example "[t]his is how you comply with HAVA; is that correct?" Id. at 48.23-24. Finally, the Court allowed Mr. Todd another opportunity to make the case regarding Plaintiffs' HAVA claims, stating, "but the database - - you got this thing started." *Id*. at 49.10-11.

Following the oral argument, this Court denied the request for a restraining order (except on the narrow question of admitting observers, a decision the Sixth Circuit subsequently reversed). The Court neither expressly based its ruling on a rejection of the HAVA claim nor expressly reserved that issue for future consideration. When a court denies relief without explanation, it is presumed that the court has implicitly overruled that argument. *Kusens v. Pascal Co.*, 448 F.3d 349 (6th Cir. 2006).

Plaintiffs then appealed this Court's denial of their motion for TRO/PI on all issues except the presence of election observers, and asked the Court of Appeals for emergency relief to enjoin this Court's denial pending appeal. *See O.R.P.*, Nos. 08-4242/4243/4251, Plaintiffs' Response to Emergency Motion for Stay Pending Appeal and Emergency Motion for Injunction Pending Appeal (filed Sept. 29, 2008). Plaintiffs' second basis for relief in the Court of Appeals was that "[D]efendant's failure to establish a plausible system for verifying absentee ballots … violates the Help America Vote Act." Id. at 13. Plaintiffs argued there that "the commingling of all absentee ballots will make it impossible as a practical matter to verify the registration of unverified voters, and hence will render any verification process a nullity, in violation of HAVA." Id. at 13-14 (citation omitted). Plaintiffs' appeal raised *precisely* the same legal and factual argument that it now seeks to assert in its "renewed" motion.

The Court of Appeals denied Plaintiffs' request for emergency injunctive relief. *ORP*, Nos. 08-4242/4243/4251, slip op. at 4. The case remains pending before the Sixth Circuit, a fact that is detrimental to Plaintiffs' quest to whittle away qualified voters from the rolls. While the Court of Appeals has ruled on the emergency motions, it has maintained jurisdiction over the question of the temporary restraining order. Therefore, this Court has no jurisdiction over the issue.

III. This Court Lacks Jurisdiction To Grant A Temporary Restraining Order

As a preliminary matter, Plaintiffs' "renewed" request for a temporary restraining order relating to HAVA compliance should fail because this Court lacks jurisdiction over that aspect of the case. Jurisdiction over that legal issue rests exclusively with the U.S. Court of Appeals for the Sixth Circuit, until such time as it remands the case back to the District court. Alternatively, the motion should fail based on the "law of the case" doctrine**.**

A. The Sixth Circuit retains jurisdiction over Plaintiffs' HAVA claims

As a general rule, filing a notice of appeal operates to transfer jurisdiction of the case to the court of appeals, and the district court thereafter lacks jurisdiction except to act in aid of the appeal. *Hogg v. United States*, 411 F.2d 578 (6th Cir. 1969). There is an exception to that rule, however: an appeal from an interlocutory order does not divest the trial court of jurisdiction to decide *other issues* in the case. *Moltan Co. v. Eagle-Picher Industries, Inc.*, 55 F.3d 1171 (6th Cir. 1995). But the trial court *is* divested of jurisdiction over those questions that were raised and decided in the appealed order. *Mountain Solutions v. State Corp. Comm'n*, 982 F. Supp. 812 (D. Kansas 1997); *Int'l Paper Co. v. Whitson*, 595 F.2d 559, 561-62 (10th Cir. 1979).

As discussed above, the "renewed" TRO request clearly involves one of the identical issues Plaintiffs appealed to the 6th Circuit, namely whether the Secretary's alleged "failure to establish a plausible system for verifying absentee ballots … violates the Help America Vote Act." Thus, until the Sixth Circuit remands the case, this Court lacks jurisdiction to revisit this issue.

