

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

**PATRICIA RAY,**

**Plaintiffs,**

**-vs.**

**Civil Action Number C2:08-1086**

**JUDGE SMITH**

**THE FRANKLIN COUNTY BOARD  
OF ELECTIONS**

**MAGISTRATE JUDGE KING**

**and**

**OHIO SECRETARY OF STATE ,  
JENNIFER BRUNNER,**

**Defendants.**

**MOTION FOR A TEMPORARY RESTRAINING ORDER**

Plaintiffs move this Court, pursuant to F.R.Civ. P. 65(b), to grant a temporary restraining order to enjoin defendants to provide reasonable accommodations to the plaintiff and other voters with disabilities who are confined in their homes in Franklin County, Ohio so that they can cure deficiencies in their absentee ballots.

**MEMORANDUM IN SUPPORT OF THE MOTION**

**A. FACTS**

The Board of Elections of Franklin County has received an unprecedented number of absentee votes in the General Election of November, 2008. Defendant Board of Elections' employees concluded that there were deficiencies in over 1500 absentee ballots and informed the voters who had submitted those ballots that they had to come to the Board of Elections to cure

their absentee ballots. Employees of the Board of Elections were informed that some of the voters have disabilities and consequently were confined to their homes and could not come to the Board to cure their absentee ballots. The Board was asked if it would send two employees (one Republican and one Democrat) to go to the homes of these voters with disabilities to assist them in curing their absentee ballots. The Board of Elections refused these requests for reasonable accommodations. Defendant Secretary of State Brunner was asked if she would require the Franklin County Board of Elections to provide accommodations to homebound disabled voters who wanted to cure their absentee ballots. Defendant Brunner has not complied with this request.

As plaintiff Patricia Ray states in her Declaration, she has “a number of disabling conditions including, diabetes, panic attacks and obesity.” Ray Declaration, which has been attached to this Motion and Memorandum. Because of plaintiff’s disabilities, “it is extremely difficult” for her to leave her home. She attempted to vote by absentee ballot and was advised that there were deficiencies in her absentee ballot, and that in order to cure the deficiencies,- she would have to go to the Board of Elections in person. She was not able to go to the Board of Elections because of her disabilities. Ms. Ray is concerned that her vote will not be counted unless the Board of Elections is required to send someone to her home to cure the defect in her ballot. Ray Declaration.

**B. Plaintiff Can Establish the Necessary Elements For this Court to Grant a Temporary Restraining Order**

In determining whether to grant a temporary restraining order, this Court must consider four factors: 1) whether there is a substantial likelihood that the plaintiff will prevail on the

merits; 2) the possibility of substantial harm to others; 3) whether the plaintiff will be irreparably injured if this Court does not grant the temporary restraining order; and 4) whether the public interest favors granting a temporary restraining order. See, *Forrey v. Neundorfer, Inc.*, 837 F. 2d 259, 262 (6th Cir. 1988).

**1. There is a substantial likelihood that plaintiff will prevail on the merits of this case**

**a. The Americans With Disabilities Act (ADA)**

Title II of the ADA provides that public entities may not exclude or deny qualified individuals with disabilities the benefits of their programs, services or activities. 42 U.S.C. § 12132. Title II regulations require public entities to provide reasonable modifications in their programs, services and activities to enable individuals with disabilities to benefit equally from the services. 28 C.F.R. § 35.130(b)(7). Consequently, if a voter requires modifications due to a physical or mental disability to enable her to register to vote or cast a ballot, modifications must be provided unless they would create an undue burden or fundamental alteration. *Id.*

Title II regulations entitle people with disabilities to program access—that is, each facility used in a public entity's program need not be accessible, but the program as a whole must be, unless creating accessibility would entail an undue burden or fundamental alteration. 28 C.F.R. § 35.150.

Under this standard, every polling or registration site does not have to be accessible to citizens with disabilities, as long as the voting program as a whole is accessible. For example, if a voter cannot enter her assigned polling place or cannot use the voting machines because of a disability, the public entity could probably satisfy the program-access requirement by notifying

her ahead of time that the site is inaccessible and, at her request, reassigning her to an accessible polling place. Similarly, if a voter discovers upon arriving at his polling place that it is inaccessible but he is transported to an accessible polling place and permitted to vote there, program access will probably be satisfied.

The ADA's program-access standard permits alternative methods of access. For example, the U.S. Department of Justice has repeatedly issued findings that "curbside voting"—where designated individuals assist voters with disabilities in completing their ballots just outside of an inaccessible polling place—constitutes program access and therefore complies with Title II of the ADA.<sup>1</sup> Similarly, providing alternative or absentee ballots to enable citizens with disabilities to vote up until the date of the election may satisfy the ADA's program-access requirement. See *NAACP v. Philadelphia Bd. of Elections*, No. CIV A.97-7085, 1998 WL 321253 (E.D. Pa. June 16, 1998)(the provision of alternative ballots that could be submitted up until the polls closed was a reasonable modification that defendants could choose to provide to comply with the ADA) and *DiPietrae v. City of Philadelphia*, 666 A.2d 1132 (Pa. Commw. Ct. 1995). (affirming the decision that permitting voters with disabilities to appoint individuals to pick up absentee ballot applications and ballots for them and to deliver the completed ballots to the election board was required by the ADA and Voting Rights Act). Indeed, one federal court held that the ADA did not even require that voters with disabilities be permitted to appoint someone to pick up and deliver absentee ballot applications and ballots for them. See *Jacobs v. Philadelphia County Bd. of Elections*, No. CIV.A. 94-6666, 1995 WL 63747 (E.D. Pa. Oct. 30, 1995). Considering the same issue decided by the state court in *DiPietrae*, the *Jacobs* court held that a voter with a

