IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPUBLICAN PARTY OF OHIO, et al.	:	**Nos. 08-4242, ___**[1]
	:	
***Plaintiff-Appellant*,**	:	
	:	
v.	:	
	:	
JENNIFER BRUNNER, Ohio Secretary of State	:	
	:	
***Defendant-Appellee*.**	:	

RESPONSE TO EMERGENCY MOTION FOR STAY PENDING APPEAL AND EMERGENCY MOTION FOR INJUNCTION PENDING APPEAL

INTRODUCTION

The disposition of this emergency motion, and the related motion filed by defendant, may determine the identity of the next President of the United States, as well as the actual and perceived legitimacy of his election. As this Court is well aware, Ohio is once again a critical "battleground" state. Unless this Court affirms the district court's partial grant of emergency relief, and grants limited additional emergency relief, the integrity of the absentee balloting

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[1] Plaintiffs' appeal (notice of appeal attached at Tab A) has not yet been given a docket number.

process in Ohio (and possibly the integrity of the election of the President of the United States), will be irrevocably tainted, and plaintiffs' federal rights irrevocably injured, starting tomorrow, Tuesday, September 30.

Defendant, Ohio's Democratic Secretary of State, recently issued a Directive authorizing simultaneous registration and absentee voting. Putting aside the general validity of that system under state law (as to which the Ohio Supreme Court earlier today denied a petition for writ of mandamus), defendant's implementation of that system violates plaintiffs' federal rights and creates two key injuries.

First, less than a week ago, defendant issued an advisory authorizing County Election Boards to *exclude observers* from sites where simultaneous registration and absentee balloting will be allowed. It is hard to conceive of a position more starkly at odds with our American tradition of honest and open elections. As the United States tries to promote democracy around the globe, and sends election observers to distant lands, it is ironic at best that state officials are trying to bar election observers from polling places right here in the American heartland. Not surprisingly, thus, the district court below enjoined defendant from enforcing this advisory, for

which she was unable to articulate any plausible legitimate state interest, and which abridges plaintiffs' federally protected right to vote in an honest and open election.

Second, defendant has authorized simultaneous registration and absentee balloting without establishing any mechanism for segregating absentee ballots cast by newly registered (and hence unverified) voters from other absentee ballots. The problem here is that Ohio does not have in place a system that allows "real time" verification at the time of registration. Thus, it will be impossible as a practical matter to prevent fraud by newly registered absentee voters: even if their registration is subsequently determined to be improper, there will be no way to find the envelope containing their absentee ballot from among the millions of commingled absentee ballots. Defendant has thus violated federal law requiring registration verification. Although she could address this problem by the simple step of segregating the absentee ballots cast by newly registered (and hence unverified) voters from other absentee ballots, she has put no mechanism in place for doing so. The court below, however, abstained from granting plaintiffs any relief on this point on the ground that the Ohio Supreme Court had denied the petition

for mandamus challenging defendant's directive authorizing simultaneous voter registration and absentee voting.

The upshot of these points is that, unless the district court's limited emergency relief is affirmed and the additional emergency relief requested here granted, county election officials will have no means of verifying the registration of newly registered absentee voters, and the process for casting absentee ballots will be irrevocably tainted. Busloads of bogus voters can enter the State with false identification, register to vote at a so-called "Vote-O-Rama" (including for example, the vast Veterans Memorial in Columbus) without any observers present, and cast an absentee ballot that will be lumped together with all other absentee ballots, and thus become essentially immune from challenge even if the registration is later determined to be fraudulent.

For the reasons set forth below, this Court should affirm the district court's limited grant of emergency relief with respect to the observers and grant additional emergency relief that, at the very least, would require defendant to order the segregation of the absentee ballots cast by newly registered (and hence unverified) voters and verification of those voters' eligibility prior to counting their ballots, consistent with federal law.