B. Alternatively, "The Law Of The Case Doctrine" Applies

The "law of the case" doctrine "precludes a court from reconsideration of issues 'decided at an early stage of the litigation, either explicitly or by necessary inference from the

disposition.'" *Westside Mothers v. Olszewski*, 454 F.3d 532 (6th Cir. 2006), quoting *Hanover Ins. Co. v. Am. Eng'g Co.*, 105 F.3d 306, 312 (6th Cir. 1997) (additional citations omitted). That doctrine precludes reconsideration of an issue a court has already decided in a particular matter unless there are "exceptional circumstances" characterized by at least one of the following three factors:

(1) where substantially different evidence is raised on subsequent trial;

(2) where a subsequent contrary view of the law is decided by the controlling authority; or

(3) where a decision is clearly erroneous and would work a manifest injustice.

Id. at 538 (citing *Hanover Ins. Co.*, 105 F.3d at 312).

This Court has already necessarily rejected the HAVA claim once. *See Kusens*, 448 F.3d 349. Plaintiffs cannot re-litigate this issue, at least not until the appellate court has spoken. Allowing this "renewed" motion would not only violate the doctrine, it would create an incentive to piecemeal litigation, a particularly undesirable outcome in election-related litigation one month before Election Day.

IV. Plaintiffs Have No Private Right Of Action Under HAVA

This second bid for injunctive relief is legally flawed because HAVA does not create a private right of action to enforce its terms. *Sandusky County Democratic Party v. Blackwell*, 387 F.3d 565, 572 (6th Cir. 2004) ("HAVA does not itself create a private right of action").

A statute must be phrased in terms of the persons benefited in order to create a private right of action. *Gonzaga University v. Doe*, 536 U.S. 273, 284 (2002) quoting *Cannon v. Univ.y of Chicago*, 441 U.S. 677, 692 n.13 (1979). If a plaintiff shows that the statute creates a right, that right is presumptively enforceable under 42 U.S.C. § 1983. *Gonzaga*, 536 U.S. at 284.

However, if the text and structure of the statute provide no indication that Congress intended to create new individual rights, there is no basis for a private suit. *Id.* at 286.

In the case of HAVA, not only is there no private right of action, but the statute expressly disavows any such right. 42 U.S.C. § 15512 requires states to establish an administrative complaint procedure. Any person who believes there has been a HAVA violation may file a complaint through this administrative process. 42 U.S.C. § 15512(a)(2)(B). There would be no reason for Congress to mandate the creation of a private administrative complaint process if it believed citizens already had a private cause of action under the statute. Or, to frame the argument in slightly different terms, the fact that Congress specifically mentioned enforcement by the United States Attorney General, 42 U.S.C. § 15511, and by private citizens through administrative grievances, but did not mention private civil actions, strongly suggests that Congress intended to create no such remedy.

Plaintiffs' reliance on *Sandusky County Democratic Party v. Blackwell* to support their claim for a right of action under HAVA is misplaced because that case does not apply to the claim before this Court. The *Sandusky* court analyzed a completely different statute than the one at issue before this Court. In *Sandusky*, the Sixth Circuit found that HAVA does provide a right of action enforceable under § 1983 for individuals who were refused the right to cast a provisional ballot, because the language of HAVA in 42 U.S.C. § 15482(b)(2)(E) explicitly refers to the "right of an *individual* to cast a provisional ballot." *Sandusky*, 387 F.3d at 573 quoting 42 U.S.C. § 15482(b)(2)(E).[1] In this case, HAVA does not create an individually

[1] 42 USCS § 15482 reads in pertinent part:
(b) Voting information requirements.
(2) Voting information defined. In this section, the term "voting information" means--
(E) general information on voting rights under applicable Federal and State laws, including information on the right of an individual to cast a provisional ballot and instructions on how to contact the appropriate officials if these rights are alleged to have been violated;

enforceable right under HAVA's verification requirement, because nowhere in 42 U.S.C. § 15483(a) does it mention "individual," nor is it phrased to identify persons benefited. *See* 42 U.S.C. § 15483(a).[2]

Plaintiffs also cite *Purcell v. Gonzalez*, 549 U.S. 1 (2006), for its general contention that "voters have an interest in ensuring that their elections are open, honest, and free from dilution" and therefore they have a right to bring an action under HAVA. While undeniably true, such general assertions are insufficient to support the Plaintiffs' claim. Only "unambiguously conferred" rights will support a § 1983 action. *Gonzaga*, 536 U.S. at 283. Here, there are no "unambiguously conferred" rights within 42 U.S.C. § 15483(a) that would support Plaintiffs' Section 1983 action.

