

IN THE COURT OF COMMON PLEAS, UNION COUNTY, OHIO

BOARD OF COMMISSIONERS,
UNION COUNTY OHIO, et al,

PLAINTIFFS,

vs.

CASE NO. 2008-CV-0068

JENNIFER BRUNNER
SECRETARY OF STATE
STATE OF OHIO

JUDGE RICHARD PARROTT

DEFENDANT.

PLAINTIFFS' MOTION FOR A TEMPORARY RESTRAINING
ORDER AND A PRELIMINARY INJUNCTION

NOW come the Plaintiffs and respectfully move the Court pursuant to Rule 65(A) and (B) of the Ohio Rules of Civil Procedure for the entry of a temporary restraining and preliminary injunction. Plaintiffs request a Temporary Restraining order pending a hearing on the Plaintiffs' Motion for a Preliminary Injunction to preserve the status quo, by enjoining:

Defendant, Jennifer Brunner, Secretary of State, and each of her agents, employees, attorneys, and any person in active concert or participation with her from:

1. Implementing Directive entitled "Directive 2008-01." (Exhibit 1)
2. Interfering, through the issuance of Directives, with the authority of Union County to select voting machines and equipment and requiring the County to use voting systems other than those chosen by the County in accordance with law; and
3. Taking any action, including the removal or threatening the removal of any election official for non-compliance with her directive.

As set forth in the Verified Complaint and Affidavit of Gary Lee, Plaintiffs face imminent irreparable harm from the implementation of the Defendant's Directive 2008-01.

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including, but not limited to the expense associated with implementation and the confusion and turmoil of operating two separate and distinct voting systems in each of the polling locations. It is clear that without a temporary restraining order and a preliminary injunction, the Defendant will order the implementation of Directive 2008-01 and cause the Plaintiffs irreparable harm before this Court can hear the Plaintiffs' Motion.

Respectfully Submitted,

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MEMORANDUM IN SUPPORT OF APPLICATION FOR
TEMPORARY RESTRAINING ORDER AND
PRELIMINARY INJUNCTION

Introduction

Plaintiffs, Board of County Commissioners, Union County, Ohio, Gary Lee, Tom McCarthy and Charles Hall have brought this action against the Defendant, Jennifer Brunner, Secretary of State, State of Ohio, to prevent the Defendant from implementing Directive 2008-01. In that Directive, the Defendant requires all counties who use direct recording electronic voting machines ("DRE"), to provide an optical scan ballot to any voter who requests it. This directive includes Union County.

On January 2, 2008, the Defendant issued Directive 2008-01 (the "Directive") to all county Boards of Elections, including the Union County Board of Elections. The Directive ordered all counties using direct recording electronic voting machines to provide paper ballots at each precinct where DRE technology is used. Union County is such a county.

The Directive also required the county boards of elections to track costs incurred in complying with the Directive. Union County utilizes the DREs which have been certified by the Ohio Secretary of State pursuant to Ohio Revised Code Section 3506.05. This Directive will require Union County to print ballots for use in a Central Count Optical Scan System ("CCOS"). In addition, the Directive also required the boards of elections to centrally count the optical ballots cast at the Board on election night. The boards of elections must provide secure ballot containers for optical scan ballots at each polling location. Finally, the Directive mandates that the boards of elections provide a minimum number of optical scan ballots at

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each polling location computed by multiplying the number of ballots cast in each precinct in a like election by ten percent (10%).

The Defendant's Directive does not provide for any means for the elector to determine an undervote or overvote at the precinct level. Nor does the Defendant's Directive address the issue of reimbursement for the counties for the significant additional cost to implement the Directive. The cost of the directive must be borne by the county general fund. The Defendant has ordered the boards of elections to comply with her Directive at the risk of removal from office. Only the intervention by this Court of equity can prevent the Defendant from implementing a plan which requires Union County to operate two, unequal systems under the color of law at a significant cost to Union County.