Needless to say, this is not a mere state-law issue: this case involves the election of the President of the United States. It is hard to imagine a more compelling federal interest than ensuring the transparency and integrity of the election of the supreme federal officer. This Court need not and should not allow defendant to plunge Ohio, and perhaps the Nation, into electoral chaos.[2]

BACKGROUND

The Ohio General Assembly has required any person seeking an absentee ballot in this State to be a "qualified elector" *at the time they request* an absentee ballot. *See* Ohio Rev. Code §§ 3509.03(G), 3509.04(B). The General Assembly, in turn, has defined a "qualified elector" as "a person having the qualifications provided by law to be entitled to vote." *Id.* § 3501.1(N). Among the qualifications to be entitled to vote is that the person have "been registered to vote for thirty days." *Id.* § 3503.01. Every applicant for absentee ballots must, at the time he or she requests such a ballot, attest to the fact that he or she is a "qualified elector." *Id.* § 3509.03(G). Indeed,

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[2] Plaintiffs do not contest this Court's jurisdiction to review the district court's order, although technically styled the partial granting and denial of a TRO, given that irreparable injury could result over the next ten days. *See, e.g.*, *Northeast Ohio Coalition for the Homeless v. Blackwell*, 467 F.3d 999, 1005-06 (6th Cir. 2006).

defendant herself has incorporated the "qualified voter" verification statement into the absentee ballot request forms supplied to the public. In particular, in the Form 11-A Application for Absent Voter's Ballot, a voter must attest to the following statement: "I hereby declare, under penalty of election falsification, *I am a qualified voter* and the statements above are true to the best of my knowledge and belief. I understand that if I do not provide the requested information, my application cannot be processed." (emphasis added). The Form further states, in all capital letters: "WHOEVER COMMITS ELECTION FALSIFICATION IS GUILTY OF A FELONY OF THE FIFTH DEGREE." *Id.*

On August 13, 2008, defendant issued Directive 2008-63. This Directive ordered all Ohio County Boards of Elections to permit "same day registration" by allowing residents to request and cast an absentee ballot immediately upon registration, rather than after the statutorily mandated 30 day verification period. Ohio, unlike most other States, has no mechanism for "real-time" verification of voter identification at the moment of registration.

Plaintiffs Ohio Republican Party and Larry Wolpert, a qualified elector, filed this action against defendant in the Southern District of Ohio on September 26, 2008, and sought a temporary restraining

order alleging a variety of federal claims. On September 29, the district court (Smith, J.) granted relief in part and denied relief in part. *See* TRO, Opinion and Order (Tabs B, C). The Court enjoined the directive allowing observers to be banned, *see id.* at 6-8, but abstained from addressing plaintiffs' request for relief with respect to the simultaneous registration and absentee voting and the handling of unverified absentee ballots, *see id.* at 6. Plaintiffs and defendant timely appealed. Defendant has sought an emergency stay pending appeal of that portion of the district court's order granting relief. Plaintiffs hereby oppose defendant's motion, and additionally move for limited emergency relief pending appeal. Given the extreme time exigency, plaintiffs are combining these two points in this single brief.

II. LAW AND ARGUMENT

The standard for granting interim emergency relief (either an injunction or a stay) pending the resolution of an appeal on the merits is well established. The movant bears the burden of showing that such relief is warranted, and the Court considers four factors: (1) the likelihood of irreparable injury to the movant in the absence of relief, (2) the likelihood of injury to the non-movant if relief is granted, (3) the movant's likelihood of success on the merits, and

(4) the public interest. *See, e.g.*, *Michigan Coalition of Radioactive Mat. Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991). "All four factors are not prerequisites but are interconnected considerations that must be balanced together." *Coalition to Defend Affirmative Action v. Granholm*, 473 F.3d 237, 244 (6th Cir. 2006). Applying these factors here, this Court should deny defendant's request for emergency relief from the district court's order, but grant plaintiffs' limited request for additional relief.[3]

A. IRREPARABLE INJURY TO THE MOVANT

As the district court recognized, plaintiffs unmistakably face irreparable injury if simultaneous registration and absentee balloting is allowed to begin at the "Vote-O-Ramas," *without any observers*,

