

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

|                                    |   |                                     |
|------------------------------------|---|-------------------------------------|
| THE SANDUSKY COUNTY                | ) |                                     |
| DEMOCRATIC PARTY, <i>et. al.</i> , | ) | Case No. 3:04CV7582                 |
|                                    | ) | Hon. James G. Carr                  |
| v.                                 | ) | <b>PLAINTIFFS' OPPOSITION TO</b>    |
|                                    | ) | <b>SECRETARY BLACKWELL'S MOTION</b> |
| J. KENNETH BLACKWELL,              | ) | <b>FOR A STAY PENDING APPEAL</b>    |
| Defendant.                         | ) |                                     |

Plaintiffs, by and through undersigned counsel, hereby submit this opposition to Defendant Blackwell's Motion for Stay and Suspension of Injunction Pending Appeal. A stay pending appeal is plainly unwarranted, and the Secretary's motion should be denied.

For many of the same reasons that this Court already has clearly expressed in its October 14, 2004 Order granting a preliminary injunction, Secretary Blackwell's foot-dragging should not be further rewarded by issuance of a stay. Moreover, the Court should take concrete steps to ensure that the Secretary issues to all county boards of elections a detailed and HAVA-compliant Directive no later than Tuesday, October 19, 2004.

**I. The Court Should Deny Secretary Blackwell's Motion for a Stay.**

This Court has already granted Plaintiffs' Motion for Preliminary Injunction, concluding that Plaintiffs will likely succeed on the merits of their provisional-voting claim under the Help America Vote Act of 2002 ("HAVA"), because the conflict between the Secretary's Directive 2004-33 and the requirements of binding federal law is "clear and stark." October 14, 2004 Order at 32 [hereinafter "Order"]. The Court also could not have

been clearer in determining that the equities weighed heavily in favor of granting the injunction that is now in place. Indeed, absent an injunction compelling Secretary Blackwell *finally* to comply with HAVA’s provisional-voting rules – after nearly two years of promising but failing to do so, *see id.* at 18 – the “potential harm to citizens and society alike is irreparable,” *id.* at 33, because “provisional voting as provided and protected by HAVA enhances the franchise, which is among the, if not *the* most fundamental of all rights.” *Id.* at 32 (emphasis in the original).

It was the Secretary’s own extended delay in issuing a Directive to implement HAVA’s provisional-voting requirements that made a preliminary injunction urgently necessary to protect Ohio voters’ right to the franchise. None the less, the Secretary now seeks yet another delay. Because such a delay would threaten the most fundamental of rights, and the balance of hardships tilts decisively in Plaintiffs’ favor, the Secretary cannot satisfy the well-established standard for obtaining a stay.

A stay pending appeal requires a court to consider four “familiar factors”:

(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

*D.A.B.E., Inc. v. City of Toledo*, No. 3:03CV7637, 2004 WL 287415, at \*1 (N.D. Ohio Jan. 30, 2004) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)); *accord, e.g., State of Ohio v. Nuclear Regulatory Comm’n*, 812 F.2d 288, 290 (6th Cir. 1987).<sup>1</sup>

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<sup>1</sup> As this Court has recently recognized, winning a stay pending appeal is *more* difficult than winning injunctive relief, because the party “seeking a stay pending review on the merits of a district court’s judgment *will have greater difficulty in demonstrating a likelihood of success on the merits.*” *D.A.B.E., Inc. v. City of Toledo*, No. 3:03CV7637, 2004 WL 287415, at \*1 (N.D. Ohio Jan. 30, 2004) (quoting *Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153-54 (6th Cir. 1991)) (emphasis added).

Notably, the Secretary’s motion for a stay pending appeal neither identifies the relevant legal standard nor attempts to explain how under that standard he is entitled to the relief he seeks. Accordingly, his motion should be denied on its face. Indeed, the vague reasons that Defendant Blackwell asserts for a stay – the “overall nature and complexity of the issues,” that “the questions raised in the instant case concern important aspects of State and Federal law,” and that the Court’s ruling is “likely to play a significant role in the November 2, 2004 State and National elections,” Def.’s Stay Mot. at 1 – have nothing to do with the legal inquiry at hand. As this Court has recognized, a stay pending appeal should be denied where the movant has “failed to cite any relevant legal principle that was not considered and applied by this court” in its previous preliminary-injunction ruling. *D.A.B.E., Inc.*, 2004 WL 287415, at \*2. Because the Secretary has offered nothing more than a one-paragraph summary of his previous unsubstantiated and meritless submissions, his motion should be denied without further inquiry.<sup>2</sup>

