

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

THE SANDUSKY COUNTY
DEMOCRATIC PARTY, et. al.

)

) Case No. 3:04CV7582

) Hon. James G. Carr

v.

) **PLAINTIFFS' MOTION FOR IMMEDIATE
RELIEF**

)

J. KENNETH BLACKWELL,
Defendant.

)

Plaintiffs, by and through undersigned counsel, hereby submit this Motion for Immediate Relief. Defendant Blackwell's recent submissions in this Court make it abundantly clear that he intends to ignore the Court's orders and to take no steps to ensure timely statewide compliance with federal law. In light of Defendant's utter contempt for the Court's mandate, Plaintiffs request that the Court order Defendant Blackwell to issue to all Ohio county boards of elections, no later than noon on October 20, 2004, a provisional-voting directive that complies with this Court's October 14, 2004 Order ("October 14 Order") and the Help America Vote Act ("HAVA").

The Court's October 14 Order granted Plaintiffs' Motion for a Preliminary Injunction, concluding that conflict between the Secretary's Directive 2004-33 and the requirements of binding federal law is "clear and stark." October 14 Order at 32. "The deficiencies of and defects in Directive 2004-33," the Court found, "are many and manifest." *Id.* at 31. Among other flaws, the Directive -- "which simply restates the requirements of Ohio's pre-existing provisional voting statute," *id.* at 19 -- unlawfully limits provisional voting to persons who

have moved or changed their names. *Id.* at 32. In addition, the Court concluded, Directive 2004-33 violates HAVA by denying provisional ballots to individuals who attempt to vote outside the precinct of their residence. *Id.* at 22-30, 32.

Recognizing that “[t]he time between now and the election is short,” the Court in its October 14 Order directed Defendant Blackwell to “forthwith, in compliance with this Order, prepare, and, not later than 4 p.m., Monday, October 18, 2004, file with this Court a Directive *that complies with the Help America Vote Act, and shall otherwise be consistent with Order.*” *Id.* at 37 (emphasis added).¹

Two days later, the Court denied motions to stay the October 14 Order, explaining the ease with which Defendant could comply with that order:

The defendant does not contend that he cannot comply with the requirement that he submit a revised directive within the time provided by the injunction. He does not contend that drafting such directive would be particularly complex or difficult, or could not otherwise be accomplished as demanded by the injunction. He does not contend that preparations for the forthcoming election would be unduly disturbed were he required to draft *now*, while time still permits, a HAVA-sufficient directive to Ohio’s election officials, and submit the same to this Court for its review.

October 16, 2004 Order (emphasis in original).² The Court subsequently ordered Defendant to submit a second new directive, one that would address the possibility of a partial affirmance and partial reversal by the Court of Appeals of the Court’s October 14 Order.³

¹ On October 18, 2004, the Court extended the deadline for Defendant’s submission by four hours, to 8:00 p.m.

² The Court further noted that “drafting a HAVA-sufficient directive should not be difficult.” October 16 Order at 6. The Court suggested that Defendant Blackwell consider a proposed directive submitted by Plaintiffs and comment on any disagreements with that proposal. *Id.* at 6 n.3.

³ “Given the exigencies of time,” the Court explained, “it is crucial for the defendant to move promptly to prepare the alternative version of a HAVA-sufficient directive.” October 18, 2004 Order at 2.

On October 18, 2004, Defendant Blackwell filed with the Court a “Proposed New Directive” (“PND”) that completely flouts the Court’s previous Orders. Shockingly, the PND states that “[p]rovisional balloting as mandated by HAVA does not . . . alter Ohio’s long-standing precinct-based voting system.” PND at 1. By its terms, the PND would require, as a precondition to provisional voting, that individuals sign an affirmation stating: “I understand that pursuant to Ohio law, if I am voting in a precinct other than my assigned precinct, my vote may not be counted.” *Id.* at 2.

This language flies in the face of the Court’s October 14 Order. As noted above, that Order unequivocally held that **“HAVA Does Not Require Residence in the Precinct to be Able to Vote Provisionally.”** October 14 Order at 22 (emphasis in original). As the Court concluded:

A provisional ballot may issue under [Directive 2004-33] “[o]nly after the precinct pollworkers have confirmed that the person is eligible to vote in that precinct.”

HAVA contains no such restriction; indeed, . . . HAVA permits provisional voting *for federal offices* in any precinct in the county in which the voter is registered. All that [42 U.S.C.] § 15482(a)(2) requires is that the individual is registered “in the jurisdiction” -- that is, the county -- in which he or she desires to vote and is “eligible to vote in that election.” Once the voter signs the written affirmation required by § 15482(a)(2), no more is required, or allowed, under that section before he or she “*shall be permitted* to cast a provisional ballot at that polling place.” *Id.* (emphasis added).

