

INTRODUCTION

The State of Ohio¹ urgently asks this Court to restore order to Ohio's election, as a district court—in a dramatic departure from the Supreme Court's most recent admonition against undue, last-minute interference in elections—has just unsettled Ohio law by putting parts of Ohio's voter-identification law on hold. Ohio's elections officials have been working diligently all year to iron out any remaining wrinkles in the elections process, but in these final days, the court stepped in as a new elections director. To be sure, the court may have meant to resolve uncertainty, but its broad-brush approach has caused more problems than it solved. That is so because our experience has shown—and the Supreme Court has said—that late-breaking court orders can be themselves unsettling, as elections officials must change directions daily to follow the restraining order du jour. See *Purcell v. Gonzales*, 549 U.S. ___, 2006 Lexis 8000 (Oct. 20, 2006). As explained below, the court's mistaken orders are a textbook example of what the Supreme Court has said *not* to do. That is not to say that no election litigation is justified, as courts may and should step in to address truly constitutional problems, when both law and equity support the court's role. But this is not such a case, so last night's orders should be reversed.

¹ While news reports have indicated that the Secretary of State did not want to appeal the district court's orders, the Attorney General of Ohio has separate litigation authority in defending the State of Ohio and its officers.

Late last night, the district court in this case ordered parts of Ohio’s voter identification law to be put on hold, after Ohio spent months of time and millions of dollars educating voters about the new rules. The court also scheduled a hearing for next Wednesday on whether it will also enjoin our law for Election Day, and Plaintiffs have already sent subpoenas and notices for discovery over the next few days. So Ohio’s election officials will have to step away from election planning to sit through depositions and court proceedings.

Worse yet, this last-minute crisis is entirely the creation of Plaintiffs, not the State of Ohio. Ohio passed the voter identification law in February, but Plaintiffs waited eight months, and sued just *three days ago*. The court rewarded this delay by issuing a temporary restraining order at approximately 9:30 last night, just twelve days before the election, and with early absentee voting already well underway. In the circumstances here—namely, the last-minute timing, Ohioans’ heightened concerns about electoral consistency, and the recent on-point guidance from the Supreme Court—the decision below does far more harm than good. The Court should vacate it without delay.

The Supreme Court ruling in *Purcell v. Gonzales*, above, is directly on point. Just last week, after the Ninth Circuit had enjoined Arizona’s voter-identification law, the United States Supreme Court vacated the injunction and allowed the law to go into effect. See *Purcell*, 549 U.S. ___, 2006 U.S. Lexis 8000, at *8. In doing

so, the Supreme Court cautioned federal courts not to rewrite election laws in the weeks before an election, as late-breaking court orders can cause chaos: “[c]ourt orders affecting elections . . . can themselves result in voter confusion and consequent incentive to remain away from the polls.” *Id.* at *6. The Court further explained that allowing Arizona’s voter identification law to go into effect could not truly harm the complaining voters, as those without identification would not be turned away at the polls, but would instead be allowed to vote a provisional ballot, which is counted after any identification issues are resolved after the election. *Id.* at *1-*2.

Ohio urgently asks this Court to vacate the district court’s three orders and restore our law, just as the Supreme Court did with Arizona’s law. Indeed, here, the time before the election – less than two weeks – is even shorter than it was when the Supreme Court in *Purcell* vacated the injunction against Arizona’s voter identification rules. Accordingly, this Court should stay or vacate the orders below, and allow Ohio’s law to go into effect during this now-imminent election.

STATEMENT OF THE FACTS

The emergency situation here has prevented the parties from producing a transcript of the hearing held in District Court. Thus, citations to the record are not possible.

On January 31, 2006, the Ohio General Assembly passed House Bill 3, Ohio's comprehensive election reform bill (the "Election Reform Law"). The Ohio Governor signed the bill on the same day. Many provisions of the Election Reform Law went into effect on May 2, 2006, and the remaining provisions went into effect on June 1, 2006. Indeed, the entire Voter Identification Law, the portion of the law at issue in this case, was in effect and enforced for elections held in Ohio on August 8, 2006, as well as elections held in the State on September 14 and 15, 2006.

