

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

REPUBLICAN PARTY OF OHIO	:	
OF OHIO, et al.,	:	
	:	
Plaintiffs,	:	
	:	Case No. 2:08-cv--00913
v.	:	
	:	
JENNIFER BRUNNER	:	
Ohio Secretary of State,	:	
	:	
Defendant.	:	

**RENEWED MOTION FOR TEMPORARY RESTRAINING ORDER
FOLLOWING INTERLOCUTORY APPEAL**

INTRODUCTION

Shortly before this brief was filed, thousands of enthusiastic Bruce Springsteen fans enjoyed an outdoor rock concert paid for by the Obama campaign. The stated purpose of the concert was to entice as many people as possible into voting centers to register and vote in an unverifiable process that violates federal law.

Last week, the Plaintiff Republican Party of Ohio (“ORP”) came to this Court seeking relief from Secretary Brunner’s recent flurry of Directives, Advisories, and Memoranda relating to the so-called “Golden Week.” In particular, Plaintiffs contended in Count II of the original Complaint (Doc. # 2) that Secretary Brunner has not conducted identity verification checks as mandated by federal law. *See* The Help America Vote Act (“HAVA”), 42 U.S.C. § 15461, *et seq.* These checks are critical as they ensure that elections can be carried out free from fraud, and protect legitimate Ohio voters from vote dilution. As a result of Plaintiffs' interlocutory

appeal, this Court has not yet ruled on Plaintiffs' HAVA claim, and we respectfully move this Court do so now.

In support of this Renewed Motion for Temporary Restraining Order pursuant to Count 2 of the Complaint, Plaintiffs present compelling evidence that the checks mandated by the Help America Vote Act are not being performed in Ohio. Most importantly, the Secretary of State admitted as much in her brief to the Sixth Circuit. Following the issuance of this Court's order, the Secretary of State explained that her Office was only checking for *duplicate* registrations. In fact, as Plaintiffs have now confirmed through the attached affidavits, Secretary Brunner actually *disabled* ("turned off," in her words) a previously functioning HAVA check mechanism, depriving the state of its ability to ensure that any of this year's newly registered voters are legally qualified to cast a ballot.

Federally mandated voter protections will be restored in time for this election only through an Order from this Court compelling Secretary Brunner to implement the HAVA required identity verification process and to take the additional specific steps outlined below in the proposed Order.

BACKGROUND

On Monday, September 29, 2008, this Court granted a temporary restraining order in the present case (Doc. #29), enjoining defendant from enforcing Advisory 2008-24, wherein she advises County Boards of Elections of their authority to bar poll observers from monitoring the casting of ballots at in-person absentee ballot casting centers. In reaching this decision, this Court did not address the merits of any of Plaintiffs' federal claims.

On interlocutory appeal, a divided panel of the Sixth Circuit Court of Appeals vacated the temporary restraining order, concluding that Plaintiffs had failed to demonstrate a likelihood of

success on the merits. The Sixth Circuit specifically addressed only the limited issue of Plaintiffs' claim under the Voting Rights Act, 42 U.S.C. § 1973 *et seq.* The Sixth Circuit did not, however, reach any conclusions regarding, or even discuss, Plaintiffs' claim under HAVA. Indeed, the Sixth Circuit invited further fact-finding on this issue, observing in Part II, Section B of its Opinion: “. . . such factually-intensive issues are best presented, in the first instance, to the district court.”

This Court, therefore, maintains jurisdiction over the instant case and may conduct the fact-finding necessary to properly adjudicate Plaintiffs' HAVA claim and other pending claims. *See Valentine v. United States*, 488 F.3d 325 (6th Cir. 2007); *see also Parks v. LaFace Records*, 329 F.3d 437 (6th Cir. 2003).

ANALYSIS

To protect their rights under HAVA, plaintiffs respectfully ask this Court to issue a temporary restraining order mandating that Secretary Brunner comply with the statute by performing the required verification of a registrant's identity. In support of this motion, Plaintiff states as follows:

1. Congress enacted HAVA as a response to the Florida fiasco in the presidential election of 2000. *See e.g., Florida State Conf. of the NAACP v. Browning*, 522 F.3d 1153, 1155 (11th Cir. 2008). “HAVA represents Congress's attempt to strike a balance between promoting voter access to ballots on the one hand and preventing voter impersonation fraud on the other.” *Id.* at 1168. HAVA thus establishes, among other things, “minimum [federal] requirements,” 42 U.S.C. § 15484, governing voting for federal office. Although “HAVA does not itself create a private right of action . . . it creates a federal right enforceable against state officials under 42 U.S.C. § 1983.” *Sandusky County Dem. Party v. Blackwell*, 387 F.3d 565, 572 (6th Cir. 2004)

(*per curiam*). A political party, like plaintiff Ohio Republican Party, has standing under HAVA to assert the rights of its members. *See id.* at 573-74; *Florida NAACP*, 522 F.3d at 1160, 1163-64.