V. SWVRD, Ohio's Computer Database, Fully Meets The Requirements Of The Help America Vote Act

Ohio fully complies with HAVA. In suggesting otherwise, plaintiffs both misstate the requirements of HAVA and mischaracterize statements made by the Secretary of State.

The Help America Vote Act, 42 U.S.C. 15483(a), requires each state to implement "a single, uniform, official, centralized, interactive computerized statewide voter registration list . . . that contains the name and registration information of every legally registered voter in the State." 42 U.S.C. 15483(a)(1)(A). Ohio has created that database: it is centralized in the Secretary of State's office, it allows real-time access by local election officials, and it contains the names and registration information of every legally registered voter in the state. [Exhibit 1, Affidavit of

[2] § 15483 states in pertinent part::

(a) Computerized statewide voter registration list requirements.

(A) In general. Except as provided in subparagraph (B), each State, acting through the chief State election official, shall implement, in a uniform and nondiscriminatory manner, a single, uniform, official, centralized, interactive computerized statewide voter registration list defined, maintained, and administered at the State level that contains the name and registration information of every legally registered voter in the State and assigns a unique identifier to each legally registered voter in the State (in this subsection referred to as the "computerized list") . . .

Gus Maragos, ¶ 5]. HAVA leaves the specific choices on the methods of complying with its requirements to the discretion of the States. 42 U.S.C. § 15485.

As implemented in Ohio and consistent with the requirements of HAVA, state and local officials have designated responsibilities. The gate-keeping function falls to local boards of elections. When a potential voter wishes to register, local election officials must gather the information required by law,[3] and enter the information into the computerized list on an "expedited basis." 42 U.S.C. 15483(a)(1)(A)(vi). As previously noted, the database has already been set up to allow local election officials to promptly enter the data provided by the registrant. [*Id*., ¶ 6].

The second requirement of HAVA is that the Secretary of State and the Ohio Bureau of Motor Vehicles must "enter into an agreement to match information in the database of the statewide voter registration system with information in the database of the [Bureau of Motor Vehicles]," the purpose of which is "to enable each official to verify the accuracy of the information." 42 U.S.C. 15483(a)(5)(B)(i). Here again, the required system exists and is in active use in Ohio. When data is received from the county boards of elections, the Secretary of State electronically conveys to the BMV information concerning the voter for verification, including the voter's: (1) first name; (2) last name; (3) date of birth; (4) driver's license number; and (5) Social Security number. [Marago Aff., ¶ 9].

The Bureau of Motor Vehicles then matches the information on the application to the data in its own system. [*Id.* at., ¶ 7]. The BMV computer automatically notifies the Secretary whether it can or cannot verify the registration information. But the system generates far more than a simple "yes" or "no" answer: the BMV reports back **any** problem or discrepancy. For

[3] Ohio's voter application form requires new registrants to provide name, address, date of birth and either their Ohio driver's license number or the last 4 digits of their social security number (referred to by the shorthand "SSN4").

example, the BMV/Secretary of State interface is programmed to identify when the driver's license numbers match but the Social Security numbers do not, as well as the converse. The system also reports mismatches between names and birthdates; Social Security numbers that belong to people who are deceased; driver's license numbers that belong to people who are deceased; and instances where a driver's license number simply does not exist in the BMV database. [*Id*]. Plaintiffs assertion that the system *only* checks for duplicate registrations is simply incorrect to. By any measure, the system meets the requirements of 42 U.S.C. § 15483(a)(5)(B)(i).