The Voter Identification Law provides in part:

(A)(1) When an elector appears in a polling place to vote, the elector shall announce to the precinct election officials the elector's full name and current address and provide proof of the elector's identity in the form of a current and valid photo identification, a military identification that shows the voter's name and current address, or a copy of a current utility bill, bank statement, government check, paycheck, or other government document, other than a notice of election mailed by a board of elections under section 3501.19 of the Revised Code or a notice of voter registration mailed by a board of elections under section 3503.19 of the Revised Code, that shows the name and current address of the elector. If the elector provides either a driver's license or a state identification card issued under section 4507.50 of the Revised Code that does not contain the elector's current residence address, the elector shall provide the last four digits of the elector's driver's license number or state identification card number, and the precinct election official shall mark the poll list or signature pollbook to indicate that the elector has provided a driver's license or state identification card number with a former address and record the last four digits of the elector's driver's license number or state identification card number.

(2) If the elector has but is unable to provide to the precinct election officials any of the forms of identification required under division (A)(1) of this section, but has a social security number, the elector may provide the last four digits of the elector's social security number. Upon providing the social security number information, the elector may cast a provisional ballot under section 3505.181 [3505.18.1] of the Revised Code, the envelope of which ballot shall include that social security number information.

O.R.C. § 3505.18.

The Voter Identification Law also provides that if a person who requests to vote is unable to provide any of the forms of identification required under O.R.C. § 3505.18(A)(1) and has a social security number but is unable to provide the last four digits of the social security number, the person may vote a provisional ballot. O.R.C. § 3505.18(A)(3). Additionally, if an elector does not have identification or a social security number, the elector may execute an affirmation under penalty of election falsification that the elector cannot provide the identification or the social security number information for those reasons, and vote a provisional ballot. O.R.C. § 3505.18(A)(4). Further, if an elector does not have identification or a social security number, and declines to execute the affirmation, the elector may vote a provisional ballot. O.R.C. § 3505.18(A)(5). Finally, if the elector has but declines to provide identification or the last four digits of her social security number, that elector still may vote a provisional ballot. O.R.C. § 3505.18(A)(6).

The Voter Identification Law provides similar requirements for voters seeking absentee ballots, except that, in addition to the forms of identification specified in §

3505.18(A)(1), an absentee ballot applicant may also satisfy the identification requirements on his or her absentee ballot application by writing in his or her driver's license number or the last four digits of his or her social security number. O.R.C. § 3509.03(E). The law also requires the elector to provide one of the specified forms of identifying information when completing his or her absentee ballot. O.R.C. § 3509.04(B); O.R.C. § 3509.05(A).

Like the provisions governing election-day voting, the absentee voter identification requirements provide procedural safeguards to ensure that legitimate voters will not be disenfranchised. If a director of a board of elections receives an incomplete absentee ballot application, the director is promptly to notify the applicant of what additional information is needed. O.R.C. § 3509.04(A). Once a voter has successfully obtained an application for an absentee ballot, the voter has assurance that the identifying information provided was adequate and the voter need only resubmit the same identifying information when casting his or her absentee ballot. A voter who has requested an absentee ballot and does not receive it may cast a provisional vote on election day. O.R.C. § 3509.09. If a voter's absentee ballot, once cast, fails to comply with the voter identification requirements, then the ballot will not be counted, just as if the voter had failed to comply with any of the other procedures of absentee voting that have been in place for years, such as by removing the stub on the ballot, failing to sign the ballot,

failing to provide one's birth date, or mailing back more than one ballot in the same envelope. O.R.C. § 3509.07.

The Secretary of State's Directive 2006-78, attached as Exhibit A, further clarifies the Ohio Voter Identification Law. For example, the directive explains that a "current" voter identification document is one that is "dated not more than six months from the date that it is presented to an election official." See *id.* The Directive explains that a "government document" means "any local, state or federal government document that shows the voter's name and current address." *Id.* The Directive also states that a driver's license that does not contain the current address of the voter is acceptable for use as an identification document. *Id.* The directive clarifies that a voter's "driver's license number," which may be used for election day voting if the address shown on the license is not current, see O.R.C. § 3505.18(A)(1), or may be used as proof of identification in absentee ballot voting, see O.R.C. §§ 3509.03(E)(1) and 3509.04(B), is the number in the field labeled "License No." on a voter's Ohio driver's license. Finally, the Directive explains that individuals who vote in person by absentee ballot before election day must provide the same identification requirements as individuals voting in person on election day, i.e., those requirements set forth in O.R.C. § 3505.18. *Id.*

Plaintiffs sued on October 24, 2006, just two weeks before the election. On October 26, 2006, the district court issued a temporary restraining order

immediately suspending operation of Ohio's Voter Identification Law with regard to absentee voting in the current election, which began in early October. Cf. O.R.C. §3509.01. The district court also has scheduled a hearing for Wednesday, November 1, 2006, to address the Voter Identification Law provisions applying to in-person election-day voting. Although the district court concluded that "Plaintiffs' members will suffer immediate and irreparable injury if the restraining order is not granted" (p.3) the district court made no factual findings regarding any injury the plaintiffs have suffered or will suffer. Likewise, while the district court concluded that "no third parties will be irreparably harmed if the restraining order is granted, . . ." (p.3), the court made no factual findings elaborating upon that conclusion.

