IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPUBLICAN PARTY OF OHIO, et al.	:	**Nos. 08-4242, 08-4243**
	:	
***Plaintiff-Appellant*,**	:	
	:	
v.	:	
	:	
JENNIFER BRUNNER, Ohio Secretary of State	:	
	:	
***Defendant-Appellee*.**	:	

REPLY IN SUPPORT OF EMERGENCY MOTION FOR INJUNCTION PENDING APPEAL

One has to wonder what this country has come to when state officials are appealing an order preventing them from barring *observers* from monitoring voting in public places. Conspicuously absent from defendant's response brief is any attempt to articulate *any* injury, much less any *irreparable* injury, flowing from the district court's order. In the absence of irreparable injury, of course, defendant cannot prevail in her request for emergency relief pending appeal. *See, e.g.*, *Michigan Coalition of Radioactive Mat. Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991).

The only thing defendant says in this regard is that "boards of elections have no law in place to govern the observers whom the

district court has ordered into their halls." Def.'s Resp. 1. That is demonstrably untrue. Yesterday afternoon, in response to the district court's order, defendant issued instructions to all boards of elections on how "to implement Judge Smith's order." *Instructions Pursuant to R.C. 3501.05(c) for Implementing Federal Court Decision on Election Observers During In Person Absentee Voting* (9/29/08) (Tab A), at 1. Those instructions are themselves remarkable: they allow only "*one* individual per day per appointing authority," *id.* at 2 (emphasis added), at any election site -- including, for example, vast "Vote-O-Ramas" like the Veterans Memorial in Columbus that hold thousands of people. That means that *one single individual* per day (*i.e.*, not even relief or replacement individuals) may perform this significant and burdensome task. Plaintiffs believe that this limitation is itself unlawful, and are prepared to return to the district court on that issue, unless this Court wishes to grant relief from this instruction too given the exigency of a situation where simultaneous registration and absentee voting is *already* occurring. Speculation regarding "unforeseen problems," *id.* at 8, cannot establish irreparable injury. Because defendant fails to show irreparable injury (or even a legitimate state interest in barring observers), her request for emergency relief must be denied as a matter of law.

In addition, defendant's arguments on the merits are groundless. Defendant insists on construing the district court decision as based on *state* law, even though that construction ignores the fact that this case involves only *federal* law claims. Certainly, it is more reasonable to interpret an emergency district court TRO, written under tremendous time pressure, as consistent rather than inconsistent with the claims in the case. Contrary to defendant's argument that plaintiffs have "cited no federal statutory or constitutional provision" that protects the right to poll observers, plaintiffs cited the federal constitutional right to vote, *see, e.g.*, *Reynolds v. Sims*, 377 U.S. 533, 554-55 (1964), and the Voting Rights Act, 42 U.S.C. § 1973 *et seq*.

With respect to the relief sought in plaintiffs' emergency motion, defendant takes the remarkable position that this Court should deny relief because a district court in the Northern District of Ohio has agreed with their legal position. But this Court is superior to a district court in the Northern District of Ohio, not vice versa. A directive to defendant from this Court thus trumps an inconsistent unappealed directive to defendant from a lower court, and certainly this Court is not bound by the unappealed decision of a lower court.

Finally, defendant does not claim that she is planning to segregate the absentee ballots cast by unverified newly registered voters from all other absentee ballots. *See* Def.'s Resp. 7-8. Rather, she says that all absentee ballots are kept "under lock and key." *Id.* at 7. But that misses the point: the issue here is not the security of the ballots, but the federally required verification of newly registered voters. As plaintiffs explained in their motion, and defendant has not contested in her brief, such verification is *impossible* if the absentee ballots of newly registered (and unverified) voters are commingled with all other absentee ballots.

CONCLUSION

For the reasons set forth above, plaintiffs respectfully request that this Court affirm the district court's order granting emergency relief with respect to observers, and further enjoin defendant from enforcing her order allowing simultaneous registration and absentee voting at least to the extent the absentee ballots cast by newly registered and unverified voters are not physically segregated.

Respectfully submitted,

/s/ William M. Todd

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Certificate of Service

I hereby certify that the foregoing Reply In Support of Emergency Motion For Injunction Pending Appeal was filed electronically on September 30, 2008. Notice of the filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. All other parties will be served by regular U.S. Mail. Parties may access this filing through the Court's system.

/s/ William M. Todd
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