

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

THE SANDUSKY COUNTY)	
DEMOCRATIC PARTY, <u>et al.</u> ,)	
)	
Plaintiffs,)	
)	
vs.)	Case No. 3:04 CV 7582
)	
J. KENNETH BLACKWELL, Secretary of State,)	Judge Carr
)	
Defendant.)	
)	

MOTION FOR STAY OF ORDER PENDING APPEAL

Pursuant to Federal Rule of Civil Procedure 62(c) and Federal Rule of Appellate Procedure 8(a), Intervenor-Defendants, Thomas W. Noe, Glenn A. Wolfe, and Gregory L. Arnold (hereinafter, “Intervenors”), hereby move this Court for an order staying any portion of the Order of this Court issued in this action on October 14, 2003 (Doc. 26) that relates to counting of provisional ballots. Reasons for this Motion are set forth in the attached Memorandum in Support.

Respectfully Submitted,

/s/ Truman A. Greenwood
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Theodore M. Rowen (0014245)
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Attorneys for Intervenors
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MEMORANDUM IN SUPPORT

Pursuant to Federal Rule of Civil Procedure 62(c) and Federal Rule of Appellate Procedure 8, Intervenors-Defendants, Thomas W. Noe, Glenn A. Wolfe, and Gregory L. Arnold (hereinafter, “Intervenors”), hereby move this Court for an order staying, in part, this Court’s Order of October 14, 2003 (Doc. 26). Specifically, Intervenors seek a stay of any portion of the Order which speaks to counting of provisional ballots. Directive 2004-33 address the counting of provisional ballots. Although this Honorable Court mentions the counting of provisional ballots in several places in dicta, the Order itself does not, apparently, extend to the counting of ballots.

Important reasons militate in favor of the issuance of a stay by this Court pending appeal of the decision to the Sixth Circuit Court of Appeals. Intervenors have raised a number of arguments that Intervenors plan to raise before the Court of Appeals, such as the failure to exhaust HAVA’s administrative

remedies, HAVA's preclusion of private right of action and Ohio's statutory scheme of precinct-based voting. While important, those issues can be determined in the normal course of appellate proceedings without creating chaos on and after Election Day.

However, any impact that this Order will have on the *counting* of votes is significant and irreversible. Boards of Elections are neither prepared nor equipped to allow the *casting* of provisional ballots to voters who votes in any precinct, regardless of their residence. While allowing voters to vote in any precinct in the county will certainly create problems for the Boards, this Court's suggestion that provisional ballot cast in the wrong precincts must be counted or somehow bifurcated is far more problematic.

Unlike some states, Ohio only has one ballot. Creating a separate ballot for federal and/or state-wide elections at this late date is not possible, nor required by HAVA or state law. As such, this Court's suggestion that local election officials must analyze a ballot that is cast in the wrong precinct and count some votes on that ballot, but not others, creates a whole new procedure for Ohio that injects a new level of uncertainty and chaos into the process of counting provisional ballots. Moreover, HAVA clearly leaves the counting of ballots to state laws and, arguably, this Court's Order does not apply to the counting of provisional ballots cast.

As such, Intervenors respectfully urge this Court to stay those provisions of its ruling that speak to the counting of ballots. A stay on this narrow issue will permit the application of state law as to the counting of ballots, and consistent with HAVA, until the Court of Appeals for the Sixth Circuit has the opportunity to rule upon all issues presented in this case. In the alternative, Intervenors ask this Court to reconsider

its Order and clarify that the Order, like the Directive, does *not* speak to the *counting* of provisional ballots.

Respectfully Submitted,

/s/ Truman A. Greenwood
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CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of October, 2004, a copy of the foregoing was filed electronically.

Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Truman A. Greenwood

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