Moreover, Congress's purpose in requiring a statewide voter registration list was not to based on the premise that new voter registrations should be presumed suspicious. Computerized "mismatches" or "nonmatches" between the three databases at issue (SOS, BMV and SSA) are not cause, in and of themselves, for disqualifying new registrants from voting. Information about fully qualified voters changes over time: people move, people change their names, etc. Accordingly, the provisions of HAVA Section 303 were created in order to assist the States in maintaining updated and current voter information lists. Had Congress intended that computers decide who is eligible to vote and who isn't, or to justify suspicion concerning eligibility to vote based on computer query results, it would have expressly provided so. To the contrary, in Ohio the voter ID requirements established in H.B. 3, requiring all voters to produce ID on election day, provide a guard against voting by ineligible individuals. Plaintiffs seek relief in the form of a proposed order that would, among other things, require counties to mark the names of individuals in pollbooks when mismatches are returned by the computer checks and require those individuals to vote provisional ballots. Plaintiffs' assertion that the relief it seeks is necessary to prevent voting fraud is specious, and is unsupported by any state or federal statutory text.

VI. Plaintiffs Have No Clear And Convincing Evidence Of Non-Compliance By The Secretary Of State

Plaintiffs' current TRO application does not provide any support for the issuance of a temporary restraining order. The "evidence" Plaintiffs put forth to support their contention that the Secretary is violating HAVA consists entirely of statements taken out of context, coupled with affidavit testimony from witnesses who have no first hand knowledge of the Ohio system of electronic transfer of data concerning voter registration verification that regularly occurs between the SOS and BMV and between the BMV and the SSA, and thus rely entirely on speculation.

A. The Cunningham Affidavit

Plaintiffs submit as Exhibit A an affidavit from Keith Cunningham, a witness who, by his own admission, has no first-hand knowledge concerning what matching the Secretary of State and the BMV perform. Mr. Cunningham's allegation of non-compliance consists of pure supposition: according to Mr. Cunningham, the Allen County Board of Elections routinely receives duplication notifications from the Secretary, but not notifications of Social Security or other data mismatches; therefore, Mr. Cunningham concludes that the Secretary is not matching those other data against BMV records. As Defendant's Exhibit B to Maragos' Affidaivit demonstrates, however, SWVRD registered 363 SSN4 mismatches for Allen County voters from 2006 until the present. For the same time period, the SWVRD matching process detected nine instances in which an Allen County registrant's Social Security number belonged to someone of "DEAD status." [Maragos Exhibit C]. The report also shows that SWVRD registered another Allen County deceased registrant in 2008. All this information appeared immediately in SWVRD, and was accessible in real-time to county election officials. [Affidavit of Maragos, ¶ Exh D].

These exhibits prove that the Secretary is verifying data by matching information, as required by HAVA. The Cunningham affidavit proves either that Mr. Cunningham is not following up on SWVRD notifications for his newly registered voters or does not understand the SWVRD system.

B. The Kindred Affidavit

The affidavit of Sam Kindred (Plaintiffs' Exhibit C) confirms that SWVRD is HAVA-compliant. According to Mr. Kindred,

> When the county database periodically transfers information regarding new voter registration applications to the SWVRD, the SWVRD then performs matching and other functions. If there is a mismatch – for example, the driver's license number or Social Security number submitted by the county does not match the information on file with the BMV – the SWVRD sends a message to the county indicating the failure to match. This message includes a specific code indicating which data did not match.

[Plaintiffs' Exhibit C, ¶ 5]. Thus, Plaintiffs' *own evidence* confirms that the state-wide computer system does more than search for duplicate registrations. The system Mr. Kindred describes is the system still regularly used by the Defendant Secretary, and has been used, with some modifications, consistently in the Brunner administration. Maragos affidavit

Moreover, on October 3, 2008, the SSA sent a letter to the Secretary acknowledging that "Since October 1, 2007 . . . we have received over 740,000 requests" for verification from Ohio." Farrell Affidaivit Exhibit C. There is some irony in the fact that the Plaintiffs suggest that the SOS or the BMV have somehow "turned off" the verification system and have not been electronically forwarding voter registration information to the SSA for verification, while the SSA suggests that the SOS and BMV are sending it too many requests for verification.