The State appealed the district court's orders last night, and we now ask this Court to stay them pending this appeal of that order.

ARGUMENT

The law and equities in this case compel a stay pending appeal. Without a stay pending appeal, Ohio loses the ability to enforce its election laws throughout the voting process, which permits early absentee voting in-person at Ohio's boards of elections now through the day of the election. Ohio's case on the merits is likely to succeed; however, the urgency of the election means that Ohio's ability to

enforce its voter identification law is all but lost without a stay of the district court's order.

A. Ohio may appeal this temporary restraining order now, and the Attorney General may do so in the Secretary of State's name.

Ohio may appeal the district court's TRO now for the simple reason that this order puts an end to an underway process, and anything less than an immediate appeal will be too late. When a party, like the Appellant here, shows that a district court's interlocutory order "might have a 'serious, perhaps irreparable, consequence,' and that the order can be 'effectually challenged' only by an immediate appeal," a court of appeals has jurisdiction under 28 U.S.C. § 1292(a)(1). *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 84 (1981); *Sims Varner & Assocs. v. Blanchard*, 794 F.2d 1123, 1127 (6th Cir. 1986); *Adams v. Vance*, 570 F.2d 950, 953 (D.C. Cir. 1978); Wright & Miller, *Federal Practice and Procedure* § 2962, at 619 ("[T]he label attached to an order by the trial court is not decisive with regard to whether it falls under Rule 65(a) or Rule 65(b) and the appellate court will look to other factors to determine whether an appeal should be allowed.").

Most important, this Court has recognized that elections cases may call for immediate review of injunctive orders. *See Summit County Democratic Central and Executive Committee v. Blackwell*, 388 F.3d 547 (6th Cir. 2004). Here, again, we have an order that must be reviewed immediately, or it will be too late.

B. Ohio is entitled to a stay pending appeal under the Court’s standards.

This Court’s balancing test for granting stays pending appeal weighs heavily in favor of granting a stay here. The following factors guide the Court’s decision: “1) whether the applicant has demonstrated a likelihood of success on the merits; 2) whether the applicant will be irreparably injured absent a stay; 3) whether issuance of the stay will substantially injure the other interested parties; and 4) where the public interest lies.” *Nader v. Blackwell*, 230 F.3d 833, 834 (6th Cir. 2000) (“These factors weigh in favor of granting a stay given the close proximity of the November [] election.”); *id.* at 835 (“A state’s interest in proceeding with an election increases as time passes, decisions are made, and money is spent.”). “The probability of success that must be demonstrated,” the Court has held, “is inversely proportional to the amount of irreparable injury plaintiffs will suffer absent the stay[,]” meaning that “a movant need not always establish a high probability of success on the merits.” *Mich. Coalition of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991).

Each factor compels granting the stay. Most important are the equities here, as the court’s broad order opens the door to unsettling the election process in Ohio during the final days before November 7. By contrast, allowing the voter identification requirements to be enforced will not block a single vote. Finally, Ohio, not Plaintiffs, will ultimately succeed on the merits, as this is a valid law that

does not infringe on the right to vote. To the contrary, it protects the right to vote, as it helps to ensure that Ohio's real voters, not fraudulent ones, decide our elections.

C. Plaintiffs lack standing to maintain their claims.

First, the order here should be stayed or vacated, as the Plaintiffs lack standing to pursue their claims. Plaintiff associations have not shown that they have suffered any “injury in fact” that is “actual or imminent, not conjectural or hypothetical,” *Friends of Earth, Inc. v. Laidlaw Env'tl. Servs., Inc.*, 528 U.S. 167, 180 (2000), much less that any such injury was caused by the challenged law, or would be redressable by a federal court order. *Cf. Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). According to the Complaint, Plaintiff SEIU is a local affiliate of a national employees' union, Compl. Para. 7, and plaintiff NEOCH alleges that it is a “non-profit charitable organization operating in the City of Cleveland that provides services to” homeless people, Compl. Para. 7. Those allegations fall far short of showing that the voting laws plaintiffs challenge cause injury in fact to the plaintiffs, or indeed to any of their members. *Cf. Kowalski v. Tesmer*, 543 U.S. 125, 129, n. 2 (2004) (assuming, without deciding, that attorneys who claimed to represent criminal defendants on appeal would have standing to challenge Michigan's rule on appointed counsel for indigents based on the allegation that the rule has reduced the number of cases in which the attorneys

