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' MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

I. INTRODUCTION

The most cherished right of a citizen of the United States is the ability to decide, through peaceful means, who will exercise sovereign power. In the voting booth, where all are equal, the opinions and desires of each citizen are measured equally, without regard to class, income, gender, race, or any other difference. The history of America has been one of continually expanding the franchise. We have done so internally through the adoption of constitutional amendments and the enactment of laws recognizing the importance of this principle to our democracy. And consistent with this fundamental American principle, Ohio, in 2006, eased exercise of the franchise by allowing "no fault" absentee balloting. Prior to this amendment, Ohioans could only cast an absentee ballot if they met one of a short list of statutory criteria. Yet, after June of 2006, any voter in

the State of Ohio may obtain and cast an absentee ballot without stating his or her reason for choosing this method of casting a ballot.

The State of Ohio, following both its state constitution and numerous provisions of federal law, allows any eligible citizen to cast a ballot in an election so long as he or she registered to vote at least 30 days before that election. However, since 1981, Ohioans are also entitled to obtain an absentee ballot as early as 35 days before the election. Thus, Ohio law creates a five-day window during which a prospective voter can both register and request an Absent Voter Ballot. This window has existed in the law for years without complication and without challenge.

Similarly, the Ohio General Assembly has allowed, in certain limited circumstances, observers to be present to watch the manner in which an election is conducted.[1] Observers may be present in various polling locations or the board of elections on election day so long as the appropriate sponsor has followed the appropriate appointment procedures. R.C 3505.21 Further, and more importantly for purposes of this case, under the Revised Code, political parties are entitled to have observers and challengers present at the critical time that absentee ballot envelopes are examined and opened. At that time boards of elections determine whether each absentee ballot is a legal vote and should be counted. In making this determination, boards of elections consider , among other factors, whether the voter who cast each absentee ballot is a qualified voter.

[1] Plaintiff Larry Wolpert, who is also a member of the Ohio General Assembly, lacks standing to bring a claim concerning the window when observers are not statutorily allowed to be present. Under the observer statute, only political parties, a group of five candidates, or committees supporting or opposing ballot initiatives have the right to appoint observers. R.C. 3505.21. Since Wolpert does not have a statutory right to appoint observers at any point in time, he cannot raise a claim over this window

Several Ohio statutues allow a challenge to any absentee ballot which was improperly cast. R.C. 3503.24 provides for the correction of any precinct registration list, or a challenge to the right to vote of any registered elector included on any precinct registration list, not later than twenty days before an election. Absentee ballots, although they may be returned to the board of elections as early as 35 days before a general election, are not processed until after the eleventh day before the election. On September 11, 2008, the Secretary issued Directive 2008-91, which establishes a comparable system for tracking and challenging absentee ballots. Additionally, R.C. 3509.06(D) provides that each identification envelope purporting to contain a marked absent voter's ballot must be thoroughly examined, and may be challenged for cause, by elections officials before the envelope is unsealed and the ballot removed. Observers may be present at these proceedings. Absentee ballots also may be rejected for any of the reasons specified in R.C. 3509.07.

Processing an absentee ballot includes examining the validity and sufficiency of the absentee ballot envelope. Wolfe Aff. At 25. Thus, any absentee ballots voted in person prior to the close of registration remains securely in the board of election office for at least 25 days. During that period of time, the eligibility of the electors who cast those absentee ballots are subject to challenge as allowed under R.C. 3503.24 and 3509.06(D). Boards of elections may set aside an absentee ballot "due to a challenge or [for] any other reason" during which time the board "shall investigate whether the ballot may be counted during the time before the official canvass." Wolfe Aff. At 32. The official canvass cannot begin until at least 11 days *after* the general election. R.C. 3505.32(A). Thus, any unsupported claim that fraud might occur is not only completely

unsupported by admissible evidence, it is also contradicted by Ohio's statutory scheme which provides for checks and challenges in the unlikely event of fraudulent absentee ballots having been cast. Secretary Brunner, the State's Chief Elections Official and the person statutorily charged with directing the boards of elections in the appropriate manner of conducting elections, fulfilled her duty by issuing nearly 100 directives this year alone. Directive 2008-63 and Advisory 2008-24, which are both in complete conformity with federal and state law, form the basis of this litigation. As will be demonstrated through this memorandum contra, Directive 2008-63 recognizes that both Ohio and federal law allow new voters to register until 30 days before an election. Likewise, Ohio law has long mandated that boards of elections provide in-person absentee ballots beginning 35 days before an election. These statutory requirements are not just in conformity with federal law for this Presidential election. Similarly, Ohio statutory law provides a full opportunity for observers and other citizens to challenge the inclusion of absentee ballots in the official counts of the election. Advisory 2008-24 merely reminds county boards of elections that the Ohio General Assembly prohibited the presence of observers for the seven day window from the beginning of the absentee voting period until 28 days before the election.

