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No. 08-4242

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Ohio Republican Party, et al.,	:	
	:	
Plaintiffs-Appellees,	:	On Appeal from
	:	the United States District Court
v.	:	for the Southern District of Ohio:
	:	District Court Case No. 2:08CV913
Jennifer Brunner,	:	
Secretary of State of Ohio,	:	
	:	
Defendant-Appellant	:	

SECRETARY'S RESPONSE TO OHIO REPUBLICAN PARTY'S EMERGENCY MOTION FOR INJUNCTION PENDING APPEAL AND REPLY TO OHIO REPUBLICAN PARTY'S RESPONSE TO THE SECRETARY'S EMERGENCY MOTION TO VACATE OR STAY DISTRICT COURT'S TEMPORARY RESTRAINING ORDER

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INTRODUCTION

Plaintiffs Ohio Republican Party et al. ("ORP") seek an emergency stay of the district court's order abstaining from ruling on ORP's claims pertaining to the five-day window under which prospective Ohio voters may both register to vote and simultaneously cast an absentee ballot. ORP's request is extraordinary: The five-day window has already opened, and voters currently are permitted to go to their boards of elections to register and vote absentee. ORP is therefore asking this court to change the rules governing absentee voting in the November 4 election *after absentee voting has begun.* Settled precedent forecloses such disruptive and unnecessary relief. *See, e.g., Purcell v. Gonzalez*, 549 U.S. 1, 7 (2006) (per curiam).

What is more, ORP is wrong on the law. Just yesterday, the Ohio Supreme Court held that the Ohio Secretary of State's ("Secretary") interpretation of Ohio law concerning the five-day window is correct. Thus, ORP is asking this Court to override the Ohio Supreme Court's definitive statement of Ohio law. Meanwhile, Judge Gwin of the Northern District of Ohio yesterday agreed that the Secretary "obviously determined the issue correctly" and held, moreover, that a contrary interpretation would violate federal law. *Project Vote v. Madison County Bd. of Elections*, No. 1:08-cv-2266-JG (N.D. Ohio Sept. 29, 2008), attached as Ex. 1 to Secretary's Motion. Judge Gwin accordingly ordered the Madison County Board

of Elections to follow the Secretary's directive. That order—which has not been appealed—means that ORP is now asking this Court to create a patchwork of election laws in Ohio: One county (Madison) would be bound by Judge Gwin's injunction to open the five-day window; the other 87 would be authorized by this Court disregard the Ohio Supreme Court's and Secretary's interpretation of Ohio law, as well as Judge Gwin's interpretation of federal law. In short, ORP asks this Court to close the five-day window in all but one Ohio county. That outcome is untenable.

ORP also argues unpersuasively that the Court should reject the Secretary's emergency request for this Court to vacate or stay the district court's temporary restraining order ("TRO") regarding election observers. But ORP has not rebutted what the Secretary showed in her opening brief: (1) that the Eleventh Amendment deprived the district court of jurisdiction to enjoin a state official on state law grounds, and (2) that the Secretary is highly likely to succeed on the merits because her Advisory 2008-24 correctly interprets Ohio law. Furthermore, the harm from the district court's order is presently occurring, because, as voting begins, boards of elections have no law in place to govern the observers whom the district court has ordered into their halls, and it is not possible to apply the existing statute within the established time constraints.

This Court therefore should immediately grant the Secretary's motion to vacate or stay the TRO and deny ORP's request for emergency relief.

ARGUMENT

A. This Court should deny ORP's request for emergency relief because the Ohio Supreme Court has definitively confirmed the Secretary's interpretation of Ohio law, and a contrary interpretation would violate federal law.

Just yesterday, two courts agreed with the Secretary that Ohio law permits—and federal law requires—a five-day window under which prospective Ohio voters may both register to vote and simultaneously cast an absentee ballot. ORP has not shown why this Court, now that the rules are in place and voting has begun, should contradict those judgments.

First and foremost, the Ohio Supreme Court yesterday held, "after construing the pertinent constitutional and statutory provisions" under Ohio law, that the Secretary "correctly instructed boards of elections that an otherwise qualified citizen must be registered to vote for 30 days as of the date of the election at which the citizen offers to vote in order to be a qualified elector entitled to apply for and vote an absentee ballot at the election, and the citizen need not be registered for 30 days before applying for, receiving, or completing an absentee ballot for the election." *State ex rel. Colvin v. Brunner*, No. 2008-1818, Entry attached as Ex. 1 to Secretary's Motion. Although ORP dismisses this order on the

theory that the Ohio Supreme Court "simply denied a writ of mandamus," ORP Motion at 14, the *Colvin* court's order could not be clearer: The court's entry (with a full opinion still to follow) expressly stated that the court agreed with the Secretary *on the merits*; it did not simply dispose of the case on a technicality.

Even if Ohio law did not clearly permit the five-day window (and it now does under *Colvin*), federal law would require the window. Yesterday Judge Gwin in the Northern District of Ohio held two things: first, that, as a matter of Ohio law, the Secretary "obviously determined the issue correctly," *Project Vote*, *supra*, at 2; and second, that a contrary interpretation "would violate the federal Voting Rights Act," which mandates that all duly qualified residents be allowed to cast an absentee ballot, *id.* at 17-18. Thus, the five-day window ordered by the Secretary is *required* for Ohio law to comply with the Voting Rights Act.