C. Plaintiffs Have Misconstrued The SWVRD System Manual

The SWVRD System Manual makes plain that verification of registration data, including Social Security numbers, is a routine operation. Specifically, Section 15.4 of the Manual, found on page 17, states:

> **15.4 BMV Not Confirmed**
>
> Upon receipt of a voter registration or update, the SOS SWVRD will validate certain voter information with the BMV. If the SOS is unable to match certain fields in the record with the BMV, the record cannot be confirmed. If this occurs the SOS automatically sets the BMV flag to "N" in the SWVRD. * * * Voter records that are not confirmed . . . must have their information updated by the [Board of Election] and re-sent to the SOS SWVRD and validation with the BMV will be automatically reattempted by the SOS.

[Maragos Affidavit, Exh. A, § 15.4]. Incredibly, Plaintiffs *quote* § 15.4 as saying that the process for matching databases "is currently turned off," [Plaintiffs' Renewed TRO Motion, at 5], even though that phrase appears *nowhere* in the section.

Even more puzzling is the affidavit of Matthew Damschroder. [Plaintiffs' Exhibit B]. Paragraph four of Mr. Damschroder's affidavit states:

> It is my understanding that paragraph 15.4 of the Manual, on page 17, titled "BMV Not Confirmed" means that the current version of the SWVRD has the function of validating certain voter information with the Ohio Bureau of Motor Vehicles database disabled or 'turned off.'

Mr. Damschroder's "understanding" is incorrect. Note that Mr. Damschroder is not attesting to personal knowledge that the SOS/BMV system *has* an "on-off-switch"; he merely intuits this conclusion from the caption "BMV Not Confirmed." But, as quoted above, that section (when read in context) clearly refers to the situation where a match is attempted and the BMV cannot confirm the information. Plaintiffs also point to Section 17 of the Manual (page 19), which does contain some ambiguous language:

17. BMV Not Confirmed Results In Second Voter ID

(BMV confirmation is currently NOT being performed.)
If the SOS cannot confirm the voter record with the BMV and there are no potential duplicates for the voter, the SOS may send a second voter record ID to the BOE.

Plaintiffs want the Court to read the parenthetical sentence as an admission that Secretary of State is not sending data to the BMV for verification. But it would make absolutely no sense for the Manual to say "the Secretary is not conducting BMV verifications" right in the middle of describing how the BMV verification process operates. But Section 17's meaning is clear when read in conjunction with Section 15.4, quoted above. Plaintiff needed only to have asked the Secretary of State what actually occurs in this process, rather than taxing this Court's time on a quixotic venture to poke holes in counties' poll lists and force excessive and unwarranted slowdowns at the polls on Election Day in favor provisional balloting for both Election Day and absentee voting[4]. Although inartfully phrased, the language of Section 17 does not mean that the confirmation process is not being performed. In fact, the confirmation process is and has been performed regularly well before and during the period of time the Plaintiffs cite, i.e., January 2008 to date. Maragos Affidavit.

Section 15.4, as explained above, deals with the situation where, for whatever reason, SWVRD cannot confirm a match: the last four (4) digits of the social security numbers are not the same, etc. When that happens, the SWVRD is updated to reflect the discrepancy, and that information may be accessed by the local boards of elections. Section 15.4 makes it incumbent upon a local board of elections to take action to update and resubmit the voter information, at which time the Secretary attempts a second verification with the BMV.

[4] There is no provisional voting of absentee ballots until 28 days before the election, so any absentee ballots voted through October 6, 2008, cannot be "provisionalized," even by court order.

Section 17 adds one gloss to this scenario. HAVA requires that the Secretary of State assign an ID number, a "unique identifier," to each legally registered voter in the state. 42 U.S.C. §15483(a)(1)(A). When a match comes back "unconfirmed," Section 17 allows the Secretary to assign a new voter record ID number to the unsuccessful applicant, in order to avoid confusion. This outcome is not well-conveyed in the caption of Section 17: "BMV Not Confirmed Results In Second Voter ID." (The caption is easier to understand if one places quotation marks around the phrase "not confirmed," and recognizes that "results" is the verb in the sentence).