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<sup>1</sup> See e.g., <http://www.usdoj.gov/crt/foia/lofc023.txt>, <http://www.usdoj.gov/crt/foia/lofc021.txt>, <http://www.usdoj.gov/crt/foia/loft018.txt> and <http://www.usdoj.gov/crt/foia/lofc017.txt>.

disability could have someone else put his or her absentee ballot in the mailbox or could give it directly to the mail carrier, and that neither the ADA nor the VRA required anything beyond that. But the ADA requires that some accommodation be made to allow disabled persons to vote.

In the *case sub judice*, the plaintiff cast her absentee ballot which contained a defect that she could cure. However, the only method for curing the defect was by her leaving her home and appearing in person at the county Board of Elections. This in-person requirement is contained in Defendant Brunner's Directive 2008-109 (Attached). However, requiring the plaintiff to come to the Board of Elections to cure the defect would mean that she would entirely lose her right to vote. She simply can not go to the Board of Elections.

Plaintiff submits that modifying Defendant Brunner's directive to require an alternative to appearing in person, such as requiring boards of elections to designate two board employees belonging to the two major political parties for the purpose of delivering the ballot to the voters with disabilities who are homebound and returning it to the board would not create an undue burden or constitute a fundamental alteration because this is precisely what is required under O.R.C. §3509.08 when a voter is confined to a public or private institution within the county.

**b. The Help America Vote Act of 2002**

The Help America Vote Act of 2002 (HAVA) 42 U.S.C. § 15301 *et seq.* set new standards for voting systems in federal elections. These standards include ensuring that voting systems are accessible for all voters with disabilities. For example, HAVA requires every precinct to have at least one voting machine or system that is accessible to voters with disabilities. HAVA also requires that each voter be able to vote secretly and independently.

HAVA authorizes state and local governments to apply for grants to improve voting accessibility and to train elections officials and poll workers to assist voters with disabilities. HAVA also requires states receiving grants to set up a process for resolving accessibility complaints.

HAVA's accessibility mandate is broad: Voting systems "shall be accessible for individuals with disabilities . . . in a manner that provides the same opportunity for access and participation (including privacy and independence) as for other voters." 42 U.S.C. §15481(a)(3)(A). HAVA defines "voting systems" to include voting equipment as well as "the practices and associated documentation used (A) to identify system components and versions of such components; (B) to test the system during its development and maintenance; (C) to maintain records of system errors and defects; (D) to determine specific system changes to be made to a system after the initial qualification of the system; and (E) to make available any materials to the voter (such as notices, instructions, forms, or paper ballots)." *Id.* § 15481(b).

In this case, defendants have violated HAVA, because they have denied plaintiff the "same opportunity for access and participation" as is afforded other voters.

### **c. The Equal Protection Clause of the Fourteenth Amendment**

The Equal Protection Clause of the Fourteenth Amendment provides that "no state shall...deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., Amend. XIV. Laws and government practices that affect the right to vote must treat people in similar situations on an equal basis. A state may take away the right to vote only when it can show that doing so is a "narrowly tailored" way to achieve a compelling government interest. See *Dunn v. Blumstein*, 405 U.S. 330, 337 (1972) (if a state law grants the right to vote to some

citizens and denies it to others, court “must determine whether the exclusions are necessary to promote a compelling state interest.”)(quoting *Kramer v. Union Free Sch. Dist.*, 375 U.S. 621, 627 (1969)). If there is more than one reasonable way to achieve the government’s interest, the way that is least burdensome on people’s rights must be chosen. Although not every restriction on the right to vote must be judged under this strict standard, restrictions that are severe or take away the right to vote altogether must meet this test. *Burdick v. Takushi*, 504 U.S. 428 (1992).

In this case, Ms. Ray has been treated differently than people who do not have disabilities with respect to casting absentee votes. Persons who are not disabled and not bed-ridden will have no difficulty in coming to the Board to cure their defects and to have their votes counted.

## **2. There is Irreparable Injury**

As another branch of this Court stated, “(t)he Supreme Court has held that ‘[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.’” *Spencer v. Blackwell*, 347 .F.Supp.2d 528, 537 (S.D. Ohio 2004). As the Court stated in *Spencer, supra*, if the right to vote is threatened, there is irreparable injury. In this case, plaintiff will be denied the right to have her vote counted unless this Court grants immediate injunctive relief.

## **3. There is not substantial Harm to Others**

Allowing plaintiff and other disabled people to have the right to vote and to have their votes counted can not cause substantial harm to others. See, *Spencer v. Blackwell, supra*, at 538.

## **4. The Public Interest is Favored by Granting the Temporary Restraining Order**

As the Court stated in *Spencer, supra*, “ ‘It is always in the public interest to prevent violation of a party's constitutional rights.’ ” *Id.*, at 538.

**C. CONCLUSION**

For the foregoing reasons, the Motion for a Temporary Restraining Order must be granted.

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on November 15, 2008 the foregoing Plaintiff's Motion for Temporary Restraining Order and Memorandum were filed electronically. 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. In addition, this memorandum was sent on the same day by electronic mail to Patrick Piccininni.

s/Alexander M. Spater  
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