II. STATEMENT OF CASE AND FACTS

Ohio law requires county boards of elections to make Absent Voter's Ballots available 35 days prior to the election. R.C. 3509.01. Voter registration continues for another 5 days, up to the 30th day before the election. R.C. 3503.01.

On August 13, 2008, Defendant Jennifer Brunner, Ohio Secretary of State, issued Directive 2008-63, which, among other things, instructed county boards of elections to develop procedures for same-day registration and distribution of absentee ballots during the 5-day overlap period. If, during that time, a new registrant requests an Absent Voter Ballot, Secretary Brunner directed the County Boards to provide the Ballot upon completion of the registration process. Directive 2008-63 did not change existing law, did not conflict with any term in Ohio or federal law, and was a valid exercise of the Secretary's powers and responsibilities as the state's chief election official.

The absentee ballot application can be divided into four simple steps: [1] applying for an absentee ballot, [2] verification of the absentee ballot application, [3] casting and submitting the absentee ballot, and [4] processing and tabulation of the absentee ballots.

In order to obtain an absentee ballot an elector must first acquire and complete an absentee ballot application. R.C. 3509.03; Wolfe Aff., ¶ 5, Attached as Exh. A. Although there is no mandatory form that this application must take, R.C. 3509.03 lists the specific requirements that must be contained in the absentee ballot application. Wolfe Aff., ¶ 8. As a courtesy to the voters, the Secretary of State has provided a template of the application, which can be found in Form 11-A. Wolfe Aff., ¶ 6. An absentee ballot application sent by mail must be received by the board of elections by noon on the third day before the election. R.C. 3509.03; Wolfe Aff., ¶ 9. However, if an absentee ballot

application is delivered in person, it does not need to be received by the board of elections until close of business hours on the day before the election. R.C. 3509.03; Wolfe Aff., ¶ 10.

Upon receiving an absentee ballot application, the board of elections must review the application for completeness. Wolfe Aff., ¶ 12. If the application is incomplete, the board must notify the applicant of the information which is needed in order to complete the application. Wolfe Aff., ¶ 13. Once it has been verified that the application is complete, the board of elections is then required to deliver an absentee ballot to the applicant, which may be done in person or by mail. Wolfe Aff., ¶ 14. In order to preserve the privacy of the absentee voter's vote, all absentee ballots, regardless of the form of delivery, must be delivered in an unsealed identification envelope, the form of which is prescribed by R.C. 3509.04(B). Wolfe Aff., ¶¶ 15-16.

After receiving an absentee ballot a voter must fill out the ballot and submit it. If the elector chooses to vote in person, the elector votes through the voting system in place by his/her county board of elections, however, all voters who register and obtain an absentee ballot during this five day window will vote on a paper ballot. Wolfe Aff., ¶ 22.

Finally, the boards of elections must process and then count the absentee ballots. Pursuant to Secretary of State Directive 2008-67, boards of elections may begin **processing** absentee ballots no earlier than ten days before Election Day. Wolfe Aff., ¶ 24 (emphasis added). For purposes of absentee ballots, "processing" refers to the handling and examining of the absentee ballots; however, it does not include tabulation or counting of the votes. Wolfe Aff., ¶ 24. Under no circumstances may absentee ballots be tabulated or counted before Election Day. Wolfe Aff., ¶ 30. In fact, Directive 2008-67

expressly forbids the counting of absentee ballots before Election Day by stating "[u]nder no circumstances may tabulation of any votes occur before 7:30 p.m. on Election Day." Directive 2008-67; Wolfe Aff., ¶ 24. Furthermore, pursuant to Secretary of State Directive 2008-67, the only way an absentee ballot may even be scanned before Election Day is if the ballot scanning device can scan the ballots without tabulating or counting the votes scanned on the ballot. Wolfe Aff., ¶ 29.

Regardless of when the processing begins, all boards must examine the validity and sufficiently of the absentee ballot identification envelope before an absentee ballot may be counted. Wolfe Aff., ¶ 25. Once the absentee ballots have been verified, the absentee ballot is eligible for counting. Wolfe Aff., ¶ 26. R.C. 3509.07 provides a list of reasons under which a board of elections may find an absentee ballot insufficient. Wolfe Aff., ¶ 27. In the event an absentee ballot is disputed, prior to the official canvass, the board of elections must investigate whether the ballot should be counted. Wolfe Aff., ¶ 32. If it is determined that the disputed absentee ballot should be counted, it must be included in the totals of the official canvass. *Id.*

In addition to providing that absentee voting begins 35 days before an election, the Code also provides that observers are allowed to be present at critical times during the administration of elections. The General Assembly did not include in-person absentee voting as one of these critical times. This is entirely reasonable, as the General Assembly would be unable to authorize observers at the alternative time and place that absentee ballots are completed by the voter prior to returning them to the board, i.e., in the person's home, hospital bed, or out-of county location. There is no rational basis for treating absentee voters who fill out an absentee ballot in the privacy of their homes or

other location differently from absentee voters who cast their ballots in person at a board of elections. Defendant Secretary Brunner issued Advisory 2008-28, pursuant to her statutory obligations to give direction and advice to the boards of election, in order to remind them of the election scheme that the General Assembly has established. The Complaint in this case seeks a writ of mandamus to compel the Secretary to take two actions: (1) to instruct county boards of elections to void any applications for absentee ballots that were "accepted" by election officials less than 30 days after the date of voter registration; and (2) to instruct county boards of elections that thirty days must elapse from the date of registration before the prospective voter may be given an absentee ballot. Under state and federal law registered voters are immediately eligible to request and receive absentee ballots.

