

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

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

Plaintiff,

OHIO DEMOCRATIC PARTY,

Plaintiff-Intervenor,

v.

JENNIFER BRUNNER, in her official capacity as Secretary of State of Ohio,

Defendant.

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

Plaintiff,

v.

THE STATE OF OHIO,

Intervenor-Defendant.

Case No. C2-06-896

Judge Algenon L. Marbley
Magistrate Judge Terence P. Kemp

**COMPLAINT IN INTERVENTION OF OHIO DEMOCRATIC PARTY
SEEKING DECLARATORY AND INJUNCTIVE RELIEF**

Plaintiff-Intervenor Ohio Democratic Party, for its complaint seeking declaratory and injunctive relief against Defendant, allege as follows:

PRELIMINARY STATEMENT

1. In order to ensure the fair and equal counting of provisional ballots pursuant to its prior order in this case, this Court must take action.

PARTIES

2. Plaintiff-Intervenor Ohio Democratic Party is a political party.

3. Defendant Jennifer Brunner is the Secretary of State of Ohio. In that capacity, she is Ohio's chief election officer and is responsible for administering all statewide elections, including those for federal office. Among other duties, Defendant Brunner appoints all members of local boards of elections to serve as her representatives; issues instructions by directives and advisories to members of the boards as to the proper methods of conducting elections; prepares rules and instructions for the registration of voters, maintenance of the rolls, and conduct of elections; determines and prescribes the forms of ballots and the forms of all blanks, cards of instructions, pollbooks, tally sheets, certificates of election, and forms and blanks required by law for use by candidates, committees, and boards; compels the observance by election officers in the several counties of the requirements of the election laws; and oversees the canvassing of election results and totals and announces election results. Defendant Brunner is sued in her official capacity.

JURISDICTION AND VENUE

4. This case is brought under 42 U.S.C. § 1983. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 and 1343(a)(4). Plaintiffs' request for declaratory and injunctive relief is authorized by 28 U.S.C. §§ 2201 and 2202.

5. Venue is proper in this district pursuant to 28 U.S.C. § 1391, because a substantial part of the events or omissions giving rise to the claim occurred in this judicial district.

6. On November 4, 2008, Ohio held its general election, at which voters voted for presidential electors, among other offices. At that election, thousands of "provisional" ballots were cast.

7. The Help America Vote Act of 2002 ("HAVA"), 42 U.S.C. § 15301 *et seq.*, requires that several categories of voters whose eligibility to vote is in question—for example,

voters who arrive at the polls believing that they are registered but whose names do not appear on the precinct election register—must be permitted to cast a provisional ballot rather than being turned away from the polls. The voter’s eligibility is later verified by appropriate election officials, and if those officials determine that the voter is in fact qualified to vote, his or her ballot will be counted.

8. Under Ohio law and the Secretary of State’s directives, when casting a provisional ballot, the voter must fill out two documents: the ballot itself and an affidavit attesting that the voter is registered to vote in the jurisdiction and eligible to vote in the election. The affidavit is contained on the outside of an envelope; the ballot itself is placed inside the affidavit envelope. The affidavit envelopes containing provisional ballots are then transmitted to the county election boards, who verify whether the provisional voter is in fact eligible and entitled to vote. If the provisional ballot is verified, it is removed from its envelope and counted.

9. On October 24, 2008, the Secretary of State of Ohio promulgated Directive No. 2008-101, which provided guidance regarding the verification of provisional ballots and addressed whether particular provisional ballots are eligible to be counted.

10. Also on October 24, 2008, this Court issued an order adopting Directive No. 2008-101 as an order of the court.

11. There is a risk that as a result of the amended complaint filed today in *Ohio Republican Party v. Brunner*, 2:08-cv-913 (S.D. Ohio), the Secretary may not follow this Court’s order regarding the counting of provisional ballots, resulting in immediate and irreparable harm to the Ohio Democratic Party.

12. This Court should act now to preserve and enforce its prior order.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff-Intervenor seeks the following relief:

A. A declaration that the standards for identifying the provisional ballots to be counted must be consistent with this Court's October 24, 2008 Order adopting Secretary of State's Directive 2008-101; and

B. A temporary, preliminary, and permanent injunction requiring the Secretary of State to issue a directive to enforce this Court's October 24, 2008 order regarding the processing and tabulation of provisional ballots.

C. Such other and further relief as this Court may deem necessary or proper.

Dated: November 4, 2008

Respectfully submitted,

s/ Donald J. McTigue

Donald J. McTigue (OH 0022849), Trial Counsel
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VERIFICATION

I am a citizen of the United States and a resident of the State of Ohio and counsel for the Plaintiff-Intervenors in this action. I have read the foregoing Verified Complaint for Declaratory and Injunctive Relief and declare under penalty of perjury under the laws of the United States of America that the foregoing factual averments are true and correct to the best of my knowledge and belief.

s/ DONALD J. McTIGUE

Donald J. McTigue (OH 0022849)
Counsel for the Plaintiff-Intervenor

CERTIFICATE OF SERVICE

This is to certify a copy of the foregoing was served upon all counsel of record by means of the Court's electronic filing system on this 4th day of November, 2008.

/s Mark A. McGinnis
Mark A. McGinnis (OH 0076275)
Attorney at Law