Law

The purpose of a temporary restraining order or a preliminary injunction is to preserve the status quo pending trial on the merits. *Consun Food Industries, Inc. v. Fowkes* (1991), 81 Ohio App.3d 63, 610 N.E.2d 463. A temporary restraining order or a preliminary injunction "serves as an equitable policing measure to prevent the parties from harming one another during the litigation; to keep the parties, while the suit goes on, as much as possible in the respective positions they occupied when the suit began." *Hamilton Watch Co. v. Benrus Watch Co.* (2d Cir. 1953) 206 F.2d 738, 742. Under Ohio law, the Court must consider and balance the following four factors in deciding whether to issue a temporary restraining order or a preliminary injunction against the Defendant, as follows:

- (1.) Whether the Plaintiffs have shown a strong or substantial likelihood of success on the merits:

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- (2.) Whether the Plaintiffs shall suffer immediate and irreparable harm if the relief is not granted (that there is no adequate remedy at law for the Plaintiffs should the relief not be afforded);
- (3.) Whether the temporary restraining order or preliminary injunction would unjustifiably harm third parties; and
- (4.) Whether the public interest would be served by issuing either the temporary restraining order or preliminary injunction. *Vanguard Transp. Sys., Inc. v. Edwards Transfer & Storage Co., Gen. Commodities Div.* (1996), 109 Ohio App. 3d 786, 790, 673 N.E.2d 182.

Each element must be established by the Plaintiffs by clear and convincing evidence.

The Ohio Courts have determined that no one element is dispositive; however, if there is a strong likelihood of success on the merits, an injunction may be granted even though there is little evidence of irreparable harm and vice versa. *Friendship Materials, Inc. v. Michigan Brick Inc.* (6th Cir. 1982), 679 F.2d 100, 105. The four factors listed above "do not establish a rigid and comprehensive test for determining the appropriateness of preliminary injunction relief, rather, they are factors to be balanced, not prerequisites that must be met." *Frisch's Restaurant, Inc. v. Shoney's, Inc.* (6th Cir. 1985), 759 F.2d 1261, 1263. A balancing of these four factors demonstrates that the Plaintiffs are entitled to relief.

I. Plaintiffs, Board of County Commissioners, Union County, Ohio, Gary Lee, Tom McCarthy and Charles Hall Will Likely Succeed on the Merits

The Defendant's Directive 2008-01 nullifies the Union County Board of Election's decision on which equipment to use in the election, and requires the use of two systems by the board – the DRE and Central Count Optical Scan. in any election held after January 3, 2008.

The Defendant cites no statutory authority for this Directive. Instead, she has issued the Directive "due to the concerns raised by the EVEREST report, and to avoid any loss of confidence by voters that their ballot has been accurately cast or recorded." By statute, the

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authority to determine the type of voting equipment to be used in a county is made on the county level, as follows:

Voting machines, marking devices, and automatic tabulating equipment may be adopted *for use* in elections in any county in the following manner:

- (A) By the board of elections;
- (B) By the board of county commissioners of such county on the recommendation of the board of elections;
- (C) By the affirmative vote of a majority of the electors of such county voting upon the question of the adoption of such equipment in such county.

Ohio Revised Code Section 3506.02. (Emphasis added).

The acquisition of voting equipment is at county expense.

The selection of voting equipment is limited to systems that are certified by the Secretary of State. See R.C. 3506.05(B) ("no voting machine, marking device, automatic tabulating equipment, or software for the purpose of casting or tabulating votes or for communications among systems involved in the tabulation, storage, or casting of votes shall be purchased, leased, put in use, or continued to be used . . . unless it, a manual of procedures governing its use, and training materials, service, and other support arrangements have been certified by the secretary of state"). Union County has selected a certified system.

Both the county boards of elections and the Secretary of State have powers and duties relating to the voting process. However, the decision as to which type of voting method is to be used in a particular county is delegated to the county board of elections, acting independently or with its board of county commissioners, or to the voters of the county. R.C. 3506.02. The Secretary of State is *not* given authority to make this decision for the county.