Judge Gwin's order presents an additional obstacle to ORP's requested relief. The Madison County Board of Elections—the losing party in *Project Vote*—has not appealed from that judgment. Thus, Madison County is now under a federal court order to implement the five-day window, and this Court currently has no jurisdiction to vacate Judge Gwin's order. ORP is asking this Court, then, to instruct 87 of Ohio's counties to close the five-day window even as the window necessarily remains open in another. And ORP asks for all of this after the window has opened everywhere and voting has begun. The Supreme Court has

admonished federal courts to avoid such untenable results in elections cases. *See Purcell*, 549 U.S. at 7. Nor should this Court countenance ORP's efforts indirectly to appeal Judge Gwin's ruling on an issue on which the district court in this case declined to rule.

ORP therefore has not shown that it is entitled to the extraordinary remedy of an injunction of election processes already underway.

B. ORP has offered no sound reason to reject the Secretary's request for this Court to vacate or stay the TRO pertaining to election observers.

In her opening emergency motion, the Secretary established that this Court should do one of two things to the district court's TRO concerning election observers: either (1) vacate the order because the Eleventh Amendment deprived the court of jurisdiction to enter this form of relief, or (2) stay the TRO pending appeal because the district court abused its discretion when it enjoined a part of Ohio's elections process just as voting was about to begin. ORP has not shown why the Secretary is not entitled to her requested relief.

First, as the Secretary explained in her opening brief, the district court's order violates the Eleventh Amendment because it instructs a "state official[] on how to conform [her] conduct to state law." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S,. 89, 106 (1984). ORP has made no effort to rebut the Secretary's argument that the district court acted without jurisdiction. In a footnote, ORP, without citing *Pennhurst* or the Eleventh Amendment, appears to

suggest that the Secretary's federalism argument is unfounded because ORP sought relief "based on violations of *state*, as opposed to *federal*, law." ORP Motion at 12. But regardless of ORP's arguments below, what matters is that *the district court's order* instructs the Secretary on how to conform her conduct to state law. The relevant passage of the district court's order discusses only Ohio law governing election observers; nowhere does the district court suggest that it is construing federal, rather than state, law, or assert that it is basing the relief on federal law. *See* TRO Order at 6-8, attached as Ex. 4 to Secretary's Motion.

The district court based its order concerning election observers on state rather than federal law for good reason: because the right to have observers present on Election Day exists only under state law. ORP appears to assume that it enjoys a federal constitutional or statutory entitlement to send election observers into boards of elections in the 35 days preceding Election Day. But ORP has cited no federal statutory or constitutional provision that confers such a right—nor could it, since none exists. Political observers have a right to be present at polling locations or boards of election only because Ohio statutory provisions confer that right. And those state law provisions confer that right only on Election Day—not on the 35 days before Election Day. Thus, the district court's order necessarily rested on state law, and it therefore violated the *Pennhurst* doctrine.

Second, even if the district court had jurisdiction under the Eleventh Amendment, the court abused its discretion in granting the TRO on the day before voting began, and ORP has not shown why this Court should not stay the TRO on that basis. The Secretary established in her opening brief that she is entitled to a stay of the TRO pending appeal because she is highly likely to succeed on the merits—that is, because the Secretary's Advisory 2008-24 correctly interprets Ohio law governing election observers. ORP has not even attempted to argue that the Secretary misinterpreted Ohio law or that Ohio law somehow requires or permits election observers other than on Election Day. Instead, again, ORP appears to assume that it possesses a federal constitutional or statutory entitlement to send election observers into boards of elections in the 35 days preceding Election Day. But as explained above, no such federal right exists. Any rights that exist with respect to election observers arise only under Ohio law, and the Secretary, as the State's chief elections official, has authoritatively interpreted Ohio law not to require observers during the 35 days before Election Day.

ORP claims further harm on the ground that the Secretary and boards of elections are not properly handling absentee ballots, and that the Secretary is violating the Help America Vote Act ("HAVA"), but both claims are meritless. First, each county board of elections keeps the absentee ballots, once cast, under lock and key. Board employees—one member from each political party—then

carefully check each ballot envelope before removing the ballot to ensure that the voter was properly registered and the ballot properly cast. Absentee ballots that were not properly cast are not counted. Second, the Secretary and county boards are in compliance with HAVA. The county boards input each registration into a statewide database to ensure that no voter has double registered. The Secretary of State uses the official statewide voter registration database to identify duplicate registrations and instructs boards on a regular basis to correct those registrations. Thus, ORP is wrong to claim that it is harmed by deficiencies in the Secretary's and boards' processes.

Not only has ORP failed to show that its rights will be undermined if this Court stays the TRO, but it has failed to rebut the Secretary's argument that the public interest is being harmed as the TRO remains in place. The district court's order creates a statutory vacuum regarding election observers: Because Ohio law does not contemplate election observers during the 35 days that precede Election Day, no mechanisms are in place to govern the observers. Officials at the boards of elections have not been trained; those entities wishing to submit lists of observers for approval have not done so; and other, unforeseen problems could easily arise from this rule change. And all this, again, occurs as voting has begun.

CONCLUSION

For all of the above reasons, this Court should reject ORP's motion for emergency relief and grant the Secretary's emergency motion to vacate or stay the district court's TRO.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify a copy of the foregoing was served on all counsel of record by means of the Court's electronic filing system on this 30th day of September, 2008.

/s/ Richard N. Coglianese
RICHARD N. COGLIANESE