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[3] Defendant has also appealed the district court's denial of her motion to transfer this case to the Northern District of Ohio and consolidate it with another lawsuit pending in that District, *Project Vote v. Madison County Bd. of Elections*, Case No. 1:08-cv-2266. *See* Order Denying Motion to Transfer (Tab D). That appeal has no merit. It is axiomatic that district courts have broad discretion over motions to transfer under 28 U.S.C. § 1404(a). *See, e.g.*, *Norwood v. Kirkpatrick*, 349 U.S. 29, 32 (1955). Here, the district court acted well within its discretion by refusing to transfer this case to the Northern District, given that the Northern District lawsuit was essentially an anticipatory declaratory judgment action seeking to *validate* the Secretary of State's interpretation of Ohio law. *See, e.g.*, *Certified Restoration Dry Cleaning Network, L.L.C. v. Tenke Corp.*, 511 F.3d 535, 551-52 (6th Cir. 2007). Indeed, given the exigency of the situation, to transfer this case to the Northern District this morning (with a hearing there already scheduled) would essentially have denied plaintiffs their only shot at relief, since plaintiffs were not even parties to the Northern District litigation (unlike defendant, who was a party to both lawsuits).

tomorrow. The key point here is that there is no transparency whatsoever in the absence of observers (and no legitimate state interest in banning such observers). Newly registered absentee voters could even be subject to undue influence and directed how to cast their ballots. But this is the United States of America, not a lawless dictatorship. At the very least, the district court's order enjoining County Boards of Elections from excluding observers from locations where simultaneous registration and absentee voting is permitted should be left in place. Plaintiffs, not to mention the people of the United States, deserve no less, especially in a State that may determine the outcome of the Presidential election. Allowing observers at polling places will serve the important interests of "deterring and detecting voter fraud, deterring voter intimidation, and safeguarding voter confidence." Order at 7; *see also id.* ("[A]t the most, the presence of observers would provide minimal safeguards to deter or protect fraud or voter intimidation that could all too easily occur ...."); *id.* at 8 ("[I]f observers were not permitted, there would be tremendous risk of harm to the general public as voter fraud and intimidation are possible, leading to the undermining of voter confidence as a whole."). Indeed, defendant herself recognized in an earlier Directive that "[p]oll observers play an important role in

assuring the public that election processes are open and transparent, affecting public trust of the process, and thus, the potential for future participation in the democratic process." Directive 2008-29 (Feb. 25, 2008).

The other key problem that will cause irreparable injury for plaintiffs is that there is no mechanism in place for segregating the ballots of newly registered absentee voters (whose eligibility by definition is unverified, since Ohio lacks "real time" verification at the time of registration) from other absentee voters. Thus, if two voters show up at a "Vote-O-Rama" simultaneously -- a nonresident fraudulently bused in from out-of-state and a lifetime resident of Ohio -- their absentee ballots will be commingled in the absence of emergency relief from this Court. Given that millions of absentee ballots are likely to be cast in Ohio this election cycle, it will be impossible as a practical matter to identify and isolate bogus absentee ballots if the ballots of newly registered (and hence unverified) voters are commingled with all other absentee ballots. Accordingly, at the very least, this Court should enjoin the Secretary's Directive allowing simultaneous registration and absentee voting to the extent the absentee ballots of newly registered

voters are not physically segregated from other absentee ballots to allow for plausible subsequent verification.

B. IRREPARABLE INJURY TO THE NON-MOVANT

Defendant, in sharp contrast, can show no irreparable injury from the emergency relief described above. Needless to say, in a free society, there is no compelling state interest in banning observers from registration and polling places, and defendant cannot show any injury whatsoever (much less irreparable injury) from being enjoined from barring election observers.

Nor is there any compelling interest in commingling all absentee ballots together into a single pool that will, as a practical matter, make it impossible to verify the identity of newly registered absentee voters. If a red flag is raised after-the-fact with respect to a new registration (*e.g.*, if a letter sent by the County Board to the registration address is returned as undeliverable), finding the absentee ballot corresponding to that address from among millions of absentee ballots will be impossible (especially because it is likely to take several weeks for verification, and because absentee ballots may begin to be taken out of their envelopes ten days before election day, *see* Directive 2008-67). For all intents and purposes, the failure to

segregate the absentee ballots of newly-registered voters makes their registration unverifiable.