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<sup>2</sup> Intervenors also seek a stay pending appeal, but they plainly lack standing because none of them is actually subject to the Court’s injunction. In any event, Intervenors’ argument is nearly as content-free as the Secretary’s. Their main point relies on a completely false assertion that the Court’s Order would somehow require the creation of a “separate ballot for federal and/or statewide elections.” Intervenors’ Stay Mot. at 3. In reality, provisional voters in Ohio, as elsewhere, can use the same ballots as nonprovisional voters. Moreover, Intervenors’ fears about the difficulty of counting these ballots are equally misplaced. Under HAVA, if an eligible voter casts a ballot for President or U.S. Senator, it counts. And the same goes for U.S. Representative, unless the ballot lists the wrong set of congressional candidates, in which case it obviously cannot be counted. *See* Order at 23 & n.6. But that is a relatively minor wrinkle: More than three-fourths of all Ohio counties (67 out of 88) fall *entirely* within one congressional district, so their congressional ballots can be counted just as readily as their presidential and senatorial ballots. Only in the 21 counties that are divided among congressional districts will the county officials even need to sort the ballots by district before counting them – hardly an arduous task.

Although the Secretary does not address them, each and every one of the relevant legal factors demonstrates that a stay would be improper. Indeed, this Court has already decisively established that all four factors point in *Plaintiffs'* favor.

*First*, Defendant Blackwell is unlikely to prevail on the merits of his defense of Directive 2004-33, because of its “many and manifest” legal failings. *See* Order at 31-32. Rather, it is *Plaintiffs* who are substantially likely to prevail.

*Second*, this Court has already concluded that Secretary Blackwell has neither alleged nor proven irreparable harm from the issuance of the injunction the Secretary seeks to stay. *See id.* at 33-35. To the contrary, the Court deemed the Secretary’s litany of alleged harms to be entirely speculative and unfounded. *See id.*

*Third*, the Court has determined that absent the injunction now in place, irreparable harm will be suffered by *Plaintiffs* (as well as by the voters they represent and by society at large). *See id.* at 32-33.

*Fourth* and finally, this Court made crystal clear that the public interest favors the injunction presently in place – not a *stay* of that injunction – to ensure “the integrity of the franchise.” *Id.* at 35-36.

**II. Allowing Secretary Blackwell to Await the Sixth Circuit’s Ruling Before Issuing a New, HAVA-Compliant Directive to Ohio’s County Boards of Elections Would Be Tantamount to Granting a Stay.**

The Court should take concrete steps to ensure the Secretary’s *rapid* compliance with HAVA and with this Court’s Order. Yesterday, during the Court’s 3:00 p.m. telephonic conference, Secretary Blackwell’s counsel conceded that his sole objection to the Court’s analysis of and conclusions under HAVA was its alleged misinterpretation of the term “jurisdiction” in the statute, 42 U.S.C. §§ 15482(a), 15482(a)(2)(A). The Court therefore

invited Secretary Blackwell to submit two alternative Directives, one for each of the two competing definitions of “jurisdiction.” (The Court defines “jurisdiction” to mean “county,” while the Secretary persists in believing that it means “precinct.”) Of course, a proposed Directive based on defining “jurisdiction” to mean “precinct” neither “complies with [HAVA]” nor is “consistent with this [Court’s] Order.” Order at 37. The Court thus should not allow Secretary Blackwell to issue any such proposed Directive to the county boards of elections unless the Sixth Circuit grants a stay.

Moreover, absent a stay by the Court of Appeals, this Court should not delay in ordering the Secretary to issue to all county boards of elections a specific, detailed Directive that complies with HAVA, as interpreted in this Court’s Order (*i.e.*, defining “jurisdiction” to mean “county”). ***After all, such a delay would be tantamount to granting the Secretary’s motion for a stay.***

If the Secretary does not comply with this Court’s Order requiring him to file by 4:00 p.m. on Monday, October 18, 2004, a Directive fully complying with this Court’s interpretation of HAVA, Plaintiffs ask the Court to order him to issue and transmit to the county boards of elections a Directive “taken directly from or presented in a paraphrase of § 15482, which could hardly have been drafted more clearly or succinctly.” Order at 34-35. For example, a Court-ordered Directive could provide as follows:

**TO: ALL COUNTY BOARDS OF ELECTIONS**

**ISSUING AND PROCESSING PROVISIONAL BALLOTS**

**This Directive replaces Directive 2004-33, which has been declared unlawful by the United States District Court for the Northern District of Ohio. Directive 2004-33 is therefore no longer in effect.**

All boards of elections must instruct their poll workers on the provisional-voting procedures authorized by state and federal law.