See, 2005 Ohio Op. Atty. Gen. No. 6.

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Boards of election were established on a county basis so that they could tailor their decisions and actions to the needs of individual counties. See *State ex rel. City of North Olmsted v. Cuyahoga County Bd. of Elections*, 93 Ohio St. 3d 529, 533, 757 N.E.2d 314 (2001) (boards of elections are the local authorities that are best equipped to gauge compliance with election laws). The Secretary of State acknowledged this factor in the State Plan outlining the program for Ohio's compliance with Help America Vote Act ("HAVA"). In the State plan submitted to the federal government, the Secretary stated:

The Help America Vote Act requires "uniform and nondiscriminatory election technology" that meets specific voting system standards. *Ohio has opted for a program that specifically addresses the requirements of the Act, but provides counties with some degree of flexibility in choice of vendor and how they implement and develop voting systems to meet the particular needs of their region.*

Ultimately, the responsibility for ensuring compliance with the Help America Vote Act of 2002 falls to the chief elections official in the state. *But the Secretary of State recognizes the execution of the Act will take place at the county level.*

It is appropriate to consider this factor in the instant case, and to respect the authority of each county board of elections to make the decisions deemed best for its county.

See, 69 Fed. Reg. 14891 (Mar. 24, 2004) (italics added).

Section 254 of HAVA provides that a state may not make any material change in the administration of the State Plan unless the change is developed and published in the Federal Register and made subject to public notice and comment in the same manner as the State Plan. See 42 U.S.C.A. § 15404(a)(11). To date, the State plan has not been amended in accordance with federal law to account for the Defendant's Directive.

Finally, county boards of elections, working with their boards of county commissioners, are given authority to make decisions about voting systems for their counties,

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and also about financial aspects of providing those systems. It is clear that various costs are involved in the selection and operation of different types of voting systems. However, as noted by the Ohio Attorney General:

The Secretary of State does have authority to advise the boards of elections as to the proper methods of conducting elections. R.C. 3501.05(B). Further, R.C. 3501.05(M) expressly authorizes the Secretary of State to "compel the observance by election officers in the several counties of the requirements of the election laws." R.C. 3501.05(M) is a general directive that is meant to make clear that Ohio's election officers must be mindful of the numerous requirements imposed in Title 35, and that the Secretary of State ultimately is responsible for ensuring that those officers observe and implement such requirements.

R.C. 3501.05(M) in no way means, however, that the Defendant, Secretary of State may exercise discretion conferred upon those officers by specific provisions of R.C. Title 35 when she has not otherwise been granted that discretion herself. And that is the case with respect to the voting machine provisions of R.C. 3506.02.

This statute makes it the responsibility of officials at the county level to exercise a reasonable discretion and select voting equipment and machines appropriately suited to the needs of the county electorate. 2005 Ohio Op. Atty. Gen. No. 6.

R.C. 3506.02 speaks to a specific aspect of the voting process and directly confers authority and responsibility upon county officials.

The general directive in R.C. 3501.05(M) cannot reasonably be interpreted to mean that the Secretary of State may override a county's exercise of that authority and discretion, at least with respect to its selection of a voting system that has already received the Secretary of State's certification. 2005 Ohio Op. Atty. Gen. No. 6.

Based upon the statutory authority cited and the 2005 Attorney General's Opinion set forth herein, there can be little question that the Plaintiffs have a substantial likelihood of succeeding on the merits of their claims.

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II. Plaintiffs will be Irreparably Harmed if the Requested Relief is Not Granted or That No Adequate Remedy of Law is Available

The expenditures of the board of elections are paid from the county treasury in pursuance of appropriations by the board of county commissioners. The board of elections may not, by law, incur any obligation involving the expenditure of money unless there are moneys sufficient in the funds appropriated to meet the obligation. R.C. 3501.07. The Defendant's Directive will require the expenditure of significant money at the county level, an estimated amount in excess of \$68,000.00, which has not been appropriated. Specifically, the Directive would require the county to purchase secure ballot boxes, privacy booths, and optical scan ballots, as well as hire and train additional poll workers to run what amounts to two separate and distinct voting systems. Because the next election is a primary election, each of the 46 precincts in Union County will have to have multiple ballot types and styles available to the voter.