This lengthy exegesis of a relatively short passage in the SWVRD Manual is necessary in order to capture the meaning of the strange parenthetical statement upon which so much of Plaintiffs' case rests. That parenthetical is not an admission that the Secretary is delinquent in her duties. Rather, it is one of two limitations on the Secretary's ability to assign a second voter record ID number. The first limitation is that the Secretary cannot assign a new voter record ID number if the BMV match came back "not confirmed" because the BMV found potential duplicate registrations. This makes sense: if there are potential duplicates in the system, the last thing that should happen is to assign them multiple numbers.

The parenthetical is a second limitation on the Secretary's discretion to assign a new ID number. Suppose a BMV match has come back "not confirmed," the local board of elections has identified and corrected an error in the application, the application has been resubmitted to the Secretary, and a second BMV match is currently underway. At that point in time, common sense says the Secretary should not confuse things by assigning a second ID number. Thus, the parenthetical is a statement of assumption: the Secretary's ability to assign a new ID number *presupposes* that "BMV confirmation is currently NOT being performed."

Even if one accepted Plaintiffs' reading of Section 17, one ambiguous parenthetical sentence offered by Plaintiffs, when contrasted with the proof of actual matching presented above, would barely create a dispute of material fact sufficient to survive summary judgment, much less the clear and convincing evidence necessary for extraordinary injunctive relief.

D. The Secretary Did Not "Confirm Her Non-Compliance" In Her Sixth Circuit Brief

In pleadings before the Sixth Circuit – which rejected Plaintiffs' contention that Ohio's early absent voter procedure violated the Voting Rights Act – the Secretary observed that the SWVRD protects against double registration. Plaintiffs seize on this statement of fact to argue that the Secretary's "insistence that her system protects against double registration is, by implication, a concession that she does not conduct the checks of Bureau of Motor Vehicles or Social Security records actually required by HAVA." [Renewed Motion for TRO, at 6].[5] This is not evidence – it is not even a logical conclusion. The Secretary emphasized detecting duplication because that was one of the express purposes of HAVA. The fact that she did not refer to the computerized interface with the BMV (in a brief where the BMV matching system was not at issue) does not suggest, much less prove, that there is no such system in use.

VII. Plaintiffs Misstate The Requirements of HAVA

At various points in their renewed TRO motion, Plaintiffs complain that the Secretary does not perform BMV verification checks before the boards of elections distribute ballots. Paragraph 5 of the Motion is devoted to a hypothetical in which someone sneaks across the Ohio border, registers with a fake Social Security number, and immediately receives a ballot, with no possibility of detection. The hypothetical is legally and factually flawed.

[5] Plaintiffs incorrectly assert that HAVA requires the Secretary to check Social Security records. HAVA imposes this responsibility on the Director of the BMV, 42 U.S.C. § 15483(a)(5)(B)(ii), and the Ohio BMV is performing this task.

Plaintiffs are merely rehashing the challenge to same-day registration/absent voter balloting that was rejected by both the Sixth Circuit Court of Appeals in this case and the Ohio Supreme Court in *State ex rel. Colvin v. Brunner*, Slip Op. 2008-Ohio-5041. HAVA does not mandate pre-registration verification, and in fact appears to contemplate the opposite. Plaintiffs' assertion that Ohio has no mechanism in place to verify certain information provided in voter registrations as contemplated in HAVA is purposely and avoidably false, as the evidence above has shown.

Plaintiffs' hypothetical is also a red herring, because it presents a problem that HAVA does not even address. In Plaintiffs' scenario, the fraudulent voter is registered *in another state*. Ohio's procedures to confirm addresses would eventually expunge that fraudulent voter from the rolls, but HAVA provides no protection against that form of voter fraud (and is not designed to do so). Moreover, any voter who would register falsely under penalty of election falsification would face prosecution for at least a fifth degree felony committed in Ohio and face a penalty of a fine of up to $2500 and imprisonment in Ohio's prison system for a period of six to twelve months.