A. Other Litigation Currently Pending

Plaintiffs acknowledge that a petition for writ of mandamus challenging Directive 2008-63 is currently pending before the Ohio Supreme Court.in Case No. 2008-1813, *State ex rel. Colvin v. Brunner*, Case No. 2008-1813. Memorandum in Support of Plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction (hereinafter "Plaintiffs' Memo). Relators in that case have argued that various sections of the Ohio Revised Code (R.C. 3503.01, R.C. 3509.02, R.C. 3509.03, and R.C. 3509.04) require a newly-registered voter to wait an additional 30 days after registration before he or she may even request an Absent Voter Ballot and that any new voter who asks for an Absent Voter Ballot sooner than 30 days following registration is guilty of a fifth-degree felony. In response, the Secretary has argued that the Revised Code does not impose a 30-day waiting period, and if it did, it would be preempted by federal election law.

Similarly, Secretary Brunner is a defendant in the case of *Project Vote v. Madison County Board of Elections*, Case No. 1:08-cv-2266, currently pending in the Northern District of Ohio, which was filed two days before this case. In that case, the Plaintiffs allege that federal law mandates that any voter who registers during the five day window and who properly completes an absentee ballot application must be given an absentee ballot.

III. LAW AND ARGUMENT

A. The 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.[2]

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

[2] Secretary of State Brunner expressly reserves the right during the temporary restraining order hearing, and in future case proceedings to expand the scope of both her legal and factual arguments. Secretary of State Brunner files this memorandum contra on an expedited basis to place on record relevant arguments, both factual and legal, as to why the Plaintiffs' motion for emergency relief should be rejected.

"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; therefore Plaintiffs have not shown any legitimate basis upon which they are entitled to a court order enjoining the enforcement of the Secretary's directive concerning absentee voting or the presence of challengers.

1. 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 prevent newly registered voters from requesting an absentee ballot within 30 days of registering. For individuals who seek to newly register, but may be unable to vote in their home precinct on November 4, such an injunction could be tantamount to a denial of the right to vote. Thus, Plaintiffs' motion for a preliminary injunction should be denied.

a. The balance of harms supports denying the temporary restraining order.

As is demonstrated above, the Plaintiffs in this case will suffer absolutely no harm whatsoever if this Court were to deny their motion for a temporary restraining order. Absentee ballots are not counted upon their receipt by the board of elections. Instead, those ballots remain under lock and key and cannot be processed until at least 10 days

before the election. Wolfe Aff at 24. Furthermore, absentee ballots are subject to challenge and will be disqualified if the person who cast it was not legally entitled to cast a vote. R.C. 3509.06(D); 3509.07; Wolfe Aff Thus, the harm in issuing a temporary restraining order is great. Namely, people who are legally qualified to receive and cast an absentee ballot will be prevented from doing so unless thirty days first transpire. On the flip side, denying a temporary restraining order does not in any way negatively impact either the Plaintiffs or the public at large. If any absentee ballot is improperly cast, it will be disallowed by the board of elections during the processing phase.

In addition to not qualifying for a temporary restraining order based upon the balance of harms, the Plaintiffs have failed to demonstrate that they are likely to prevail on the merits of their claims.

B. Under The Doctrines Of Eleventh Amendment Immunity And Federal Abstention, This Court Should Decline To Address Plaintiffs' Claims.

1. The Eleventh Amendment bars this Court's jurisdiction over all of Plaintiffs' state law claims, and, by extension, all of Plaintiffs' federal claims, which Plaintiffs concede rely on interpretations of state law.

The Eleventh Amendment bars relief against the states in federal court on the basis of violations of state law. *Pennhurst St. School & Hosp. v. Halderman*, 465 U.S. 89, 117 (1984). As the Supreme Court explained in *Pennhurst*, "it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law." *Id.* at 106. Allowing such claims to be heard in federal court "directly conflicts with the principles of federalism that underlie the Eleventh Amendment." *Id*. The *Pennhurst* Court made clear that this jurisdictional

bar also applies to state-law claims over which federal courts might otherwise have pendent jurisdiction:

> We concluded above that a claim that state officials violated state law in carrying out their official responsibilities is a claim against the State that is protected by the Eleventh Amendment. See *supra*, at 106. We now hold that this principle applies as well to state-law claims brought into federal court under pendent jurisdiction.