2. As relevant here, HAVA mandates that “each State, acting through the chief State election official shall implement . . . a . . . computerized statewide voter registration list that contains ***the name and registration information of every legally registered voter in the State.***” 42 U.S.C. § 15483(a)(1)(A) (emphasis added); *see also Florida NAACP*, 522 F.3d at 1155-56. But the State’s duties under HAVA do not end there. In addition, “[t]he chief State election official and the official responsible for the State motor vehicle authority of a State shall enter into an agreement to ***match*** information in the database of the statewide voter registration system with information in the database of the motor vehicle authority.” 42 U.S.C. § 15483(a)(5)(B)(i) (emphasis added); *see also id.* § 15483(a)(1)(A)(iv) (“The computerized list shall be coordinated with other agency databases within the State.”). The purpose of this federally mandated matching is “***to verify the accuracy of the information provided on applications for voter registration.***” *Id.* (emphasis added).¹

3. All available evidence points to the conclusion that defendant has *not* established procedures for the requisite HAVA “match[ing]” and “verif[ication]” to occur in “real time” at the moment of registration. *See, passim*, Cunningham Decl. (Tab A). Accordingly, right now, here in Columbus and across Ohio, anyone may walk into a “Vote-O-Rama,” register with false information, and submit an absentee ballot ***before*** the requisite HAVA “match[ing]” and “verif[ication]” has taken place. Nor does any evidence suggest that defendant has established a procedure for the requisite HAVA “match[ing]” and “verif[ication]” to occur ***after*** the absentee

¹ Ohio Revised Code section 3503.15(c)(4) sets forth Ohio’s requirement for implementation of this verification process.

ballots of newly registered voters are cast, but before they are counted. To the contrary, defendant clearly acknowledges in the official Statewide Voter Registration Database (SWVRD) System Manual (“System Manual”) that she sent to all local elections boards that the process for matching the statewide voter registration database with the Bureau of Motor Vehicle database “is currently turned off.” System Manual § 15.4. (Exhibit A to Damschroder Aff., Tab B); *see also* Damschroder Aff. at ¶ 4. The document reiterates, several pages later, that “BMV confirmation is currently NOT being performed.” System Manual at §17. Thus defendant admits that she is failing to perform the matching and verification procedures mandated by HAVA. This is remarkable considering the State of Ohio has, in the past, had the capability to conduct these verification checks. *See, passim*, Kinder Decl. (Tab C). Secretary Brunner’s failure to conduct these checks fatally undermines HAVA’s stated goal of “verify[ing] the accuracy of the information provided on applications for voter registration.” 42 U.S.C. § 15483(a)(5)(B)(i).

4. Defendant further confirmed her non-compliance with HAVA in her recent brief to the Sixth Circuit in this case. In appealing the TRO previously issued by this Court, defendant told the Sixth Circuit that “the Secretary and the Boards are in compliance with HAVA” because “[t]he county boards input each registration into a statewide database to ensure that no voter has double registered.” Secretary’s Emergency Resp. (9/30/08), at 8 (Tab D); *see also id.* (“The Secretary of State uses the official statewide voter registration database to identify duplicate registrations and instructs boards on a regular basis to correct those registrations.”). Defendant’s description of the checks she does perform is most telling in its omission of the checks actually mandated by HAVA, *i.e.*, the checks of Bureau of Motor Vehicles or Social Security records. As noted above, HAVA does not merely require the State simply to *create* a statewide voter database; HAVA requires the State “to *match* information in the database of the statewide voter

registration system with information in the database of the motor vehicle authority.” 42 U.S.C. § 15483(a)(5)(B)(i) (emphasis added). The registration process in place in Ohio, in other words, may be equipped to deal with the problem of double registration, but nonetheless does not satisfy the HAVA requirement of “match[ing]” to deal with other problems, such as false or fictitious Social Security numbers. Defendant’s insistence that her system protects against double registration is, by implication, a concession that she does not conduct the checks of Bureau of Motor Vehicles or Social Security records actually required by HAVA.