A HAVA check with the Ohio BMV would show the voter has no Ohio driver's license, but that is not a disqualification from voting. The HAVA check would <u>not</u> disclose that a voter was simultaneously registered in Indiana or West Virginia, irrespective of whether the HAVA check occurred before or after a ballot was distributed, *and irrespective of whether the registered and voted on the same day, voted absentee before the election or voted in person on Election Day*. One might argue that, in a perfect world, there would be a national database, but HAVA does not create one. Secretary of State Brunner, upon taking office, initiated an effort to create an interstate compact with Ohio's contiguous states to compare voter databases. She did not

receive any affirmative response from the secretaries of state of Indiana and Michigan. Pennsylvania and Kentucky expressed interest in the idea, but concerns about administrative feasibility, given the newness of (especially) Pennsylvania's database, have delayed the project. Farrell Aff. At ¶ 14

HAVA contains no "real time" registration or matching requirement. Rather, 42 U.S.C. § 15483(a)(4)(A) says the database must be updated "regularly." HAVA specifically prohibits a board of elections from entering a voter's registration application into the database unless the application contains either the last four digits of the applicant's Social Security number or driver's license number. 42 U.S.C. 15483(a)(5)(A)(i). By contrast, HAVA does *not* say that a match with the BMV is a prerequisite to registration. Indeed, HAVA is silent as to when the data must be put into the system, other than to say that it must be done "on an expedited basis." Ohio law gives local boards twenty days to input registrations, Ohio Rev. Code § 3503.19(C)(1), and the Secretary of State shortened that period to one week for registrations received during the "overlap period." SOS Directive 2008-63. Plaintiffs have no legal basis to claim that HAVA requires instant verification at the time of registration, let alone for this Court to declare it a legal requirement that could be used to force voters into provisional voting or disqualify their registrations or votes, based on Plaintiffs' layered deadlines, starting first with the voter challenge deadlines of R.C. 3501.19 and 3503.24. Plaintiffs seek a first snare of getting information that will be impossible to obtain by the deadline to file challenges, followed by the second snare of marked signature poll books and poll lists, followed by a third snare of provisional voting for Election Day voters. This is so anti-democratically oppressive that this Court should outright reject Plaintiff's claims and dismiss this action.

VIII. Plaintiffs Have Failed To Show They Are Entitled To A Temporary Restraining Order.

Before issuing a motion for preliminary injunction, the Court must examine four separate factors:

(1) Whether the movant has a "strong" likelihood of success on the merits;

(2) Whether the movant would otherwise suffer irreparable injury;

(3) Whether issuance of a preliminary injunction would cause harm to others; and

(4) Whether the public interest would be served by the issuance of a preliminary injunction.[6]

McPherson v. Michigan High Sch. Athletic Ass'n, 119 F.3d 453, 459 (6th Cir. 1997) (en banc); *Cabot Corp. v. King*, 790 F. Supp 153, 155 (N.D. Ohio 1992). The standard for granting an emergency injunction is more stringent than that required for summary judgment. *Leary v. Daeschner*, 228 F.3d 729, 739 (6th Cir. 2000). This is because it is "an 'extraordinary remedy involving the exercise of a very far-reaching power, which is to be applied 'only in [the] limited circumstances' which clearly demand it." *Id.* (quoting *Direx Israel, Ltd. v. Breakthrough Med. Corp.*, 952 F.2d 802, 811 (4th Cir. 1991)) (internal quotations omitted). "In making its determination, the district court is required to make specific findings concerning each of the four factors, unless fewer factors are dispositive of the issue." *Id.* The foregoing are "factors to be balanced, not prerequisites that must be met. Accordingly, the degree of likelihood of success required may depend on the strength of the other factors." *In re DeLorean Motor Co.*, 755 F.2d 1223, 1229 6th Cir. 1985)

None of the above factors is supported by Plaintiffs' motion. This memorandum has shown at great length that plaintiffs have no likelihood whatsoever of prevailing on the merits.