Id. at 121. Thus, Plaintiffs cannot invoke this court's supplemental jurisdiction over the state-law claims, as they apparently attempt to do, *sub silentio*, under 28 U.S.C. §§ 1331 and 1343, and 42 U.S.C. § 1983. P's Compl. ¶ 7.

Plaintiffs' prayers for relief ask this Court to do exactly what the *Pennhurst* Court deemed so intrusive to state sovereignty: instruct a "state official[] on how to conform [her] conduct to state law." *Pennhurst*, 465 U.S. at 106. This court should thus decline to exercise jurisdiction over any of Plaintiffs' claims, all of which are dependent on the resolution of threshold state law issues: whether not Secretary Brunner's Directive No. 2008-63 violates Ohio's voter qualification and registration statutes. Regardless of how Plaintiffs' attempt to dress their claim in federal law clothing, their claim cannot survive a motion to dismiss. For this reason, among others, Plaintiffs' request for a temporary restraining order and preliminary injunction should be denied.

2. Where, as here, resolution of a plaintiff's federal constitutional claims rests on interpretations of unsettled state law issues, the *Pullman* doctrine instructs federal courts to abstain from deciding those questions.

The United States Supreme Court has directed the federal courts to refrain from deciding federal constitutional questions the resolution of which also requires resolution of unsettled state law issues. *See R.R. Comm'n of Texas v. Pullman Co.*, 312 U.S. 492 (1941); *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229 (1984). As articulated in this

Circuit, the "*Pullman* doctrine" holds that, "where uncertain questions of state law must be resolved before a federal constitutional question can be decided, federal courts should abstain until a state court has addressed the state questions." *Brown v. Tidwell*, 103 F.3d 330, 332 (6th Cir. 1999), quoting *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 508 (1985) (O'Connor, J., concurring) (additional citations omitted). The *Pullman* doctrine "acknowledges that federal courts should avoid the unnecessary resolution of federal constitutional issues and that state courts provide the authoritative adjudication of questions of state law." *Id*.

Here, Plaintiffs' claims that Directive 2008-63 violates Art. 2 §1 Cl. 2 and the Equal Protection Clauses of the Fifth and Fourteenth Amendments rely on the resolution of "difficult and unsettled questions of state law." *Midkiff*, 467 U.S. at 236, These issues are currently before the Ohio Supreme Court on its expedited election docket. *See State of Ohio ex rel. Colvin v. Brunner*, No. 08-1813. It would be a major assault on the principles of state sovereignty, comity, and federalism to decide this issue while it is pending in the Ohio Supreme Court. As then-Associate Justice Rehnquist held in *Rizzo v. Goode*, "[w]e think these principles [of federalism] likewise have applicability where injunctive relief is sought … against those in charge of an executive branch of an agency of state or local governments," such that federal courts should abstain from resolving such cases.[3] 423 U.S. 362, 380 (1976).

Where, as here, Plaintiffs have essentially dressed up a state law action as a variety of federal constitutional and statutory claims, and these state law claims are before the state's highest court, *Pullman* abstention is particularly appropriate. Not a

[3] Though *Rizzo* involved federal court abstention under *Younger v. Harris*, 401 U.S. 37 (1971), the federalism principles are identical.

single allegation in Plaintiffs' Complaint alleges a violation of federal law that is independent of a state law issue. *See, e.g., Compl.* ¶¶ 10-33 ("Secretary of State's Arbitrary and Unlawful Directives"). Plaintiffs' Memorandum in Support of their Motion for TRO/PI states unequivocally that their Article II claim rests solely on resolution of state law issues: "[Defendant's] actions violate Ohio law, and, as a result, Article II of the Constitution." P's Mem. In Support of M. for TRO/PI at 5. And, Plaintiffs' claim alleging Equal Protection violations rests entirely on competing interpretations of state law by state and county officials.[4] Id. at 17-18. Again, these controversies are currently before the Ohio Supreme Court on its expedited elections docket, and have been fully briefed.

Where, as here, a federal court is being asked, among other things, to resolve competing interpretations of the law among state and local officials, the impetus for abstention should be especially high. (Compl. ¶¶68-72) (outlining conflicting interpretations of Ohio election law and Secretary Brunner's directives between county prosecutors and Secretary Brunner).

Pullman abstention also rests on the venerable principle of avoiding unnecessary resolution by the federal courts of constitutional issues. *See Midkiff*, 467 U.S. 229; *Pullman*, 312 U.S. at 501. By abstaining in such cases, federal courts will avoid both unnecessary adjudication of federal questions and "needless friction with state policies. . . ." *Id., at 500.*

[4] Ohio law provides that the boards of elections must follow the Secretary's interpretation of Title 35, even if that interpretation is erroneous, unless and until a court of competent jurisdiction overturns that interpretation. *See, e.g., State ex rel. Hodges v. Taft,*64 Ohio St. 3d 1 (1992), Ohio Atty. Gen. Opinion 1423. Thus, it does not matter how various county prosecutors advised their boards of elections to proceed. Secretary Brunner's directives and advisories are what the boards must follow. Thus, no equal protection problem is present.