could be appointed). The Plaintiff associations are not asserting their own legal rights, and have failed to show that they have standing to bring the claims they raise on behalf of unnamed others, including the associations' members. Cf. *Warth v. Seldin*, 422 U.S. 490, 498-99 (1975).

D. Shutting down Ohio's voter identification system as voting begins seriously threatens Ohio's interest in preserving a fair and legitimate election system for its citizens.

Ohio election officials have worked diligently for the past few months to implement Ohio's Voter Identification Law, which went into effect in June 2006. Since the law was passed, Ohio and its Boards of Elections have spent months of time and millions of dollars devising procedures to implement the law and educating voters about the new rules. Now, little more than a week before the election, the district court at the behest of the plaintiffs, has shut down parts of Ohio's election procedure relating to absentee ballots. To that end, the district court even has drafted its own directives to the county Boards of Elections, and ordered the Secretary of State to issue them. Indeed, the district court also scheduled a preliminary injunction hearing for next Wednesday, as it might also enjoin our law for Election Day. Plaintiffs have already sent notices for discovery and subpoenas to take place over the next few days. Ohio's election officials will have to turn their attention from election planning to litigation in the critical final days.

As the Court observed just last week in *Purcell v. Gonzalez*, “[c]ourt orders affecting elections . . . can themselves result in voter confusion and consequent incentive to remain away from the polls.” 2006 U.S. Lexis 8000, at *6. In *Purcell*, after the Ninth Circuit had enjoined Arizona’s voter-identification law, the Supreme Court vacated the injunction and allowed the law to go into effect. See *id.* at *8. In doing so, the Court cautioned federal courts not to rewrite election laws in the weeks before an election, as late-breaking court orders can themselves cause chaos. See *id.* at *6-*7.

Consequently, “[g]iven the imminence of the election and the inadequate time to resolve the factual disputes” in that case, the Court vacated the Ninth Circuit’s order, thus “of necessity allow[ing] the election to proceed without an injunction suspending the voter identification rules.” *Id.* at *8. This Court should follow the Supreme Court’s approach in *Purcell*, and vacate the district court’s interlocutory order suspending Ohio’s voter identification rules.

This Court also has recognized the “strong public interest in smooth and effective administration of the voting laws that militates against changing the rules in the hours immediately proceeding the election.” *Summit County*, 388 F.3d at 551 (6th Cir. 2004). While Election Day is eleven days away, voting by absentee ballots at boards of elections has already begun, and will continue through Election Day. Consequently, in this case, the strong public interest in “smooth and effective

administration of the voting laws” also militates strongly in favor of allowing Ohio to continue to require voter identification from now through Election Day.

Moreover, this Court should disallow this pre-election maneuvering for the simple reason that it was filed too late, and it is unfair to disrupt Ohio’s machinery in this way. The voter identification rules were enacted nine months ago, and became effective almost five months ago. But this lawsuit was not filed until *three days* ago.

Additionally, of course, Ohio’s voter identification law was designed to protect against fraudulent voting, an unquestionably important state interest. Ohio’s law serves as an important check to confirm that each person offering to vote is in fact who he or she claims to be. No duly qualified voter wants to arrive at the polls on election day only to find out that “someone” has already voted in her name.

Ohio’s voter identification law not only protects against actual fraudulent voting – and creates a significant deterrent against such fraud – it also assures greater public confidence that such fraudulent voting has not tainted the election results, whatever they turn out to be. As the Court in *Purcell* recognized last week:

Voter fraud drives honest citizens out of the democratic process and breeds distrust of our government. Voters who fear that 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.”

2006 Lexis 8000, at *5 (citation omitted). Ohio’s voter identification law, like its Arizona counterpart allowed to go into effect in *Purcell*, protects against actual voter fraud and public perceptions of such fraud.

For all these reasons, the Court should vacate the district court’s order suspending Ohio’s voter identification rules, as not to do so would interfere with orderly election procedures both now and on Election Day, and would harm our electoral process and our faith in it.

