

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT**

**Case No. 06-4412**

**NORTHEAST OHIO COALITION FOR THE HOMELESS, *et al.***

**Plaintiffs-Appellees,**

**v.**

**J. KENNETH BLACKWELL,**

**Defendant-Appellant.**

**On Appeal from the United States District Court  
for the Southern District of Ohio, Eastern Division  
Case No. 2:06-cv-00896**

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**MOTION OF PLAINTIFFS-APPELLEES NORTHEAST OHIO COALITION FOR THE  
HOMELESS AND SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 1199  
TO DISMISS THIS APPEAL UNDER 6 CIR. R. 27(c)(1) FOR LACK OF SUBJECT-  
MATTER JURISDICTION**

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Plaintiffs-Appellees The Northeast Ohio Coalition for the Homeless and Service  
Employees International Union, Local 1199 (collectively “the Voters’ Organizations”)  
respectfully request under 6 Cir. R. 27(e)(1) that this Court issue an Order dismissing this appeal  
because this Court does not have subject-matter jurisdiction.

## LEGAL ARGUMENT

This is an interlocutory appeal ostensibly by Appellant Ohio Secretary of State J. Kenneth Blackwell (or rather, his Attorney General counsel against Blackwell's wishes<sup>1</sup>) from Temporary Restraining Orders (collectively "TRO") issued by the U.S. District Court for the Southern District of Ohio two days ago, on Thursday, October 26, 2006. (Attached as Exhibit 1.) The TRO will expire, by its terms, upon "disposition of Plaintiff's motion for preliminary injunction."<sup>2</sup> The TRO itself expressly provides that the matter is set to be heard on November 1, 2006,<sup>3</sup> four days from now and a mere six days after the TRO was issued. This Court does not have any jurisdiction regarding this interlocutory appeal from the interim TRO issued by the District Court in this case.

Under 28 USC § 1292(a), this Court has limited subject matter jurisdiction regarding interlocutory appeals from interim orders of a District Court. By statute, interlocutory orders granting or denying injunctions are immediately appealable.<sup>4</sup> By necessary implication from the text of that statute, "interlocutory injunctions" – i.e., preliminary or temporary injunctions, *pendente lite* – also are appealable.

*Temporary restraining orders*, however, are not appealable under the statute and do not fall within the appellate jurisdiction of any of the federal appeals courts.<sup>5</sup> "The rationale for distinguishing between a temporary restraining order and a preliminary injunction is that

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<sup>1</sup> See Voter Organizations' Opposition to Blackwell's Motion for Emergency Stay.

<sup>2</sup> TRO at ¶ 4.

<sup>3</sup> *Id.* at ¶ 5.

<sup>4</sup> 28 U.S.C. § 1292(a)(1).

<sup>5</sup> *Sampson v. Murray*, 415 U.S. 61, 86 n.58, 94 S.Ct. 937, 951 n.58 (1974).

temporary restraining orders are of short duration and terminate with a ruling on the preliminary injunction, making an immediate appeal unnecessary to protect the rights of the parties.”<sup>6</sup>

Of course, this Court is not bound by the title a district court gives to an interlocutory order to determine whether the order is an appealable preliminary injunction within this Court’s jurisdiction or an unappealable temporary restraining order from which this Court lacks jurisdiction to entertain an appeal.<sup>7</sup> Blackwell briefly refers to this well-settled principle of “non-deference” to the title of the appealed order halfway into his recent Emergency Motion for a Stay, in what appears to be Blackwell’s only effort to support a finding of jurisdiction, which does not exist here.<sup>8</sup> While Blackwell also then correctly notes in his Emergency Motion that “other factors” apart from the label affixed to the interlocutory order determine whether a given order is or is not appealable,<sup>9</sup> Blackwell then conspicuously avoids all discussion of what those “other factors” might be or what they establish about the appealability of the District Court’s TRO in this case.

When those “other factors” – and there are three most prominently featured in the case law on this subject – are applied to the District Court’s TRO in this case, they conclusively establish that this TRO is, in law and fact, an unappealable temporary restraining order and not an appealable injunction within the meaning or scope of 28 USC § 1292(a)(1) or, accordingly, within this Court’s subject matter jurisdiction.

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<sup>6</sup> *Nutrasweet Co. v. Vit-Mar Enters., Inc.*, 112 F.3d 689, 692 (3<sup>rd</sup> Cir. 1997).

<sup>7</sup> *Melanson v. John J. Duane Co.*, 605 F.2d 31, 33 (1<sup>st</sup> Cir. 1979).

<sup>8</sup> Emergency Mot. at 10 (quoting WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE §2962 at 619).

<sup>9</sup> *Id.*

**I. THIS COURT LACKS SUBJECT-MATTER JURISDICTION BECAUSE THE TRO IS OF TOO SHORT A DURATION FOR IT TO BE CONSIDERED AN INJUNCTION**

Chief among the “other factors” which determine appealability of an interlocutory order is the *duration* of the order. If the order in question by its terms exceeds the 20-day limit for an *ex parte* temporary restraining order under Fed. R. Civ. P. 65(b), or has in fact lasted beyond that period, then the order will be deemed to be an appealable preliminary injunction, regardless of what it is called. Thus, in *International Primate Protection League v. Administrators of Tulane Educ. Fd.*,<sup>10</sup> the appellate court noted that when “the district court extended the temporary restraining order beyond the 20 days permitted by Rule 65(b), the extended TRO became the functional equivalent of a preliminary injunction, appealable under . . . § 1292(a)(1).” Similarly, in *United States v. Board of Educ. of Chicago*,<sup>11</sup> the appellate court held that when a temporary restraining order is extended by the limited period in Rule 65(b), “it becomes a preliminary injunction, immediately appealable to this court under . . . § 1292(a)(1).”