5. At the time of this brief’s filing, an out-of-state resident may drive to Columbus this weekend, go to the Veterans Memorial, and register to vote by submitting a false Social Security number and Ohio address. The Board of Elections would input his information into the database, which would identify no problem of double registration in Ohio, because the voter in question is not double-registered in Ohio. The Board of Elections has no way to verify the voter’s address or Social Security Number, because the voter registration database does not instantly match the information against records of the Bureau of Motor Vehicles. The bogus voter would thus be given an absentee ballot and allowed to submit it. And as things now stand, defendant has put no procedures in place to ensure that the mandatory HAVA matching take place even after the ballot is submitted, and before it is counted. Thus, defendant has no procedure in place to ensure that absentee ballots from bogus voters are not counted.

6. The foregoing establishes a clear violation of the “minimum [federal] requirements,” 42 U.S.C. § 15484, set forth in HAVA: as noted above, the whole point of the federal requirement of “match[ing]” the statewide voter registration database with the motor vehicle registration database is to “verify the accuracy of the information provided on applications for voter registration.” *Id.* If an absentee ballot is cast and counted before the

requisite HAVA “match[ing]” and “verif[ication]” have taken place, the federal statute is a dead letter.

7. To redress the HAVA violation set forth above, plaintiffs hereby seek a temporary restraining order mandating that defendant do the checks that HAVA requires. This is no mere technicality: it is a cornerstone of American democracy that every qualified voter should vote, but that persons who are *not* qualified voters should *not* vote. *See, e.g., Purcell v. Gonzalez*, 549 U.S. 1, 7 (2006) (“Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy. Voter fraud drives honest citizens out of the democratic process and breeds distrust of our government. Voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised. ‘[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.’ *Reynolds v. Sims*, 377 U.S. 533, 555 (1964).”) (*per curiam* order staying order enjoining enforcement of Arizona voter identification law). To allow unqualified persons to vote demeans the process and unlawfully dilutes the votes of qualified voters.

8. In the absence of emergency relief from this Court to address the HAVA violation set forth above, plaintiffs face irreparable injury. Under Ohio law, the deadline for challenging any absentee ballot is October 16, 2008 -- nineteen days before the general election on November 4, 2008. *See* Ohio R.C. 3505.19. Also, county Boards of Elections may start removing absentee ballots from their envelopes (and thus making it impossible to ever again link the ballot to its envelope or to invalidate the ballot) as early as October 25, 2008 -- ten days before the general election date. *See* Ohio Secretary of State Directive 2008-67 (issued August 15, 2008) (Tab E). Unless this Court acts immediately, there will be no time for defendant to

conduct the requisite HAVA matching and to ensure that the absentee ballots of those newly registered voters whose registration cannot be verified by HAVA matching are not counted.

9. Defendant, in contrast, faces no legally cognizable injury, much less an irreparable injury, from a temporary restraining order requiring defendant to comply with HAVA by conducting the mandatory matching and verification before counting absentee ballots. Defendant can claim no legitimate interest in counting bogus ballots, or in failing to comply with federal law. What plaintiffs are trying to do here is to enforce federal law, and this federal court certainly cannot hear defendant to complain about the burden of complying with federal law. Any such complaint is properly directed to Congress, not this Court.

10. It is hard to imagine a public interest more compelling than the legitimacy of the election of the President of the United States. Not only must the bogus registrants not be allowed to vote, but the people of Ohio and the American people as a whole must have *confidence* that bogus registrants have not been allowed to vote. *See, e.g., Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610 (2008); *Purcell*, 549 U.S. at 7. Indeed, that is why Congress enacted HAVA in the aftermath of 2000 Florida election fiasco. Nothing could be more damaging to the nation, especially in these times of crisis, than a cloud over the election of the President. One need not go back far in American history to understand the rancor that a disputed election can cause. The public interest thus favors an emergency hearing to establish whether or not defendant is performing the matching mandated by HAVA and ensuring that absentee ballots disqualified by such matching are dealt with appropriately.

11. For the foregoing reasons, this Court should issue a temporary restraining order mandating HAVA checks in the form of the attached Proposed Order.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing Renewed Motion for Temporary Restraining Order Following Interlocutory Appeal was filed electronically on October 5, 2008. 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 system.

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