

**In The United States District Court
For The Southern District of Ohio
Eastern Division**

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U.S. DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EAST. DIVISION COLUMBUS

**Board of Commissioners,
Union County, et al.,**

Plaintiffs,

vs.

Case No.

2 : 0 8 cv 1 1 2

Secretary of State Jennifer Brunner

Judge

JUDGE WATSON

MAGISTRATE JUDGE KING

**Defendant's Memorandum Contra Plaintiffs' Motion For A
Temporary Restraining Order or, in the alternative, Defendant's
Motion To Dissolve The Temporary Restraining Order**

Now comes Secretary of State Jennifer Brunner and files her opposition to the Plaintiffs' Motion For A Temporary Restraining Order. The Secretary of State respectfully requests this Court issue an order denying such a motion. In the alternative, the Secretary respectfully requests this Court issue an order dissolving the restraining order issued by the Union County Common Pleas Court. A memorandum in support is attached.

Respectfully submitted,

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Secretary of State Jennifer Brunner

Memorandum In Support

On January 2, 2008, Secretary of State Jennifer Brunner issued Directive 2008-01 which required all counties which used Direct Recording Electronic (DRE) voting machines as their primary voting system to provide paper ballots for those citizens within the counties who did not have faith in the use of the DREs or otherwise wished to cast a paper ballot. The order sought to make sure vindicate the government's overriding obligation to provide its citizens with an electoral system in which they can have faith.

All counties in the State of Ohio have already purchased equipment to provide absentee ballots to Ohio's citizens. All DRE counties also use this same central count optical scan voting system for people who are obligated to cast provisional ballots on election day. Finally, every DRE county also is required to have paper ballots at their polling locations in case of a machine failure or electrical problem. The Secretary of State, pursuant to her authority as the State's chief elections official, simply required counties to make paper ballots available to individual citizens who feel more secure in putting their votes on a piece of paper instead of into a machine.

After the Union County Board of Elections took the unusual step of voting on whether to follow the Secretary of State's directive and actually tied 2-2 in that vote, Secretary of State Brunner used her authority pursuant to Ohio law to break the tie. The Union County Commissioners then filed this litigation on February 5, 2007 in the Union County Common Pleas Court. Secretary of State Brunner exercised her authority under State law to remove the case to an adjoining county – Franklin County. She filed her removal notice on February 5, 2007. On February 6, 2007, the Plaintiffs filed a motion for a temporary restraining order. The Union County judge granted the Secretary's motion to transfer venue. He also *ex parte* granted Union County's motion for a temporary restraining order. Because the Plaintiffs have alleged a

violation of the Help America Vote Act, 42 U.S.C. § 15301, Secretary of State Brunner removed this case to this Court. She asks this Court to find that the common pleas court's order granting the temporary restraining order is a void order. In the alternative, she asks this Court to issue an order dissolving the temporary restraining order.

I. The Common Pleas Court Was Without Jurisdiction To Issue Any Temporary Restraining Order And Its Order Is Void As A Matter Of Law.

On February 5, 2008, the Union County Common Pleas Court issued an *ex parte* temporary restraining order against Secretary of State Brunner despite the fact that she had exercised her authority to move the cast to Franklin County. State law provides that:

The Secretary of State may apply to any court that is hearing a case in which the Secretary of State is a party, for a change of venue as a substantive right, and the change of venue shall be allowed, and the case removed to the court of common pleas of an adjoining county named in the application or, if there are cases pending in more than one jurisdiction that involve the same or similar issues, the court of common pleas of Franklin County.

R.C. § 3501.05.

State courts have found that the Secretary's authority to transfer venue in a case under this statutory provision is absolute. *In re Protest of Initiative Petitions Proposing the "Ohio Sales Tax Reduction Act"*, 2004 Ohio 4157, attached as Exh. A. (3rd Dist. 2004); *In re Protest of Initiative Petitions Proposing the "Ohio Sales Tax Reduction Act"*, 2004 Ohio 4290 (7th Dist. 2004). Once a court receives a motion from the Secretary of State to transfer venue, the transfer is mandatory. *Id.* Such a filing deprives the common pleas court of all jurisdiction over the matter. As a result, the order of the Union County Common Pleas Court granting a temporary

restraining order permitting them to ignore the directive of the Secretary of State is void as a matter of Ohio law.¹

II. If This Court Believes An Effective Temporary Restraining Order Has Been Entered, It Should be Immediately Dissolved.

Fed. R. Civ. P. 65 governs the issuance of temporary restraining orders. A court should consider whether (1) the movant has shown a strong likelihood of success on the merits; (2) whether the movant would suffer irreparable injury without the injunction; (3) whether issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by the issuance of an injunction. *Rock and Roll Hall of Fame and Museum, Inc. v. Gentile Productions*, 134 F.3d 749, 753 (6th Cir. 1998). Since the Plaintiffs have failed to demonstrate any of these requirements, the temporary restraining order should be dissolved.

A. The Plaintiffs will not succeed on the merits.

Secretary of State Brunner is the State's chief elections official. R.C. § 3501.04, 3501.05. Under R.C. § 3501.05(B), (C), and (M), the Secretary of State is authorized to issue instructions to the boards of elections as to the proper conduct of elections and to compel the observance of elections laws by elections officials. Ohio courts have also recognized the authority of the Secretary of State to direct the boards in administering elections. *State ex rel. Donegan v. Cuyahoga County Bd. of Elections*, 136 Ohio App. 3d 589, 596 (2000). All boards of elections must follow those directions so long as the directives are not in conflict with other provisions of State law. *State ex rel. White v. Franklin County Board of Elections*. 65 Ohio St.3d 5, 8 (1992). Finally, the Secretary of State's interpretation of Ohio election law is entitled to more weight than interpretation by other officials. *State ex rel. Chance v. Mahoning Cty. Board of Elections*, 75 Ohio St. 3d 42, 44 (1996).

