

**UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION**

PROJECT VOTE, et al.,	)	
	)	
Plaintiffs,	)	
	)	Civil Action No. 08-2266
vs.	)	
	)	Judge Gwin
MADISON COUNTY BOARD OF	)	
ELECTIONS, <i>et al.</i>	)	
	)	
Defendants.	)	

**MEMORANDUM OF DEFENDANT MADISON COUNTY BOARD OF ELECTIONS IN  
OPPOSITION TO MOTION FOR TEMPORARY RESTRAINING ORDER**

This case is about a legal opinion issued on September 5, 2008, by the Madison County Prosecuting Attorney to the Madison County Board of Elections regarding Directive 2008-63 issued by Ohio's Secretary of State. Plaintiffs object to the conclusion in that opinion letter that permitting newly registered voters to immediately cast in-person "absentee" votes between September 30 and October 6 would be unlawful. The dispute over the lawfulness of same-day registration and voting is currently the subject of a mandamus action before the Ohio Supreme Court, as mentioned in the Complaint herein. The organizational Plaintiffs herein also have filed an amicus brief in the Ohio Supreme Court action in support of the Secretary of State's position. The federal issues regarding same-day registration and voting are also the subject of a federal

action pending in the Southern District of Ohio, which is the federal district in which Madison County is located.<sup>1</sup>

Nothing in federal law requires Ohio to permit same-day registration and in-person “absentee” voting, and many of the provisions of federal law cited in Plaintiffs’ TRO motion are not in dispute. Secretary of State Directives 2008-67, 2008-78, 2008-79, 2008-81 and 2008-82 (copies of which are attached hereto) address many of the provisions of federal statutes discussed by Plaintiffs, but were not the subject of the Madison County Prosecuting Attorney’s opinion letter and no one at the Madison County Board of Elections is in danger of disregarding them. The dispute between the Secretary of State and the Madison County Board of Elections is solely about same-day registration and voting.

Plaintiffs seek a temporary restraining order from this court requiring Madison County Board of Elections to permit same-day registration and voting. Plaintiffs are not entitled to such an order because:

1. This Court lacks subject matter jurisdiction and venue over this case.
2. Federal law does not mandate same-day registration and voting.
3. State law does not permit same-day registration and voting.
4. Same-day registration and voting would violate HAVA.

**I. THIS CASE SHOULD BE DISMISSED FOR LACK OF SUBJECT MATTER JURISDICTION AND VENUE, OR IN THE ALTERNATIVE, TRANSFERRED TO THE SOUTHERN DISTRICT COURT OF OHIO.**

This Court should dismiss Plaintiffs’ Complaint because it lacks subject matter jurisdiction and because this Court is not the proper venue. Defendant Madison County Board of Elections incorporates by reference herein its arguments set forth in its Motion to Dismiss, or

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<sup>1</sup> *Ohio Republican Party, et al. v. Jennifer Brunner*, Southern District of Ohio Case No. 2:08-cv-913.

in the Alternative, Transfer Venue and its Memorandum of Points and Authorities in Support of its Motion to Dismiss, or in the Alternative, Transfer Venue, which were filed today.

## **II. FEDERAL LAW DOES NOT MANDATE SAME-DAY REGISTRATION AND VOTING.**

Plaintiffs argue that regardless of what Ohio's Constitution and statutes require, federal law requires Ohio to permit immediate in-person absentee voting by newly registered persons. In fact, none of the federal statutes discussed require immediate in-person voting by newly registered voters, and Plaintiffs have cited no case authority imposing such a requirement.

The U.S. Supreme Court has recognized "that a person does not have a federal constitutional right to walk up to a voting place on election day and demand a ballot. States have valid and sufficient interests in providing for some period of time -- prior to an election -- in order to prepare adequate voter records and protect its electoral processes from possible frauds." *Marston v. Lewis*, 410 U.S. 679, 680 (1973). Nevertheless, Plaintiffs argue that the Voting Rights Act ("VRA") and National Voter Registration Act ("NVRA") require States to permit same-day registration and voting. They do not. In fact, both the VRA and NVRA grant some flexibility to states to determine who "eligible voters" are.