Pullman abstention is also proper when a state court determination of a question of state law might moot or change a federal constitutional issue. *United States v. Anderson County*, 705 F.2d 184, 186-187 (6th Cir. 1983); *NY Life Distribs. v. Adherence Group*, 72 F.3d 371 376 n.8 (3rd Cir. 1995). Here, two of the three possible ways the Ohio Supreme Court could decide *Colvin* would render Plaintiffs' action moot:

1. It could find that Ohio law does not impose a waiting period for the issuance of an absentee ballot, repudiating the prosecutor's opinion; or

2. It could find that, if there is a waiting period requirement in Ohio law, it is trumped and nullified by federal law.

Either of these outcomes would render Plaintiffs' claims moot, as they all rely on the allegation that same-day-voting violates state law. Therefore, the Secretary requests that this Court apply the abstention doctrine to the case at bar.

In the alternative, the Secretary submits the following arguments in opposition to Plaintiffs' request for injunctive relief.

C. Plaintiffs' misconstruction of Ohio law leaves them without a reasonable possibility of success on the merits.

Under Ohio law, "electors" must be qualified to vote on election day, period. Plaintiffs' claims to the contrary are based on a misreading of the relevant provisions of Ohio law that selectively ignores applicable provisions and reads nonexistent language into others.[5]

[5] Most interestingly, the deadline to register to vote in Ohio is 30 days before the election. RC 3503.06. Since this deadline falls on a Sunday, by operation of law the deadline actually falls on the next day – 29 days before the electionR.C. 1.14 Thus, if the Plaintiffs' reading of Ohio law were correct, a person who registers on the last day could not vote in an election because they would not be registered for 30 days before casting a ballot.

The precise language of Ohio Rev. Code § 3509.02(A) is as follows: "Any qualified elector may *vote* by absent voter's ballots at any election." (emphasis added). "Voting" does not occur when the County Board distributes the absentee ballot, nor when the voter returns the ballot. The act of voting occurs only on Election Day, irrespective of when the voter mails or hands in the ballot. *Millseps v. Thompson*, 259 F.3d 535, 545-46 (6th Cir. 2001).

Various provisions of the Ohio Revised Code speak of absentee voting by "qualified electors." *See, e.g.*, R.C. 3509.02(A), R.C. 3509.03(G), and R.C. 3509.04(B). According to Plaintiffs, a new registrant cannot be a "qualified elector" on the date of registration, since one cannot be a "qualified elector" under R.C. 3503.01 until one has been registered to vote for 30 days. Thus, on the date of registration, Plaintiffs' argument continues, the applicant is not a "qualified elector" under R.C. 3509.02(A), cannot make the statement of qualification required by R.C. 3509.02(A), and cannot be given a ballot because of R.C. 3509.04(B). Reading only these provisions, Plaintiffs conclude that a voter cannot even obtain an absentee ballot until 30 days after registration, when he becomes a "qualified elector."[6]

Plaintiffs ignore Ohio Rev. Code 3503.06(A), which provides that:

> No person shall be entitled to vote at any election, or to sign or circulate any declaration of candidacy or any nominating, or recall petition, unless the person is registered as an elector and will have resided in the county and precinct where the person is registered for at least thirty days *at the time of the next election.*

[6] At best, Plaintiffs can claim that R.C. 3503.01 is ambiguous as to whether the prospective voter must be a "qualified elector" by the time he receives the absentee ballot (as Plaintiffs would have it) or by the date of the election, as the Secretary interprets the law. If the law is ambiguous, it is well-established under Ohio law that the courts must defer to the Secretary, the state's chief elections official. *State ex rel. Herman v. Klopfleisch*, 72 Ohio St. 3d 581, 586 (Ohio 1995).

This language confirms the Secretary's position, as stated above and in Directive 2008-63, that the relevant date for testing an elector's qualifications to vote is Election Day. Thus, anyone who registers to vote and requests an absentee ballot during the 5-day window on which same-day registration is allowed will have met the 30-day qualification by the time that person's ballot is actually voted – Election Day. If an absentee voter fails to meet some other requirement, the voter's ballot will be disallowed, just as any other improperly registered voter will be denied a ballot upon arrival at the polls.

Plaintiffs correctly observe that R.C. § 3509.03(G) requires an applicant to certify he is a "qualified elector" when requesting an absent voter's ballot, and someone who has just that day registered to vote cannot make such an attestation: he has not been registered for 30 days and so is not a "qualified elector" by definition. And the same logic undoubtedly applies to R.C. 3509.04(B): an election official cannot confirm that a same-day registrant is a "qualified elector."