Implementing the Defendant's Directive, the Union County board of elections will not only have to expend significant funds to purchase additional equipment and supplies, it will have to run two distinct voting systems in the Presidential Primary election on March 4, 2008. The impact of operating two separate and distinct voting systems is that the poll workers would be required to be trained on, operate and balance each system concurrently but separately. Similarly, Union County voters would need to be educated on the operation of the optical scan system. The responsibility to educate Union County voters on the optical scan system would undoubtedly result in a delay in the voting process and voter confusion in the precincts about which voting system to choose.

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As further evidence of the irreparable harm that the Plaintiffs face, the Court need only consider the timeframe in which the Defendant, Secretary of State is requiring the Plaintiffs to operate. The primary election is less than thirty days away at the time of the filing of the Plaintiff's Motion. In a letter dated February 5, 2008 and faxed at 11:37 A.M., the Defendant instructed the Union County Board of Elections to follow Directive 2008-01 immediately, stating that the failure to follow her Directive is tantamount to insubordination and 'could be considered a violation of the Board Member's oath.' (Exhibit 2). Complying with the Defendant's Directive will result in the Plaintiffs hiring two sets of poll workers to operate each separate voting system in each precinct, printing two sets of ballots, and purchasing optical scan machines, secure ballot boxes and privacy booths for the optical scan system. Because of the time constraints, the hiring and training issues, and the significant amount of expense involved in complying with the Defendant's Directive, the Plaintiffs will be irreparably harmed if the Court does not issue a temporary restraining order and a preliminary injunction.

There is no mechanism to recover these costs.

III. No Third Parties Will Be Unjustifiably Harmed by Issuance of the Order

The Union County voters will not be harmed if the Court issues a temporary restraining order or a preliminary injunction in this case. Both of these orders will preserve the status quo of the situation as it currently exists and, as a result, the Plaintiffs would not be required to expend significant taxpayer funds which have not been appropriated to comply with the Defendant's Directive. The voters of Union County will still be able to vote in the upcoming primary and general elections. The Union County Board of Elections has successfully completed seven (7) elections using DREs voting equipment without incident.

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If a Union County voter desires to vote using a paper ballot, the Board of Elections has these ballots available to individuals to fill out and vote absentee. Thus, no Union County voters will be injured with the Court's issuance of a temporary restraining order or a preliminary injunction.

IV. The Public Interest will be Served by Issuing the Order Maintaining the Status Quo

The issue of whether to implement the Defendant's Directive is a matter of great public interest. Fifty-seven counties in the State of Ohio are affected by the Defendant's Directive and many of the county Boards of Elections are seeking guidance on the lawfulness of the Defendant's Directive. There also exists a significant concern in the affected counties about the cost to the residents and voters of implementing the Defendant's Directive. Another concern for the public is the fact that both HAVA and State law require that voting machines must preclude electors from undervoting or overvoting, i.e., from "voting on any candidate or upon any question for whom or upon which the elector is not entitled to vote, from voting for more persons for any office than the elector is entitled to vote for, and from voting for any candidates for the same office or upon any question more than once." R.C. 3506.10. The central count optical scanning system (CCOS) does not account for this, absent the installation of additional equipment at the precinct level.

It is true that State and Federal law allow the use of CCOS equipment so long as the State establishes a voter education system specific to that voting system. However, the Directive does set forth any procedure for a replacement ballot in the event the voter cannot otherwise change or correct the error at the precinct level. Thus, there is a concern that the use of a CCOS without additional equipment will violate both State and Federal law. In contrast, the DRE with the VVPAT provides immediate feedback of any undervoting or

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overvoting issues, and permits the voter to immediately correct any error and ensure their vote is counted. Thus, the public interest will be best served if the Court issues a temporary restraining order or a preliminary injunction maintaining the status quo and ensuring the preservation of the current election system.