The VRA prohibits citizens from being denied the right to vote for failure to comply with durational residency requirements or failure to be physically present in the State on election day, "if such citizen *shall have complied with the requirements prescribed by the law of such State* or political subdivision *providing for the casting of absentee ballots* in such election." 42 U.S.C. § 1973 (emphasis added). But when a citizen has failed to comply with the State's law regarding the casting of absentee ballot, then the right to vote has not been infringed upon.

Furthermore, the NVRA deals purely with voter *registration*, not voter qualifications. *Assoc. of Community Organizations for Reform Now v. Miller*, 912 F. Supp. 976, 985

(W.D.Mich. 1995) (“Every court that has considered whether the NVRA alters voter qualifications fixed by a state has found that it does not.”).

VRA and NVRA neither require nor expressly permit same-day voting by new registrants. The temporary restraining order requested by Plaintiffs would provide no time to ensure that new registrants are not attempting to commit voter fraud, nor would it provide any time for voter rolls to be updated. *No one* has cited *any* provisions of federal law that require Ohio to permit immediate voting by previously unregistered persons.

Plaintiffs have argued that there are provisions of federal law that would require absentee ballots to be issued to some voters after they have been registered for a period of time less than thirty days, but none has suggested that any federal law requires Ohio to permit immediate in-person voting of an absentee ballot the same day as the person registers for the first time. The Madison County Prosecuting Attorney’s opinion was not dealing with the question of whether or not to issue an absentee ballot at least seven days before the election to someone who registers 31 days before the election, but only the question of whether same-day registration and voting is permitted under Ohio law. Even assuming, for the sake of argument, that there were a federal law requiring Ohio to reduce the thirty-day registration requirement in some instances to twenty or twenty-nine days, there is clearly no authority under federal or state law for a temporary restraining order that would reduce Ohio’s registration requirement to *zero* days.

No one will be deprived of their right to vote. Persons registering to vote during the so called “overlap period” will be able to vote – on election day *at the polls*. In *Friedman v. Snipes*, 345 F. Supp. 2d 1356, 1377 (S.D.Fla. 2004), the court found that the imposition of a deadline by which voters must return votes does *not* disenfranchise voters. The court explained that the plaintiffs were “still able to cast a ballot, however, they must either return their absentee ballots

in sufficient time so that votes are received by the 7 p.m. deadline or they must vote in person.”

Id. Similarly, here, voters have a choice: register in time to qualify as an elector before requesting an absentee ballot or vote in person.

### III. OHIO LAW DOES NOT MANDATE SAME-DAY REGISTRATION AND VOTING.

Plaintiffs argue that same-day registration and voting is mandated by Ohio law and that under Ohio law a person immediately becomes a qualified elector once they register, as long as their registration is thirty or more days before the next election. What Ohio law does and does not require is the subject of the mandamus action pending before the Ohio Supreme Court, which is fully competent to decide and declare Ohio law. It is neither necessary nor proper for this Court to prejudge a purely state law issue.

Madison County Board of Elections agrees that those who register thirty or more days before an election will have the right to fully exercise their franchise once they become qualified electors. However, Ohio law clearly prohibits treating newly registered electors from immediately being treated as “qualified electors” until they have been registered for the requisite period of time.

Ohio Constitution Article V, Section 1 states that “Every citizen . . . who . . . *has been registered to vote for thirty days*, [and meets all other qualifications] has the qualifications of an elector and *is* entitled to vote at all elections.” (emphasis added). Ohio’s Constitution does not say or suggest that a person who *will be* registered for thirty days from now is entitled to vote immediately.

R.C. 3501.01(N) defines a “qualified elector” as “a person *having* the qualifications provided by law to be entitled to vote.” (emphasis added). R.C. 3501.01(N) does not define a

qualified elector as a person who *will have* the qualifications provided by law thirty days from now.

R.C. 3509.03(G) requires applicants for absentee ballots to include a “statement that the person requesting the ballots *is* a qualified elector.” (emphasis added). R.C. 3509.03(G) does not permit the application to state merely that the applicant *will be* a qualified elector.

R.C. 3509.04(B) authorizes the director of each board of elections to deliver absentee ballots to applicants only “if the director finds that the applicant *is* a qualified elector.” (emphasis added). R.C. 3509.04(B) does not authorize providing absentee ballots to persons who merely *will be* qualified electors at some future time.