October 14 Order at 26-27. Plainly, the PND is not “consistent with” the Court’s October 14 Order. Indeed, in submitting the PND, Defendant Blackwell has acted as if that Order simply never existed.⁴

⁴ In complete defiance of the Court, Defendant Blackwell also ignored the October 16 instruction to consider and comment on the proposed directive submitted by Plaintiffs. *See* October 16 Order at 6 n.3.

The Court should not countenance such brazen disregard for its orders. In fact, the Court should not reward Defendant's intransigence by delaying any further the promulgation to the Ohio boards of elections of a proper, HAVA-compliant directive. Several days ago, while denying Defendant's and Intervenors' stay motions, the Court declined Plaintiffs' request to order Defendant Blackwell immediately to issue a revised directive to the Ohio county elections boards. "Whether to distribute such directive," the Court explained, "may become appropriate in due course; but that is a question for further consideration." *Id.* at 7. Now is the time to consider and take such action. As the Court has recognized on several occasions, "[t]he time between now and the November 2, 2004, election is short," October 16 Order at 7," and the rights at stake in this case are fundamental to both the individual voter and "the integrity of the electoral process." October 14 Order at 33. And as the Court recently noted in a related context, there simply is "no reason to permit the defendant to tarry further, and potentially imperil the right to vote provisionally." October 18 Order at 2.

Accordingly, Plaintiffs request immediate relief in the form of a Court Order requiring Defendant Blackwell to transmit a new, HAVA-compliant directive to the 88 county boards of elections no later than 12:00 p.m. on Wednesday, October 20, 2004. That directive should include, or at least closely approximate, the following language:

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.

Although the Court's preliminary injunction is now on appeal in the Sixth Circuit, expedited resolution in the Court of Appeals is not guaranteed.⁵ And given the limited nature of this Court's injunction, even if the Sixth Circuit expedites the current appeal, it is possible the appellate court will not timely reach the ultimate substantive issues in this case. To avoid undue delay and potential irreparable harm, and in light of the Defendant's blatant disregard of this Court's orders, the Court should mandate the immediate promulgation of a new, HAVA-compliant directive.

As the Court already has found, the threat of irreparable harm absent quick action in this case is immense:

Unless Ohio's election officials receive accurate guidance on how to implement HAVA, the risk is great, indeed certain, that persons entitled to vote provisionally will not be given that opportunity, and they will lose their franchise despite the safeguards of HAVA. The harm to such persons is truly irreparable: once they are wrongly turned away from the polls, they cannot return or regain their "voice in the election of those who make the laws under which, as good citizens, we must live."

⁵ Defendant and Intervenors apparently filed a motion to expedite the appeal on October 18, 2004. Counsel for Plaintiffs learned that the motion had been filed only by calling the Sixth Circuit's Office of the Clerk shortly before 5:00 p.m. on Monday, October 18. Plaintiffs' counsel was informed that the motion requested simultaneous briefing of the appeal on October 19, but that the Court had not yet ruled on the motion. Plaintiffs' counsel then telephoned the offices of counsel for the Secretary of State, Richard Lillie and Gretchen Holderman. Neither would take the telephone call; their secretary indicated they would be unable to return the telephone call until Tuesday, October 19. When counsel again identified himself as counsel for the Ohio Democratic Party, and requested a fax of the motion to expedite, the secretary indicated that the motion had been served by mail and would not be faxed.

October 14 Order at 33.

Conversely, there is no possibility of harm to Defendant Blackwell if a new, properly drafted directive is sent to the boards of elections. As the Court has found, Defendant's and Intervenors' claims that "Ohio's precinct-based election system will be threatened by fraud and procedural chaos" are supported by "nothing but speculation." October 14 Order at 35. Indeed, lest there be any doubt, Plaintiffs have submitted with this motion several affidavits from veteran Ohio elections officials, putting to rest any lingering, unsupported fears "that implementation of HAVA would create insurmountable problems, or even modest difficulties, even with regard to the upcoming election." *Id.* at 35. As those sample affidavits demonstrate, Ohio county boards of elections are well-equipped to implement provisional-voting rules in accordance with this Court's October 14 Order, without undue delay, practical difficulty, or administrative hardship. *See* Aff. of Michael R. Hackett, Deputy Director of the Franklin County Boards of Elections, with attached draft public notice (Exh. A); Aff. of Susan Gwinn, Chair of the Athens County Board of Elections (Exh. B).

Accordingly, the Court should grant Plaintiffs' request for immediate relief and order Defendant Blackwell to promulgate to all Ohio county boards of elections, no later than noon on October 20, 2004, a new directive that complies with HAVA and the Court's ruling of October 14, 2004.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that the foregoing was filed electronically on the 19th 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.

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