¹ Since the order is void, the Defendant believes that this Court should schedule a hearing based upon Plaintiffs' motion for a temporary restraining order.

Ohio law specifically commands that “[t]he board of elections shall follow the instructions and advisories of the secretary of state in the production and use of polling place supplies.” R.C. § 3501.30(B). “Ballots” are among the polling place supplies that boards of elections must provide for each polling location. *See* R.C. § 3501.30(A). Thus, Directive 2008-01 which mandates a board of elections make paper ballots available to any Ohio citizen in a DRE county who wishes to vote on a paper ballot system is well within the power of the Secretary of State. Most importantly, her requirement that the boards have paper ballots in polling locations in an amount equal to at least 10% of the total of registered voters at each polling location is a reasonable number of ballots. Thus, the Secretary of State acted well within her authority in issuing this directive.

Furthermore, Union County’s claims that the Secretary’s directive requires Union County to adopt a new voting system in violation of R.C. § 3506.02 is completely incorrect. Union County already provides centrally counted optical scan ballots for absentee voters. Union County purchased equipment to tabulate these centrally counted optical scan ballots under funding provided for by the Help America Vote Act. The Secretary of State has not ordered Union County to adopt a new voting system. She has simply ordered Union County to provide that voting system to those Ohioans who wish to use the system on election day. This is the same system used by individual voters who are casting absentee ballots, provisional ballots, emergency ballots, and curbside ballots.

Likewise, the use of central count optical scan ballots does not violate the Help America Vote Act. Rather, HAVA specifically permits the use of central count optical scan ballots. *See*, 42 U.S.C. § 15481(B). The only statutory requirement for centrally counted optical scan ballots is voter education about the proper way to cast a ballot and the problem if a ballot is not filed out

correctly. Secretary of State Brunner has already mandated that any voter who casts a ballot on a centrally counted optical scan voting system be provided proper education. *See* Directive 2008-21. Furthermore, the Directive that individuals be allowed to cast ballots on a centrally counted optical scan system does not violate the State's plan under HAVA. 42 U.S.C. § 15404(a)(11) provides that the State may not make a *material* alteration of its HAVA plan without publishing that plan in the Federal Register, allowing it to be subject to public comment, and waiting for 30 days after publication to have it take effect. The provision to allow individuals to be given the option of a paper ballot when they arrive at a polling location is not a material change in the State's plan. The State HAVA plan presupposed the use of a central count optical scan voting system when it submitted the plan. That system, which is currently used by election day voters who cast provisional ballots, will be used by others who do not trust DRE machines. This is not an alteration of the State plan. Thus, the Plaintiffs have failed to prove they are likely to succeed on the merits.²

B. Union County Will Not Be Harmed If This Court Dissolves The Temporary Restraining Order.

In their motion for a temporary restraining order, the Plaintiffs have only alleged monetary harm. The Sixth Circuit has recognized that “potential monetary damage does not constitute irreparable harm. ‘Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough.’” *Baker v. Adams County/Ohio Valley School Board*, 310 F.3d 927, 930 (6th Cir. 2002) *quoting Sampson v. Murray*, 415 U.S. 61, 90 (1974). Thus, the Plaintiffs have failed to show any harm.

² Secretary of State Brunner specifically reserves the right to supplement this argument. She also believes that the Plaintiffs do not have a right to bring a private cause of action in relation to the State's HAVA plan.

C. The Defendant Will Be Irreparably Harmed If Her Lawful Order Is Not Carried Out.

The Secretary of State has a great interest in making sure that her lawful orders are properly carried out. “[T]he State’s interest in not having its voting processes interfered with, assuming that such processes are legal and constitutional is great. It is particularly harmful to such interests to have the rules changed at the last minute.” *Summit County Democratic Central & Exec. Committee v. Blackwell*, 388 F.3d 547, 551 (6th Cir. 2004).

D. The Public Interest Is Supported By Dissolving the Temporary Restraining Order.

Secretary of State Brunner issued Directive 2008-01 on January 2, 2008. Yet, the Plaintiffs waited until February 5, 2008 before they challenged this statute. “[T]here is a strong public interest in smooth and effective administration of the voting laws that militates against changing the rules in the hours immediately preceding the election.” *Id.*

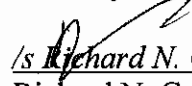
In addition, the public interest in confidence in electoral systems is greatly enhanced by dissolving the temporary restraining order. Some members of the public do not have faith that DRE machines correctly and accurately count their ballots. This directive allows those individuals who are concerned about the accuracy or reliability of DRE machines to cast ballots on paper which is easily auditable. On the other hand, the Plaintiffs have only identified a monetary issue with respect to public interest. Faith in the accuracy and soundness of an electoral system trumps the money that Union County will have to spend to provide these paper ballots.

Conclusion

For the foregoing reasons, this Court should either deny or dissolve the temporary restraining order filed in this case.

Respectfully submitted,

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Certificate of Service

This is to certify a copy of the foregoing was served upon the following by fax and first class mail on this 6th day of February, 2008.

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