Plaintiffs argue that the statute prohibits election officials from handing out absentee ballots to new registrants. But interpreting the Revised Code in this fashion would make it impossible for *anyone* to obtain an absent voter's ballot. For example, in addition to being registered for 30 days, a "qualified elector" must "[have] been a resident of the state thirty days immediately preceding the election." Under Plaintiffs' interpretation of Ohio law, a registered voter who has voted at the same address for 20 years and requests an absentee ballot in person 35 days before the coming election would have to be refused. Even though the applicant is properly registered and otherwise entitled to vote absentee, under Plaintiffs' analysis, the election official would have to

refuse to hand out the ballot because it would be impossible to confirm, 35 days out, that the voter will continue to reside in the state during the 30 days immediately preceding the election. The voter might move to Oklahoma two days after returning her absentee ballot. By strict definition, the voter is not—and cannot—be a "qualified elector" until Election Day, when we can confirm his residency over the past 30 days. Therefore, the only time one could obtain an absent voter ballot would be on Election Day itself. Of course, the last day to obtain an absentee ballot is the day before Election Day.

Further, Article V, section 1 of the Ohio Constitution requires an individual to be, among other things, eighteen years old in order to be entitled to vote at an election. However, nothing in Ohio law/past practice prohibits a 17-year old from requesting, receiving, and returning an absentee ballot - so long as that individual will turn 18 before the date of the election. This is evidence of an unstated legal presumption that a ballot is not voted until Election Day and further rebuts Plaintiff's interpretation of Ohio law. Plaintiffs' analysis reads nonexistent words into the statute. Neither Article V of the Ohio Constitution nor R.C. 3503.01 say that one must be registered to vote for 30 days *at the time one receives one's ballot*, as Plaintiffs would require. Under Plaintiffs' reading of the Ohio Revised Code, every person who has requested an absentee ballot since the first of the year has committed a felony if the request was made within 30 days of registration. Ohio Rev. Code § 3509.02(A) provides that, "[a]ny qualified elector may vote by absent voter's ballot at an election."

The relief Plaintiffs seek would impose tremendous burdens on local boards, deprive citizens who acted in good faith (and who at the eleventh hour may no longer be

available to come submit another request), and do absolutely nothing to detect election fraud or promote confidence in the integrity of the system.

Measuring voter/electors' qualifications at the earlier date that Plaintiffs suggest has no basis in the law, would be a fruitless exercise that adds no protection to the voting process, and would add a needless (and probably illegal) obstacle to exercising the fundamental right to vote.

D. The Secretary of State has the Authority to Issue the Directive and Advisories at Issue and the United States Constitution does not prohibit her from doing so.

The claim that Secretary Brunner is prohibited from issuing Directive 2008-63 under the United States Constitution is plainly incorrect. Plaintiffs allege that Secretary Brunner does not have the authority to issue Directive 2008-63. Under this premise, because the U.S. Constitution vests power in the General Assembly to select the method by which a state's presidential electors are chosen, the Secretary apparently is powerless to issue directives to the county boards of elections.[7] Plaintiffs' Memo at 9-11. Directive 2008-63 was a valid exercise of the Secretary of State's statutory authority to "[i]ssue instructions by directives and advisories in accordance with section 3501.053 of the Revised Code to members of the boards as to the proper methods of conducting elections. . . [and] [prepare rules and instructions for the conduct of elections." R.C. 3501.05(B) and (C). This is statutory authority directly given to the Ohio Secretary of State by the General Assembly.

[7] If the Plaintiffs argument is correct, Article V Sec 1 of the Ohio Constitution also violates Art. II of the US Constitution.. Article V Sec 1 of the Ohio Constitution was adopted by Ohio voters, not the General Assembly.

In *Libertarian Party of Ohio v. Brunner*, 2008 U.S. Dist. LEXIS 64375, 8-9 (S.D. Ohio July 17, 2008) the Court ruled that Presidential electors must be chosen in the manner directed by state legislature. This decision does not support Plaintiff's position. The reason for the holding in that case was simple. Ohio's ballot access law for minor parties had been previously declared unconstitutional and the General Assembly failed to pass a new statute. In order to fill the void left by legislative inaction, the Secretary issued a directive for ballot access. The district court found that because the General Assembly had simply not passed a law regulating ballot access for minor parties, the Secretary could not act. In the present case, the Secretary is not attempting to exercise legislative authority by writing a law. Instead, the Secretary is merely reiterating to the boards of elections that Ohio law allows any person to both register to vote and to obtain an absentee ballot from 35 days before an election until 30 days prior to an election.

Directive 2008-63 does not change or modify any requirements to be an elector. Nor does Directive 2008-63 modify any requirement for absentee voting found in Chapter 3509 of the Ohio Revised Code. What Directive 2008-63 does is "facilitate the voter registration of eligible persons [and] facilitate the ability of each qualified elector to vote in elections conducted in the elector's precinct," and "promote the ability of all eligible electors for the general election to vote by absentee ballot if they so choose . . ." simply by expediting the processing of voter registration "received during the week immediately preceding the voter registration deadline . . ." Plaintiffs claim that the Secretary of State is somehow violating Article II of the United States Constitution must fail. This claim must fail.

