

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

<b>PATRICIA RAY,</b>	:	
	:	<b>Case No. C2-08-1086</b>
<b>Plaintiff,</b>	:	
	:	
<b>v.</b>	:	
	:	<b>JUDGE SMITH</b>
<b>THE FRANKLIN COUNTY</b>	:	
<b>BOARD OF ELECTIONS, et al.,</b>	:	
	:	<b>MAGISTRATE JUDGE KING</b>
	:	
<b>Defendants</b>	:	

**MEMORANDUM OF DEFENDANT JENNIFER BRUNNER SECRETARY OF  
STATE OF OHIO IN OPPOSITION TO PLAINTIFFS' MOTION FOR  
TEMPORARY RESTRAINING ORDER**

**I. INTRODUCTION**

In the interest of guaranteeing fair and accurate elections and in ensuring that every eligible vote is counted, Ohio Secretary of State Jennifer Brunner has issued scores of directives and advisories to the Ohio boards of elections that explain and articulate the often complicated nuances of state and federal election laws. These directives and advisories often require the Secretary to consider the manpower and resources of Ohio's 88 county boards of elections as well as the interests of the voters. In addition, these directives and advisories must often take into account the extremely tight and unyielding deadlines that must be met in elections.

On November 3, 2008, Secretary Brunner issued Directive 2008-109 to provide voters who may have incorrectly filled out their absentee ballot envelopes, and who were otherwise eligible to vote, an opportunity to be notified of the problem and an

opportunity to correct the problem. The Secretary acknowledges that certain voters, like the Plaintiff, may have difficulty with physically appearing at their local board of elections to correct an absentee ballot envelope that the voter incorrectly completed. The Secretary appreciates the concerns raised by the Plaintiff in this case, but maintains that providing voters the opportunity to correct their errors, as authorized by Directive 2008-109, only in person at the board of elections was reasonable given the manpower and time restraints under which the boards find themselves.

Although the Secretary empathizes with the Plaintiff and plans to investigate possible legislative and/or administrative remedies to the situation in which the Plaintiff finds herself, the Secretary opposes any temporary restraining order that would extend the amount of time a voter has to correct an absentee ballot envelope. The November 14, 2008 deadline issued in Directive 2008-109 was the latest possible date the Secretary could give a voter to make such a correction. Because this lawsuit was filed on November 15, 2008, a day after the deadline to correct an absentee ballot envelope, the Secretary respectfully asks this Court to deny Plaintiff's motion for a temporary restraining order.

## **II. OHIO ELECTION LAW**

Pursuant to Ohio law, any qualified Ohio elector whose current voting residence is at the address appearing in the records of the board of elections may request an absentee ballot. In order to obtain an absentee ballot an elector must first acquire and complete an absentee ballot application. R.C. 3509.03. Once it has been verified that the application is complete, the board of elections is then required to deliver an absentee ballot to the applicant. After receiving an absentee ballot, a voter must fill out the ballot

and submit it to his or her board of elections. The boards of elections must process and then count the absentee ballots. All boards must examine the validity and sufficiency of the absentee ballot identification envelope before an absentee ballot may be counted. Once the absentee ballots have been verified, the absentee ballot is eligible for counting. R.C. 3509.07 provides a list of reasons under which a board of elections may find an absentee ballot insufficient.

Am. Sub. H.B. 350, which took effect on September 12, 2008, altered the return deadline for absentee ballots mailed back to boards of elections from within the United States. These changes provided that, beginning with the November 4, 2008, general presidential election, all absentee ballots sent from within the United States must be postmarked by the day before the election and received by the board of elections before the eleventh day after the election to be eligible to be counted with the official count of the votes, as long as the absentee ballot meets all other requirements of law. Ballots received later than the tenth day after the election must not be counted. R.C. 3509.05(A); R.C. 3509.05(C)(1); R.C. 3511.11(C); R.C. 3511.11(D)(1).

On November 3, 2008, Secretary Brunner issued Directive 2008-109. This directive was issued to provide voters who incorrectly filled out their absentee ballot envelopes, yet were otherwise eligible to vote, an opportunity to be notified of the problem and an opportunity to correct the problem. Pursuant to Directive 2008-109, because absentee ballot envelopes are signed by the voter under penalty of election fraud, to correct any deficiencies associated with the absentee ballot envelope, the voter was required to physically appear at the office of the board of elections by the close of business on November 14, 2008.

The November 14, 2008 date was not arbitrarily chosen. It is ten days after the election, a significant deadline used in several areas of Title 35 of the Ohio Revised Code. For example, it is the last day before a county board of elections is permitted to begin to conduct its official canvass. Further, voters who cast a provisional ballot are required to appear at the office of the board of elections and provide to the board, within ten days of the election, any additional information necessary to determine their eligibility. And finally, ten days from the election is the deadline the General Assembly enacted as the last possible day that an absentee ballot that is postmarked before the election may be received by the board and still counted in the official election results. R.C. 3509.05(A); R.C. 3509.05(C)(1); R.C. 3511.11(C); R.C. 3511.11(D)(1).