C. LIKELIHOOD OF SUCCESS ON THE MERITS

Plaintiffs have also shown a likelihood of success on the merits of their federal claims. As plaintiffs explained in their briefing below, *see* Mem. in Support of TRO (Dist. Ct. Dkt. No. 3), defendant has violated several provisions of federal law. Plaintiffs focus on three such federal issues here, in light of the limited emergency relief now at issue.[4]

First, defendant's advisory regarding observers violates 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.*, by increasing the risk that voters will face intimidation and harassment in casting absentee ballots. Poll observers play an important role in ensuring the integrity of the right to vote protected by the Constitution and the Voting Rights Act; they maintain the secrecy of the ballot-marking process, and thus minimize undue

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[4] Defendant devotes the first part of her brief to arguing that the relief in this case is based on violations of *state*, as opposed to *federal*, law. *See* Def.'s Mot. 1, 6-8. That argument is baffling. Plaintiffs brought *only* federal claims in the court below, and there are no state-law claims in this case.

influence. By allowing local Election Boards to exclude observers from the "Vote-O-Ramas," defendant has created a serious risk that voters may be intimidated or harassed at the polls, without anyone there to protect them. By authorizing the exclusion of observers from "Vote-O-Ramas" where simultaneous registration and absentee balloting take place (and the possibility for intimidation and coercion is at its zenith), the advisory at issue here unreasonably infringes plaintiffs' federal rights.[5]

Second, defendant's failure to establish a plausible system for verifying the absentee ballots cast by newly registered (and hence unverified) voters violates the Help America Vote Act (HAVA), 42 U.S.C. §15301 *et seq*. That Act, in relevant part, requires States to create a computerized statewide voter registration list of every legally registered voter and to verify a registrant's information to prevent fraud. 42 U.S.C. § 15483(a)(5)(A). As noted above, the

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[5] Defendant's assertion that plaintiffs "came to the courthouse too late," Def.'s Mot. 1, is puzzling, because defendant did not issue Advisory 2008-24 (the Advisory authorizing County Election Boards to exclude observers) until September 23, 2008. Plaintiffs filed their complaint and TRO request just three days later. If defendant herself releases a flurry of unlawful directives on the eve of an election, she cannot complain if she is sued on the eve of an election, and certainly cannot complain that she is being sued too late. The prospect of "chaos on the eve of voting," Def.'s Mot. 13, was created by defendant, not plaintiffs.

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

Third, defendant's interpretation of the Ohio election laws to authorize simultaneous registration and absentee voting violates Article II Section 1 of the Federal Constitution, because it contravenes the plain language of the statutes as written by the General Assembly providing that only a "qualified voter" may request and cast an absentee ballot, and a "qualified voter" must have been registered for 30 days. Neither defendant nor the Ohio Supreme Court (which simply denied a writ of mandamus) has explained how a person who is not a "qualified voter" may obtain and cast an absentee ballot without running afoul of the election laws enacted by the General Assembly. This violates the Federal Constitutional

requirement that the rules for the election of the President be set by a state "Legislature," not a state court or executive official. *See, e.g.*, *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70, 77 (2000); *Bush v. Gore*, 531 U.S. 98, 111-22 (2000) (Rehnquist, C.J., concurring); *Libertarian Party of Ohio v. Brunner*, No. C2-08-555, 2008 U.S. Dist. LEXIS 64375, at *9-10 (S.D. Ohio July 17, 2008).

D. THE PUBLIC INTEREST

Finally, there can be little dispute that the overriding public interest here is the legitimacy and transparency of the election of the President of the United States. Not only must the election be transparent, but the people of Ohio and the American people as a whole must have *confidence* in the integrity of the process. *See, e.g.*, *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610 (2008); *Purcell v. Gonzalez*, 549 U.S. 1, 7 (2006). Nothing could be more damaging to the Nation, especially in these times of crisis, than a cloud over the election of the President. One need not go back far in American history to understand the rancor that a disputed election can cause. The public interest thus favors an injunction against enforcement of the Directive allowing Election Boards to bar observers from places where simultaneous registration and absentee voting is conducted, as well as against the commingling of the

absentee ballots of new registrants with other absentee ballots to allow for meaningful verification of the new registrations.

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

William M. Todd (0023061)
BENESCH FRIEDLANDER COPLAN & ARONOFF LLP
2600 Huntington Center
41 South High Street
Columbus, OH 43215-6197
Tel: (614) 223-9348
Fax: (614) 223-9300
Email: wtodd@bfca.com

Counsel for Plaintiffs

Certificate of Service

I hereby certify that the foregoing Response to Emergency Motion To Stay Pending Appeal And Emergency Motion for Injunction Pending Appeal was filed electronically on September 29, 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
William M. Todd