If an individual declares that such individual is a registered voter in the county in which the individual desires to vote and that the individual is eligible to vote in an election for Federal office, but the name of the individual does not appear on the official list of eligible voters for the precinct or a poll worker asserts that the individual is not eligible to vote, such individual shall be permitted to cast a provisional ballot as described below. No person may be denied the opportunity to cast a provisional ballot solely because that individual does not reside in the precinct in which the individual desires to vote.

- A poll worker in the precinct shall notify the individual that the individual may cast a provisional ballot in that election. If the poll worker can determine that the individual resides in a precinct assigned to a different polling place, the poll worker also may notify the individual that individual may cast a ballot at that other polling place.
- A poll worker shall issue a provisional ballot to the individual upon the individual's execution of a written affirmation before a poll worker in that precinct stating that the individual is –
  - (a) a registered voter in the county in which the individual desires to vote; and
  - (b) eligible to vote in that election.
- For purposes of the individual's affirmation, an individual is eligible to vote in that election if the individual satisfies Ohio's statutory requirements for eligibility, including being: a citizen of the United States; age eighteen years or over; a resident of the State thirty days immediately preceding the election at which the citizen offers to vote; a resident of the county in which the citizen offers to vote; and registered to vote for thirty days. Ohio Rev. Code § 3503.01. *However*, eligibility for purposes of the individual's affirmation does *not* depend on the individual's residency in the precinct in which the individual desires to vote. That is, no person may be denied the opportunity to cast a provisional ballot solely because that individual does not reside in the precinct in which the individual desires to vote.
- Poll workers in the precinct shall transmit the ballot cast by the individual or the voter information contained in the written affirmation executed by the individual to the county board of elections for prompt verification.
- If the county board of elections to which the ballot or voter information is transmitted determines that the individual is eligible under Ohio law to vote, the individual's provisional ballot shall be counted in accordance with Ohio law. An individual's eligibility for these purposes does *not* depend on the individual's residency in the precinct in which the cast a provisional ballot. No county board of elections shall refuse to count an individual's provisional

ballot solely because that individual does not reside in the precinct in which the individual cast a provisional ballot.

- Pursuant to this Directive, an individual's provisional ballot shall be counted only in the elections for which the individual is eligible to vote. For example, eligible voters' provisional ballots for the offices of President, Vice President, and U.S. Senator shall be counted. But a provisional vote cast in a contest for a Representative in Congress should be rejected if the voter resides outside that Representative's congressional district.

This proposed Directive, or a similar Directive fully compliant with HAVA's provisional-voting rules and with this Court's Order of October 14 should be issued by the Secretary of State and transmitted to the 88 county boards of elections no later than 4:00 p.m. on Tuesday, October 19, 2004. That deadline would give the Court (with input from the parties) 24 hours to review whatever the Secretary submits on Monday and to order it to be issued as is, amended and issued, or replaced with something resembling the language blocked and single-spaced above. The schedule would also maximize the time available to local election officials throughout the State to implement the new Directive and thus comply with federal law.

### **Conclusion**

Ample time remains for Secretary Blackwell to conform provisional voting in Ohio to the requirements of federal law – a task that, as the Court pointed out, “need not be complicated.” *Id.* at 36. The voting rights of tens of thousands of Ohio voters are at stake. *See, e.g.,* M. Niquette, *Provisional Balloting Broadened by Judge*, Columbus Dispatch, Oct. 15, 2004. As the Secretary himself has recognized, ““Ohio is ground zero in a high-stakes presidential election”” – a fact that will certainly increase turnout generally and the need for provisional ballots specifically. K. Kemper, *Officials Busy Trying to Keep Franklin Co. from Becoming an Election Day Debacle*, Columbus Bus. First, Oct. 8, 2004 (quoting Secretary of

State Blackwell), *available at* <http://columbus.bizjournals.com/columbus/stories/2004/10/11/story1.html>. Given this state of affairs, there is every reason for the Secretary to take immediate corrective action to bring Ohio into compliance with HAVA. As the Court aptly recognized, “[t]he time between now and the election is short,” and the rights at stake are fundamental to both the individual voter and “the integrity of the electoral process.” Order at 33, 36. Accordingly, the time for recalcitrance has come to an end.

The motion for a stay pending appeal should be denied.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

This is to certify that the foregoing was filed electronically on the 16<sup>th</sup> day of October, 2004 in accordance with the Court's Electronic Filing Guidelines. 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 Filing System. A version of this document, converted into wordperfect, was also sent via electronic mail to the following addresses:

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