No. 06-4412

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Northeast Ohio Coalition for the Homeless, et al.,	:	
	:	On Appeal from
Plaintiffs-Appellees,	:	the United States District Court
	:	for the Southern District of Ohio:
v.	:	District Court Case No. 06-CV-896
	:	
J. Kenneth Blackwell,	:	
	:	
Defendant.		

RESPONSE TO PLAINTIFFS-APPELLEES' MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

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The Court should deny Plaintiffs-Appellees' motion to dismiss this appeal. As explained below, these are appealable orders, because time is short, and because the results are irreversible in some respects. Moreover, their attempt to dismiss for lack of jurisdiction based on a lack of standing, which is in turn premised upon their opposition to the Attorney General's representation of the Secretary of State, should also be denied.

A. The duration of the temporary retraining order is of sufficient length to be considered an injunction.

Plaintiffs are wrong to say that the TRO is not appealable merely because it lasts just a few days. Even a one-day TRO can be final, when that day is Election Day, and there is no going back when the day is done. And for an absentee voter, in a sense, the day she sends in her ballot *is* Election Day. This court has previously considered the State's appeal of an election case in a situation very similar to this case. In *Summit County Democratic Central v. Blackwell,* 388 F.3d 547 (2004), this Court considered and granted the State's motion for an emergency stay of a TRO issued by a district court on the eve of the 2004 general election. In granting the motion to stay, and vacating the TRO, the court noted that the State's interest in not having its voting processes interfered with is great. It further noted that "[i]t is particularly harmful to such interests to have the rules changed at the last minute." *Id.* at 551. And as Judge Ryan noted in his concurrence, should the

“horrors the plaintiffs posit become a reality tomorrow, the federal courts will be open to respond to proof-supported allegations of an unconstitutional burden on Ohio’s citizens’ right to vote. *Id.* at 552.

Plaintiffs contend that the TRO will expire immediately following the upcoming preliminary injunction hearing, which is set for this Wednesday, six days after the temporary restraining order was originally issued. However, because this case deals with absentee ballots, every day between the time the TRO was issued and the preliminary injunction hearing is a voting day for voters who choose to vote absentee.

The TRO eliminates all of the new voter identification provisions mandated in H.B. 3. As a result, boards of elections must accept both requests for absentee ballots and cast absentee ballots regardless of whether the voter has complied with the Ohio’s voter identification laws.

Even if the district court were to find in the State’s favor at the upcoming preliminary injunction hearing, and the TRO is removed, with every day that this TRO is in effect more and more voters may cast their absentee ballots relying on the TRO and submitted absentee ballots without proffering the identification mandated in Ohio’s voter identification laws. Each day the TRO is in place is another day in which elector may be casting ballots. To be sure, the ballots are not formally cast until they are counted on Election Day, but once they are sent in

while the TRO is in effect, it is highly likely, if not certain, that such votes will be ordered to be counted under the terms of the TRO. That is, the TRO creates a window of time during which voters have been told, by publicity of the court order and by the court-ordered directive to the Boards of Elections, that they need not comply at all with Ohio's voter ID law. Even if this Court vacates entirely, the State will work to find an equitable solution that does not disenfranchise those who acted in reliance upon the TRO, or those confused by the court's orders that have changed the rules midstream. Thus, every hour that the TRO stays in place, more ballots are moved into category of being exempt from State law, and that effect will be permanent, not temporary, and that supports allowing an appeal.

B. The TRO is not interim in character and therefore, it is appealable.

The TRO issued by the district court is not interim in character, for the reasons explained above. Though Plaintiffs contend that the TRO will only stand until the upcoming preliminary injunction proceedings, in actuality, the TRO has a permanent impact so long as it is in effect. The TRO eliminates all of the new voter identification provisions mandated in H.B. 3. As a result, boards of elections must accept both requests for absentee ballots and cast absentee ballots regardless of whether the voter has complied with the Ohio's voter identification laws.

And again, as explained above, the practical effect of this will be that ballots cast in the TRO "interim" will be *permanently* entitled to be cast without following

Ohio law. Again, even it is arguable whether the current TROs have that permanent effect regarding counting the ballots on Election Day, a future order will likely ensure that effect, and indeed, no one on the State side wishes to disenfranchise anyone who was assured a federal court order that the rules were on hold for today, and might or might not be on hold for tomorrow or whatever the court order du jour brings.

C. The proceedings that led to the issuance of the temporary retraining orders were comparable to preliminary injunction proceedings, and in any case, Plaintiffs cannot have it both ways regarding the impact of the their offered facts.

Finally, Plaintiffs argue that this court lacks subject matter jurisdiction because the proceedings that led to the issuance of this temporary restraining order were, in their view, not comparable to preliminary injunction proceedings because all evidence presented was only presented in documentary and declaration form. In one sense, Plaintiffs are right, as the TROs did not include extensive factfindings, and were based on conclusory statements by the Court premised upon Plaintiffs' allegations, much like a TRO and unlike a preliminary injunction. But in making this argument, Plaintiffs seem to contradict the arguments they make in their Memorandum in Opposition to the State's Motion to Stay the TRO, where they present all of their facts in such a way as to suggest that the district court adopted

all those facts by reference, and in urging this Court to defer to those facts as if they were court-adopted. Plaintiffs cannot have it both ways.