E. Plaintiffs have no private right of action under the Help America Vote Act and cannot prevail on that claim.

Plaintiffs argue that Directive 2008-63 and Advisory 2008-24 violate the Help America Vote Act ("HAVA") 42 U.S.C. 15483(a). However, the Plaintiffs simply cannot bring a private right of action under this statutory provision. Plaintiffs cannot bring these claims because they have no private right of action under HAVA; "HAVA does not itself create a private right of action." *Sandusky Cnty. Democratic Party v. Blackwell*, 387 F.3d *565, 572* (6th Cir. 2004). A statute must be phrased in terms of the persons benefited in order to create a private right of action. *Gonzaga University v. John Doe 536* U.S. 273, 284 (2002) quoting *Cannon v. University of Chicago*, 441 U.S. 677, 692 n. 13 (1979). If plaintiff shows that the statute creates a right, then it is presumptively enforceable under § 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. *Gonzaga University* 536 U.S. at 286.

Plaintiffs rely on *Sandusky Cnty. Democratic Party v. Blackwell* to support their claim for a right of action under HAVA, 42 U.S.C.15483(a). Plaintiffs' reliance on *Sandusky Cnty. Democratic Party* is misplaced as it has no application to the claim before this Court. The *Sandusky* court analyzed a completely different statute than the one at issue before this Court. In *Sandusky Cnty. Democratic Party v. Blackwell*, the Sixth Circuit court 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 Cnty. Democratic Party*, 387 F.3d at 573 quoting 42 U.S.C. § 15482(b)(2)(E)[8]. In this case, HAVA does not create an

[8] 42 USCS § 15482 states in pertinent part:

individually 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 U.S.C. 15483(a)[9].

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. Plaintiffs' Memo at 14. While undeniably true, such general assertions are insufficient to support the Plaintiffs' claim. Only "unambiguously conferred" rights will support a § 1983 action. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283. Here there are no "unambiguously conferred" rights within 42 U.S.C.15483(a) that would support Plaintiffs' § 1983 action. Furthermore, Plaintiffs have failed to produce even a shred of evidence that any person will fraudulently register under Directive 2008-63.

F. Plaintiff's requested relief, *not* the Secretary's directives, will result in violations of the National Voter Registration Act of 1993.

Plaintiff erroneously cites the National Voter Registration Act of 1993 ("NVRA"), 42 U.S.C. § 1973gg *et seq.*, for the proposition that Ohio election officials must "determine and ensure the eligibility of voters before registering them to vote." Memo in Support of Compl. for TRO/PI at 15. But the provision on which Plaintiffs rely

---

(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;

[9] § 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") . . .

for this proposition, 42 U.S.C. 1973gg-6(a)(1), simply sets various 30-day *timelines* for voter registration verification:[10] it does not impose verification requirements on the states or state election officials.

Moreover, Plaintiff's desired regime would actually violate the NVRA by increasing time barriers to the franchise. Congress passed the VRA in order to "establish procedures that will increase the number of eligible citizens who register to vote in elections for Federal office." 42 U.S.C. § 1973gg(b)(1). Under the NVRA, voters cannot be made to register to vote more than 30 days before an election. 42 U.S.C. § 1973gg-6. "[A]pplicants who submit a 'valid voter registration form' no later than the thirtieth day before any federal election *must be permitted to vote*." *Diaz v. Cobb* (S.D. Fla. 2008), 541 F. Supp. 2d 1319, 1331, n.10 (emphasis added). Plaintiffs' position conflicts with the NVRA, because it effectively requires some voters to register 31 days before Election Day. Were the Court to grant the relief Plaintiffs seek, a qualified voter who registers on the last permissible day – 30 days before the election – would not be eligible to request or receive an absentee ballot until Election Day. Thus, under Plaintiffs' desired regime, a person who registers to vote 30 days before the election would be ineligible to vote absentee, in contravention of the NVRA.

1. Plaintiffs' requested relief, *not* the Secretary's directives, would result in violations of the Voting Rights Act of 1970.

The Voting Rights Act of 1973, 42 U.S.C. § 1973aa-1(d), abolished durational residency requirements and mandated that any registered voter be permitted to cast an

[10] For example, 42 U.S.C. 1973gg-6(a)(1)(A) requires each state to "insure that any eligible applicant is registered to vote in an election … not later than the lesser of 30 days, or the period provided by State law, before the date of the election, where the application takes place "with a motor vehicle application under section 5 [42 USCS § 1973gg-3], if the valid voter registration form of the applicant is submitted to the appropriate State motor vehicle authority."

absentee ballot for President and Vice President if he or she requests an absentee ballot at least seven days before the presidential election and returns the ballot by the time the polls close on election night. 42 U.S.C. § 1973aa-1(d). Under Plaintiffs' scheme, a newly-registered voter who provided her application to the board of elections thirty-three days before a presidential election would be prohibited from obtaining an absentee ballot until three days before the election, a violation of the VRA's seven-day requirement.