In the present case, however, the TRO will expire by its terms upon disposition of the Voters’ Organizations’ preliminary injunction motion. A hearing on that motion is set, by the TRO itself, a mere six days after the TRO issued. So far, the TRO has lasted only two days. Thus, this TRO by its terms and in fact has come and will come nowhere near the time limits for duration of an *ex parte* TRO in Civil Rule 65(b). It is therefore an unappealable temporary restraining order when analyzed under the “other factor” of duration.

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<sup>10</sup> 895 F.2d 1056, 1058 (5<sup>th</sup> Cir. 1990).

<sup>11</sup> 11 F.3d 668, 671-72 (7<sup>th</sup> Cir. 1993).

## II. THIS COURT LACKS SUBJECT MATTER JURISDICTION BECAUSE THE TRO IS INTERIM IN CHARACTER

The second of the more prominent “other factors” considered in determining the appealability of an interlocutory order is whether the order is truly *interim* in character. If the order will only stand until a more permanent determination can be made on the merits in upcoming preliminary injunction proceedings, then, again, the order will be deemed to be an unappealable temporary restraining order.<sup>12</sup> The proper appeal, if any, will be from the ruling on the preliminary injunction motion, which ruling may continue the interim order in effect, or it may invalidate it.

Indeed, even where an interim restraining order has lasted, or by its terms will last, beyond the 20-day limit in Civil Rule 65, it still will be deemed an unappealable temporary restraining order if it is, by its terms, only effective until the disposition of a motion for a preliminary injunction.<sup>13</sup>

As shown above, in this case the TRO is, by its terms, only effective until the District Court decides the Voters Organizations’ motion for a preliminary injunction, and the hearing on that motion is set to take place in four days time, less than a week after the District Court entered this interim restraining order.

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<sup>12</sup> *Pennsylvania Motor Truck Assn. v. Port of Philadelphia Marine Terminal Assn.*, 276 F.2d 931 (3<sup>rd</sup> Cir. 1960).

<sup>13</sup> *See Connell v. Dulien Steel Prods., Inc.*, 240 F.2d 414, 418 (5<sup>th</sup> Cir. 1957) (dismissing appeal of TRO that was continued for only twenty days and noting that appellant should have waited for a decision on the motion for preliminary injunction). *See also Maine v. Fri*, 483 F.2d 439, 441 (1<sup>st</sup> Cir. 1973)(an extended temporary restraining order does not become an appealable injunction “as long as the hearing on the preliminary injunction is held expeditiously, within the appropriate time frame”); 16 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 3922.1 at 87 (“Appeal should be precluded so long as the district court is proceeding with all plausible speed to conclude the preliminary injunction hearings and to decide.”).

### **III. THIS COURT LACKS SUBJECT MATTER JURISDICTION BECAUSE THE TRO WAS NOT ISSUED FOLLOWING PRELIMINARY INJUNCTION PROCEEDINGS**

The third of the “other factors” most often discussed in determining whether an interim order is an appealable interlocutory injunction is whether the proceedings which led to the order were comparable to preliminary injunction proceedings. As stated in Wright & Miller, “some cases suggest that an order that results from a substantial contested hearing may be treated as an injunction and appealed”; however, in such cases, “at least some element of excess duration or other factors are likely to support the injunction characterization,” and “the bare fact that a substantial hearing was provided should not justify appeal.”<sup>14</sup>

In the present case, there was a typical hearing on a temporary restraining order prior to the District Court’s issuance of the TRO. There certainly was no “substantial hearing” typical of preliminary injunction proceedings. The evidence presented below was in documentary and declaration form and only presented by the Voters’ Organizations; the District Court heard argument but took no evidence from Blackwell because none was offered. The nature of these proceedings, alone, establish that the TRO is an unappealable temporary restraining order and not a preliminary injunction.

### **CONCLUSION**

In sum, as was stated in the seminal case of *Connell v. Dulien Steel Prods., Inc.*, supra:

\*\*\*The practical reasons for not generally allowing appeals from temporary restraining orders are that (1) they are usually effective for only very brief periods of time, far less than the time required for an appeal \* \* \* and are then generally supplanted by appealable temporary or permanent injunctions, (2) they are generally issued without notice to the adverse party and thus the trial judge has had opportunity to hear only one side of the case, and (3) the trial court should

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<sup>14</sup> 16 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 3922.1 at p. 87-89.

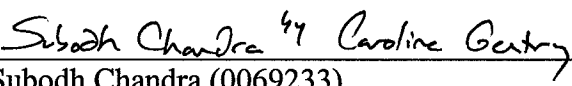
have ample opportunity to have a full presentation of the facts and law before entering an order that is appealable to the appellate courts.

240 F.2d at 418.

All of the foregoing considerations apply here to one extent or another. The order below is limited in time and will be superseded by the preliminary injunction decision. The order was entered with notice, but with an evidentiary presentation by only one side of the case. The order was entered before the trial court had a full presentation on the facts and law that necessarily precede an order that might be appealable.

For all of these reasons, the TRO in this case should not and does not fall within the limited appellate jurisdiction this court has with respect to interim orders of the trial court, and the appeal from it must be dismissed because it does not fall within the subject matter jurisdiction of this Court.

Respectfully submitted,

  
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## CERTIFICATE OF SERVICE

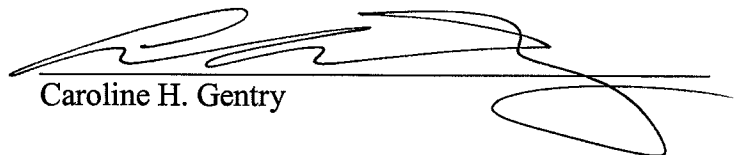
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