Conclusion

A balancing of the interests clearly favors the issuance of the requested relief.

Respectfully Submitted,

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AFFIDAVIT OF DAVID W. PHILLIPS, ESQUIRE

David W. Phillips, being first duly cautioned and sworn according to law, states the following:

- 1.) I am a licensed attorney in good standing with the State of Ohio. My bar registration number is 0019966.
- 2.) I am the duly elected Prosecuting Attorney for Union County, Ohio. My current term began on January 3, 2005 and continues through December 31, 2008.

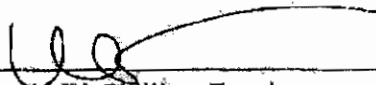
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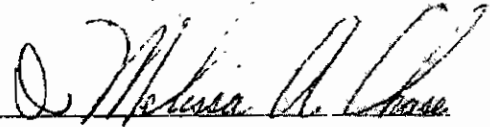
3.) In an effort to ensure that the Defendant receives immediate notice of the filing of the Plaintiff's Motion for a Temporary Restraining Order and Preliminary Injunction along with the Memorandum in Support and Affidavits, I will fax and/or email a copy of these documents to legal counsel for the Defendant and/or the Defendant upon the filing with this Court.

FURTHER AFFIANT SAYETH NAUGHT.



David W. Phillips, Esquire

Sworn to and subscribed in my presence this 6th day of February, 2008.



Notary Public
Lifetime Commission

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AFFIDAVIT

IN THE STATE OF OHIO)
)ss.
COUNTY OF UNION)

Gary Lee, being first duly cautioned and sworn according to law and under penalty of perjury, states the following upon my personal knowledge, information and belief.

- 1.) I am one of the Plaintiffs in the instant action. I am also a duly elected County Commissioner for Union County Ohio and I have served in that position for 6 years. Before becoming a County Commissioner, I was a duly appointed member of the Union County Board of Elections for over 14 years. I was on the Union County Board of Commissioners when the DREs were purchased.
- 2.) I am very familiar with the Directive 2008-01 issued by Jennifer Brunner, Ohio Secretary of State which required the Board of Elections to provide paper ballots using the Central Count Optical Scan system to any voter who requests them.
- 3.) I have also read and reviewed a letter dated February 5, 2008 directed to the attention of Karla R. Herron, Director, Union County Board of Elections, from Jennifer Brunner instructing the Union County Board of Elections to follow her Directive 2008-01. The letter was faxed to the Board of Elections at 11:37 A.M. on February 5, 2008.
- 4.) As County Commissioners, we are charged with providing the funding to the Union County Board of Elections so that it may conduct elections in Union County in accordance with the law.
- 5.) The County Commissioners made the decision in 2005, upon the recommendation of the Board of Elections, to purchase and use the digital recording electronic machines in elections held in Union County. The cost of the voting machines (DRE) was \$550,716.36.
- 6.) On Thursday, February 7, 2008, the County Commissioners must vote to provide additional funding to the Union County Board of Elections so that it may comply with the Secretary's Directive 2008-01. Based on information provided to me by the Board of Elections, the cost for compliance with the Directive will exceed \$68,000.00 which must be paid from county general funds. Without an immediate decision by the Commissioners concerning the Board of Elections' request for funding, the Board will not be able to comply with the Secretary's Directive.