2. Plaintiffs' claim that the Secretary's decision not to require the presence of election observers during the 5-day window violates the Voting Rights Act are without merit.

Plaintiffs' claims regarding election observers are wholly without merit. As explained in the introduction section of this memorandum, the General Assembly allowed absentee voting to begin 35 days before the election. and has provided observers, including those named by members of the Plaintiff Ohio Republican Party, the opportunity to be present at the critical point in time that absentee ballots are reviewed for their validity. .Secretary Brunner would have violated Ohio law if she issued an advisory or directive telling boards of elections to allow observers into the board when the observer statute did not authorize their presence, and the statute provides no framework for administering or governing their their entrance.

Plaintiffs' allegation that the presence of observers is compelled under the Voting Rights Act is lacks any legal support. The Plaintiffs do not point to any provision of the Voting Rights Act to support their claim because such a provision simply does not exist. The VRA, therefore, cannot possibly preempt the terms of Advisory 2008-24, as Plaintiffs suggest it should. Plaintiffs' suggestions that the Advisory "only serves to encourage and increase the likelihood of intimidation, threats and coercion of voters in

the polling place" are wholly unsubstantiated and are not supported by a single legal citation. Thus, Plaintiffs apparently use rhetoric in place of evidence and legal support. While such rhetoric may help with newspaper headlines, it does not advance any legal arguments.

G. Under Federal Law, Public Policy Prohibits Any Challenge to Directive 2008-63 This Close to the Election.

As a matter of policy and sound governance, the federal courts have repeatedly refused to grant injunctions superseding state election laws in cases brought too close to Election Day. *Purcell v. Gonzalez* (2006), 549 U.S. 1. The Sixth Circuit "require[s] that any claims against the state [election] procedure be pressed expeditiously," and has held that waiting less than a month after learning of such a claim is fatal. *Kay v. Austin* (6th Cir. 1980), 621 F.2d 809, 813. The United States Supreme Court requires similar promptness; it has rejected or affirmed rejection of requests made a little over a month out precisely because of the proximity to the elections—without regard for the reasons for the delay. *Purcell*, 549 U.S. at 7; *Reynolds v. Sims* (1964), 377 U.S. 533.

"Interference with impending elections is extraordinary." *Southwest Voter Registration Educ. Project v. Shelley* (9th Cir. 2003), 344 F.3d 914, 918. So extraordinary, in fact, that courts have refused to intervene even in the face of undisputed constitutional violations. *Reynolds*, 377 U.S. at 585-6; *Chisolm v. Roemer* (5th Cir. 1988), 853 F.2d 1186, 1190 (collecting cases); *French v. Boner* (M.D. Tenn. 1991), 771 F. Supp. 896, 902 (collecting additional cases).

The disruption to this election caused by the late filing of this case will be extraordinary. Any grant of injunctive relief would substantially impair the ability of many qualified electors to properly register and have the ability to vote in the year's elections. Every day that passes is one less day in which a qualified elector may be certain of the registration procedures in Ohio.

Judicial action so close to the thirty-five day deadline and Election Day will have real, adverse effects. Absentee voting begins tomorrow. People who may have chosen to

contemporaneously register and receive an absentee ballot may have registered earlier had they known they were not allowed to do both actions at the same time. Also, on a general level, changing the rules this close to the election process will undermine public confidence and will likely confuse the electorate. As the Supreme Court recently observed, "Court orders affecting elections…can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase." *Purcell,* 546 U.S. at 6. Public confidence, already weakened by well-publicized perceived problems in 2000 and 2004, will be further undermined by changing the rules at the last minute. That, together with today's generally corrosive political atmosphere, will further undermine public confidence. Those very real consequences combine with Plaintiffs' considerable delay to bar their request for equitable relief.

IV. CONCLUSION

Based on the Pullman abstention doctrine, the Secretary respectfully asks this Court to withhold action until the Supreme Court of Ohio issues its ruling. Alternatively, based on the lack of merit of Plaintiff's substantive claims, the Secretary asks the Court to DENY any injunctive relief that would withhold Absent Voter Ballots from registered voters.

Respectfully submitted,

NANCY H. ROGERS
ATTORNEY GENERAL

/s Richard N. Coglianese
Richard N. Coglianese (0066830) Trial Attorney
Aaron D. Epstein (0063286)
Damian W. Sikora (0075224)
Daniel C. Roth (DC Bar Number 503236)
Steven McGann (0075476)
Assistant Attorneys General
Constitutional Offices
30 East Broad Street, 16th Floor
Columbus, Ohio 43215-3400
aepstein@ag.state.oh.us
(614) 466-2872 – phone
(614) 728-7592 – fax

Attorneys for Defendant
Jennifer Brunner
Ohio Secretary of State

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 29th day of September, 2008.

/s Richard N. Coglianese