[6] Secretary of State Brunner renews her request for a hearing on the motion to present evidence.

Plaintiffs have failed to show they will suffer any harm in the absence of relief. And the issuance of a preliminary injunction would be contrary to the public interest and would significantly harm the all voters in the State of Ohio. A temporary restraining order would effectively federalize administration of this election by placing all decisions under the direction of the federal courts rather than the Secretary of State. The order would also undermine confidence in Ohio's election, since it suggests the Court has to correct a problem when in fact none exists.

Moreover, the negative impact on the administration of the election by the Secretary and the 88 boards of elections, should the Plaintiffs Proposed Order be entered, cannot be overstated. We are less than one month from the November 4 presidential election. Pollworker training materials have been prepared and distributed. See Farrell Aff. At 12 Entry of Plaintiffs' proposed order would impose duties on pollworkers that they could not be effectively trained to perform within the time remaining before the November 4 election. Plaintiffs would require boards to mark the pollbooks as to every voter where a non-match or mismatch is demonstrated by database comparison. If this Court enters the proposed order, boards would be required to expend their resources to do database maintenance at a time when their attention should, and must, be focused on other responsibilities necessary for election preparedness.

Moreover, the time frames contemplated in Plaintiffs' proposed order call for acts to be completed by the Secretary and the counties by dates as early as October 12 – four days from the date of the filing of this memorandum. Plaintiffs propose that the counties "resolve any discrepancy in the registration application" as revealed by a computer mismatch or nonmatch report or alter their pollbooks to register the nonmatch. All of this, the Plaintiffs suggest, must be done by October 21 –less than two weeks from the date of the filing of this memo. The

Secretary urges the court to take judicial notice of the fact that 88 county boards of elections will be busy performing other election administration duties during the next two weeks. It should also be noted that the SSA intends to shut down its computerized verification system during the period October 10-13 for maintenance and/or upgrading. See Maragos Affidavit at 20.

It is not in the public interest for this court to change the rules in the middle of the game, and that is what plaintiffs seek by asking for an order that counties must make new notations in election day pollbooks and train pollworkers to take additional steps consistent with those notations *after* statewide poll worker training materials have been provided to boards and each poll worker and after significant poll worker training has been accomplished. Included as one of those new additional steps would be the requirement that "marked" voters vote a provisional ballot. Chaos and long lines would undoubtedly be produced on Election Day.

In addition, the order proposed by the Plaintiffs lacks clarity. For instance, it contemplates new responsibilities concerning "all *new* voter registration applications in Ohio received on or after January 1, 2008." Are "new" voter registrations those provided by citizens who have never voted before? Does a "new" voter registration include a "new" voter registration card filled out by a previously-registered voter who has moved or a voter who has changed her name based on marriage, or who had been registered in the past, but whose registration is no longer active? If not, how are election officials to determine whether any particular "new" registration is "new" for the purposes of the court order? Voter application forms (wisely) do not require the voter to provide a history of any prior voter registration status in Ohio.

In addition the specific relief sought would result in the deplorable and unconstitutional practice of "vote caging." The proposed order seeks nothing less than an order that the Secretary

create a list of all registrants whose names are flagged in a BMV or SSA search, even if the source of the mismatch or nonmatch is the result of data entry error in any of the three databases or result from a lack of consistency in terms of the names provided (such as reversal of first and middle names). Fully qualified electors would likely be negatively impacted and possibly disenfranchised. Plaintiffs want this Court to enter an order that would require Ohio election officials to create a list of "marked" citizens that could then be improperly used to engage in reprehensible voter suppression activities. (cite *State ex rel. Myles v. Brunner*, near end of decision). The courts should not enable such a perversion of the intent of HAVA.

IX. Conclusion

Based on the lack of merit of Plaintiffs' substantive claims, the Secretary respectfully requests that this Court to DENY any injunctive relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify a copy of the foregoing was served upon all counsel of record by means of the Court's electronic filing system on this 8th day of October, 2008.

/s Richard N. Coglianese