. Directive 2008-109 did not change existing law, did not conflict with any term in Ohio or federal law, and was a valid exercise of the Secretary's powers and responsibilities as the state's chief election official.

### **III. LAW AND ARGUMENT**

When determining whether to issue a preliminary injunction, a court should address four factors: 1) the likelihood of success on the merits of the action; (2) the irreparable harm that could result if the court did not issue the injunction; (3) the impact on the public interest; and (4) the possibility of substantial harm to others.<sup>1</sup> *Christian Schmidt Brewing Co. v. G. Heileman Brewing Co.*, 753 F.2d 1354, 1356 (6th Cir. 1985), cert. dismissed, 469 U.S. 1200, (1985). The standard for granting an emergency injunction is more stringent than that required for summary judgment. *Leary v.*

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<sup>1</sup> Secretary of State Brunner expressly reserves the right during the temporary restraining order hearing, and in future case proceedings to expand the scope of both her legal and factual arguments. Secretary of State Brunner files this memorandum contra on an expedited basis to place on record relevant arguments, both factual and legal, as to why the Plaintiffs' motion for temporary restraining order should be rejected.

*Daeschner*, 228 F.3d 729, 739 (6th Cir. 2000). This is because it is “an ‘extraordinary remedy involving the exercise of a very far-reaching power, which is to be applied ‘only in [the] limited circumstances’ which clearly demand it.” *Id.* (quoting *Direx Israel, Ltd. v. Breakthrough Med. Corp.*, 952 F.2d 802, 811 (4th Cir. 1991)) (internal quotations omitted). “In making its determination, the district court is required to make specific findings concerning each of the four factors, unless fewer factors are dispositive of the issue.” *Id.* The foregoing are “factors to be balanced, not prerequisites that must be met. Accordingly, the degree of likelihood of success required may depend on the strength of the other factors.” *In re DeLorean Motor Co.*, 755 F.2d 1223, 1229 (6<sup>th</sup> Cir. 1985)

Given the manpower and time restraints under which the boards find themselves, and despite the understandable concerns expressed by the Plaintiff, the requirement that a voter physically appear at a board of elections to correct an absentee ballot envelope is reasonable. Several county boards of elections within the State have only two full-time employees. While the Secretary is not ideologically opposed to having boards designate and send out two employees belonging to the two major political parties for the purpose of allowing a disabled or confined voter correct the voter’s initial error in completing an absentee ballot envelope, the Secretary cannot in good faith order boards to do so when it may make it impossible for boards to carry out all of their other obligations that must be completed between now and the certification of the ballot results. The issuance of the injunctive relief sought by the Plaintiff would negatively impact these boards of elections and would not serve the public interest.

Further, due to the limited time boards of elections have to certify ballot results, the Secretary opposes any temporary restraining order that would extend the amount of

time a voter has to correct an absentee ballot envelope because any such extension risks a board's ability to certify its results. As was mentioned earlier, the ten day time period in 2008-109 was not arbitrarily chosen, as ten days is a significant deadline relied upon by boards in Ohio's post-election, pre-certification laws.

Finally, as a matter of policy and sound governance, the federal courts have repeatedly refused to grant injunctions superseding state election laws in cases brought too close to election day. *Purcell v. Gonzalez* (2006), 549 U.S. 1. While this case was filed after election day, the same logic applies in that it has been filed too close to the official canvass and certification of election results. R.C. 3505.32. The Sixth Circuit "require[s] that any claims against the state [election] procedure be pressed expeditiously," and has held that waiting less than a month after learning of such a claim is fatal. *Kay v. Austin*, 621 F.2d 809, 813 (6th Cir. 1980). The United States Supreme Court requires similar promptness; it has rejected or affirmed rejection of requests made a little over a month before the election precisely because of the proximity to the elections—without regard for the reasons for the delay. *Purcell*, 549 U.S. at 7; *Reynolds v. Sims*, 377 U.S. 533 (1964). Here, Directive 2008-109 was issued on November 3, 2008 and Plaintiff did not file this action until November 15, 2008, a day after the last day an absentee envelope could have been corrected.

"Interference with impending elections is extraordinary." *Southwest Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 918 (9th Cir. 2003). So extraordinary, in fact, that courts have refused to intervene even in the face of undisputed constitutional violations. *Reynolds*, 377 U.S. at 585-6; *Chisolm v. Roemer*, 853 F.2d 1186, 1190 (5th Cir. 1988); *French v. Boner*, 771 F. Supp. 896, 902 (M.D. Tenn. 1991).

The potential disruption to the official canvass and certification of results caused by the late filing of this case will be extraordinary. Any grant of injunctive relief would substantially impair the ability of many boards of elections to perform all of the tasks they are required to do between now and the certification of results. Accordingly the Secretary asks this Court to deny Plaintiff's motion for a temporary restraining order.

#### **IV. CONCLUSION**

The Secretary respectfully asks this Court to deny Plaintiff's motion for a temporary restraining order.

Respectfully submitted,

**NANCY H. ROGERS  
ATTORNEY GENERAL**

*/s/ Damian W. Sikora*

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**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 17<sup>th</sup> day of November, 2008.

/s/ Damian W. Sikora