E. Ohio is substantially likely to succeed on the merits, and Plaintiffs have not shown that they will be unconstitutionally harmed by the voter identification law.

In contrast to the drastic harm that would befall our election if the challenged law is enjoined, Plaintiffs have not shown any irreparable harm that they will suffer if voters are required to show identification at the polls. Complaints of inconvenient delay are not complaints of disenfranchisement, and, in any event, are unsupported by any factual findings by the district court. Any predictions about Election Day delay at the polls under the recently clarified Directives are sheer speculation. Cf. *Summit County Democratic Central & Exec. Comm. v. Blackwell*, 388 F.3d 547, 552 (6th Cir. 2004) (Ryan, J., concurring) (“The plaintiffs have pleaded and the district courts have found a possible chamber of horrors in voting places throughout the state of Ohio based on no evidence

whatsoever, save unsubstantiated predictions and speculations.”). Finally, claims that voters will stay home, for fear of having to provide identification, are not substantiated, and in any case, are not enough to outweigh the harm caused by preventing enforcement of Ohio’s sensible rules, for as noted above, headlines about the absence of voter identification rules will invite cheaters to take chances.

As noted above, the district court made no factual findings regarding any injury that the plaintiffs have suffered or will suffer from Ohio’s requirement that voters produce identifying information. The court’s sole specific finding, that certain statutory terms describing acceptable forms of identification are unconstitutionally vague, has already been mooted by the Secretary of State’s Directive 2006-78. The court’s emergency order does not make mention of this Directive, which was filed as part of the record before the court. But if the district court had addressed all of the evidence before it, it would have been compelled to conclude that the Directive’s definition of “current” to mean “six months,” or the definition of “government document” to mean “any local, state or federal government document that shows the voter’s name and current address,” or the definition of “driver’s license number” to mean the number in the field labeled “License No.” on one’s license, are not vague at all, and certainly not unconstitutionally vague.

Thus, even if the district court had found that the statute was problematic until clarified by the October 26 directive, a forward-going temporary restraining order against applying the clarified statute simply makes no sense. The district court's order performs major surgery upon Ohio's statutory scheme in order to fix what was never more than a minor blemish. In doing so, the court creates rather than cures inconsistency in the course of an ongoing election process.

The district court's sweeping order illustrates why federal judicial challenges are not the appropriate vehicle for resolving the administrative details of state elections. However well-meaning judicial efforts may be in micro-managing Ohio's statutory election scheme, the goals of stability and consistency are best served when the election process is permitted to work as set forth under Ohio law: namely, when legislatures craft – well in advance – the laws that will govern an election, and the Secretary of State issues clarifying directives as needed. Federal judicial intervention is appropriate only insofar as the laws threaten to deprive anyone of their right to vote.

Any potential risk of disenfranchisement occurs only to the extent that Ohio voters, having unwittingly fallen short of identification requirements, are not permitted to rectify the problem or to cast a provisional ballot. We are committed to working with the court toward a consent TRO that obviates any risk of such a result. Insofar as absentee voters may have difficulty identifying their driver's

license numbers, given that Ohio licenses, in addition to listing a number labeled “License No.,” also list a different number underneath the bearer’s photograph, we emphasize again that this dilemma was indisputably cured going forward by the Secretary of State’s Directive. We also reiterate that efforts to resolve any legitimate confusion in the statute were utterly frustrated by the plaintiffs’ late filing, months after the statute was passed and midway through voting, suggesting that the plaintiffs’ true concern is not improving clarity and due process in Ohio’s election but rather overturning a statute that they would not have chosen to enact. Despite the plaintiffs’ delay in bringing suit, in the interest of ensuring consistent application of law throughout Ohio’s election, Ohio would not appeal, and indeed would consent, to replacing the current overbroad TRO with a limited, curative order, e.g., an order ensuring that no already-cast ballots be discarded due to the voter entering a seeming but not actual license number.

While the current TRO from the district court relates only to pre-election-day absentee ballot voting, the court has scheduled an upcoming hearing on Wednesday, November 1, 2006, to address the application of Ohio’s voter identification law at the polls. Guidance from this Court regarding how strongly to interpret the *Purcell* Court’s admonition against enjoining voter laws when elections are imminent, see 2006 Lexis 8000, at *8, would provide guidance to the

district court as it approaches the November 1 hearing, and would result in less need for this Court's later review of those issues on the eve of the election.

CONCLUSION

For the above reasons, the State of Ohio asks this Court to stay or vacate the orders below.

Respectfully submitted,

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