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- 7.) This is a significant additional expense to the County and will be an unnecessary expenditure of funds to add a second voting system to Union County.
- 8.) The Presidential primary election will be held on March 4, 2008, less than thirty days after the receipt of the Secretary of State's letter. Based upon my experience as a Member of the Board of Elections, it is my belief that the county will not be able to accomplish all of the requirements set forth in the Directive because of the time constraints and the significant cost.
- 9.) Based upon my experience as a member of the Board of Elections, I believe that compliance with the Secretary of State's Directive, specifically the use of two separate and distinct voting systems in the upcoming primary election on March 4, 2008, will cause confusion, chaos and turmoil for Union County voters.
- 10.) It is my belief as well that educating voters on the use of two different systems will cause delay in the voting process that will negatively impact on the ability of the Board of Elections to promptly count the votes and return election results.
- 11.) In a letter dated February 5, 2008 directed to my attention, Jennifer Brunner, Ohio Secretary of State instructed the Union County Board of Elections to follow her Directive 2008-01. She threatened to remove any board member who fails to comply with her directive.
- 12.) In her Directive, the Secretary of State required the Board of Elections to provide paper ballots using the Central Count Optical Scan system to any voter who requests them.
- 13.) My concerns in complying with the Secretary of State's Directive are as follows:
 - The board must research costs and submit a funding request and/or a submit a proposed budget to the County Commissioners by Thursday, February 7, 2008 which includes all of the new equipment and supplies that we have to purchase;
 - The board of elections has voted 4-0 to hire two sets of poll workers- one set to assist voters with the DREs and the other set to assist voters with the optical scan system in order to comply with the Secretary's directive.
 - The board also will have to train the poll workers on two different voting systems;
 - The board will have to locate and purchase secure ballot boxes at a reasonable cost; and

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- The board will have to locate and purchase privacy booths to be used with the optical scan system.

- 14.) In an effort to comply with the Secretary's Directive, the Board of Elections passed a resolution on February 5, 2008. In the resolution, the members determined that we would provide paper ballots (ballots used with the optical scan system) to 101% of the voters in each precinct in accordance with Ohio Revised Code Section 3505.11(A). The Secretary of State in her Directive only required us to provide paper ballots to 10% of the voters in each precinct.
- 15.) I have great concern about the cost of all of the equipment and supplies that the county will need to comply with the Secretary's directive from the county general fund. Based upon information provided to me by the Board of Elections, the cost of complying with the Secretary of State's Directive will exceed \$68,000.00. The ballots alone will cost \$0.39 each for 37,500 ballots or an estimated cost of \$14,625.00. The cost of the secure available ballot boxes is the amount of \$200.00 per precinct for each of the forty-six precincts for a cost of \$9,200.00. The cost of additional poll workers to comply with the directive is \$95.00 times 184 poll workers plus a cost of training of \$25.00 each or a total cost of \$22,080.00.
- 16.) I am also greatly concerned about the issue of overvoting and undervoting when the optical scan machines are used. Since the ballots are scanned at a centralized location, the voter will be unable to correct a ballot in which he or she under or over voted. Based on my experience, the use of paper ballots will lead to an increase in spoiled votes.
- 17.) I am also greatly concerned because voting on absentee ballots begins on Friday, February 8, 2008. In addition, the board of election has not yet purchased any privacy booths to use with the paper ballots, nor have funds been appropriated for this purpose.
- 18.) Because of the requirement of the use of two different and distinct voting systems in the upcoming primary election on March 4, 2008, it is necessary for the Board of Elections to rewrite the Voting Instructions Guide and the Poll Worker's Guide to incorporate information on the use paper ballots. It will also be necessary for the Board of Elections to change the chain of custody certificates to reflect the paper ballots that will be voted at the precincts.
- 19.) Thus far, the County has had no guidance from the Secretary of State on the issues that will arise in operating two voting systems including what to do with voters who wish to switch from DRE to paper or vice-versa.

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20.) The county will lose space in each of the precincts to install the necessary privacy booths necessary to comply with the Secretary's Directive. The need for voters to read the instructions on using the ballots will cause delays in the voting process.

FURTHER, Affiant sayeth naught.

Gary Lee

Gary Lee, Commissioner (Affiant)
Board of Commissioners, Union County, Ohio

Sworn to and subscribed in my presence this 6th day of February, 2008.

Michelle H. Chase
Notary Public
Lifetime Commission

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