The Secretary does not mean to debate the stay motion itself, as we understand that this is a separate motion at issue here, but since Plaintiffs base *this* motion on the nature of the fact-fining, it seems worth noting that Plaintiffs' opposition to our stay motion relies heavily on the evidence they gathered and put before the district court, alleging problems with Ohio's new voter identification laws. Now, Plaintiffs argue that the evidence before the district court was not based on court-found fact, just declarations and documentary evidence. That cannot be right, so one or the other view must go. The better view is that they are right in this motion, and wrong on the other, as the court did *not* adopt all those allegations as particularized facts. But that one factor, which would support classifying this as a non-appealable TRO standing alone, does not overcome the other factors listed above regarding the permanent effect of the TRO.

D. The case should not be dismissed based on Plaintiffs' objections to the Attorney General's representation, as the Ohio Attorney General decides how to pursue litigation, even when the sole named party is a state officer such as the Secretary of State.

We wish to briefly address, in urging the court not to dismiss for lack of jurisdiction, Plaintiffs' mistaken insistence that the State must pull the plug on this appeal because the Secretary of State has said that he did not wish this appeal. We understand that Plaintiffs placed this argument in their substantive response on the

motion to stay the TRO, and not in their motion to dismiss, and we understand that we are not to file a reply as to our stay motion. Thus, we apologize in advance if this note does not belong here, but we beg the Court's indulgence for two reasons. First, although Plaintiffs put the argument in their opposition-to-stay, it substantively belonged as part of the motion to dismiss, as the argument amounts to a motion to dismiss for lack of jurisdiction: Plaintiffs are saying that nothing was legitimately filed, including, logically, the notice of appeal itself, so they are arguing for a lack of jurisdiction. Indeed, they say we do "not have standing," (Opp. to stay motion at 11), and standing is of course a jurisdictional objection. Thus, if the Court believes that motions to dismiss for lack of jurisdiction deserve response, as opposed to the substantive response on the TRO, then this argument fits the bill. Second, this merits response because Plaintiffs' argument is stunning in two respects: it goes against longstanding practice in Ohio and around the country, and as applied here, Plaintiffs are using this argument as part of a two-pronged attempt to deprive the people of Ohio of *any* representation, so that Plaintiffs win by default, and that is just plain wrong.

First, Ohio's Constitution does vest the Attorney General with independent authority to determine litigation, as that result inheres in the very structural decision to have an independently-elected Attorney General. See Ohio Const., Art. III, sec. 1; R.C. 109.02. If the Attorney General were simply a hired gun, with no

power to exercise judgment on behalf of the people who elected him, then there would be no need for that constitutional choice to elect him separately. Moreover, our typical private-sector notions of the attorney-client relationship, as important as they are, are given the effect of law only through the adoption of state ethical rules; in Ohio, that is the Code of Professional Responsibility. These rules are still just that—rules—and as such, they are outranked by Ohio's Constitution.

The weight of authority strongly supports Attorney General independence. But, as Plaintiffs note, "[t]here is insufficient time or space to brief this question here." Opp. to stay motion at 12. Thus, we note only this scholarly article, which surveys the field and confirms that "[t]he majority rule favors attorney general independence," and explains "The Power of the Attorney General To Exercise Independent Legal Judgment in Litigation." See William P. Marshall, *Break Up the Presidency?: Governors, State Attorneys General, and Lessons from the Divided Executive,* 115 Yale L.J. 2442 (2006), at 2451-52, and cases cited there (also at www.law.columbia.edu/center_program/ag/Library/AG_Publications).

Second, Plaintiffs' attempt to block this appeal over representation issues should be denied because it is part of a two-pronged attempt to improperly deny the State and its citizens *any* voice before this Court, and perhaps even in the trial court. In this prong, Plaintiffs object to this appeal in the Secretary's name, and in a seemingly-reasonable comment, they say this of the Attorney General's

independent power to litigate: "While this may be, the Attorney General did not file this appeal on behalf of the State of Ohio or its General Assembly but rather the Secretary of State." Opp. to stay motion at 9. That comment almost suggests that they would accept that alternate path, and indeed, they refer to the Attorney General's independently-pursued attempt to intervene for the State as State. *Id.* at 10.

But they fail to note that they simultaneously oppose that intervention attempt. That is, Plaintiffs simultaneously argue that (1) the Attorney General may not appeal in the name of the Secretary, and (2) the State many not independently intervene through the Attorney General, to pursue all interests including the right to appeal. They ask this court and the district court to arrange things so that they win by default, by ordering our side to abandon the field. That leaves no one to stand for the interest of the people of Ohio in having our laws defended and upheld. Two years ago, this Court called the State's interest "in not having its voting processes interfered with" a strong one, especially against last-minute attacks (such as the challenge here, with a vagueness claim that can only be classified as *facial*). *Summit County Democratic Central v. Blackwell,* 388 F.3d 547, 551 (2004). ("It is particularly harmful to such interests to have the rules chaaged at the last minute."). Now, Plaintiffs classify such an interest as not even worthy of representation.

Indeed, it is ironic that Plaintiffs claim to fight disenfranchisement at the ballot box, but what they seek here is nothing less than disenfranchisement in the judicial process. They ask that Ohio's collective citizenry, who have spoken through our representatives in passing this law, should have our collective voice muzzled in the courts. Regardless of what the Court does on any other procedural or substantive issue, it should firmly reject Plaintiffs' attempt to tell the people of Ohio to shut up and go away.

CONCLUSION

For the above reasons, the State of Ohio asks this Court to deny the Plaintiffs' Motion to Dismiss.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above brief was sent to the following by email or fax on October 29, 2006, with regular mail to follow:

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