Nonetheless, Plaintiffs suggest that R.C. 3503.06(A) changes the “has been registered” requirement to a “will have been registered” so that the thirty-day registration requirement for “qualified electors” does not need to be met as of the time that an absentee ballot is obtained and cast, as long as the registration takes place thirty days before the election. In fact, R.C. 3503.06(A) says nothing of the kind.

R.C. 3503.06(A) says nothing about who *can* vote, but only makes a general statement about who *cannot* vote. R.C. 3503.06(A) states, “No person shall be entitled to vote at any election . . . unless the person is registered as an elector and will have resided in the county and precinct where the person is registered for at least thirty days at the time of the next election.” This statute does not conflict with Section 1, Article V of the Ohio Constitution, or with R.C. 3503.01.

R.C. 3503.06(A) does not purport to be an exhaustive statement of the requirements to be a qualified elector. Wholly apart from the thirty-day registration requirement, R.C. 3503.06 says nothing about Ohio’s constitutional requirements that a qualified elector must be a citizen of the

United States and at least eighteen years of age. Nor does R.C. 3506.03 mention R.C. 3503.21(A)'s requirements that a convicted felon or adjudicated mentally incompetent may not be registered as a qualified voter. Failing to repeat in R.C. 3503.06 all of the qualifications set forth elsewhere in Ohio law does not change or abolish those qualifications, including the requirement that the person "has been registered to vote for thirty days."

**IV. SAME-DAY REGISTRATION AND VOTING WOULD VIOLATE HAVA.**

A temporary restraining order requiring Madison County to implement a same-day registration/absentee voting scheme would create a scheme in violation of The Help America Vote Act ("HAVA"). 42 U.S.C. § 15483(a)(1)(A) requires Ohio to "implement, in a uniform and nondiscriminatory manner, a single, uniform, official, centralized, interactive computerized statewide voter registration list defined, maintained, and administered at the State level that contains the name and registration information of every legally registered voter in the State." R.C. 3503.15, similarly, establishes this duty as a matter of state law and specifies that this list "shall be the official list of registered voters for all elections conducted in this state." HAVA also requires states to verify a prospective voter's registration information. 42 U.S.C. § 15483(a)(5)(A). Permitting immediate votes to be cast by persons who have not been registered for thirty days guarantees that such persons cannot be on this official registration list at the time they cast their votes, and prevents the ability to check this "official" list with respect to such voters.

Ohio law requires all applicants to register thirty days prior to voting *precisely* so that election officials will have the opportunity to verify their information and so that applicants can correct any errors. R.C. 3503.01. *Summit County Democratic Cent. and Executive Comm. v. Blackwell*, 338 F.3d 547, 551 (6th Cir. 2004) held that Ohio's thirty-day registration period

further the State's "strong interest" in the "smooth and effective administration of [voting laws]." The relief sought by Plaintiffs would frustrate the very purpose in having an accurate and timely statewide list of qualified electors available at the time persons seek to exercise their rights as qualified electors.

While HAVA permits an individual who declares to be registered *and eligible* to vote to cast a provisional ballot when that person's eligibility is contested at the polling place, HAVA does not require that person's vote to be counted if it is determined that the person was not eligible to vote. 42 U.S.C. § 15482 (a) and (a)(4). HAVA specifically states, "If the appropriate State or local election official to whom the ballot or voter information is transmitted . . . determines that the individual *is eligible under State law to vote*, the individual's provisional ballot shall be counted as a vote in that election in accordance with State law." 42 U.S.C. § 15482(a)(4).

Far from being required by federal law, the "same-day registration/voting" procedure that Plaintiffs ask this Court to establish via a temporary restraining order would violate HAVA and undermine the integrity of the elections process.

### CONCLUSION

A party moving for a temporary restraining order has the burden of proving each of the following elements: (1) likelihood of success on the merits; (2) irreparable harm; (3) that granting the injunction will not cause substantial harm to others; and (4) that the public interest is advanced by the issuance of the injunction. Civ. R. 65 (A); *Washington v. Reno*, 35 F. 3d 1093 (6th Cir. 1994). Here, there is no likelihood of success because this Court lacks subject matter jurisdiction and venue in this district and because federal and state laws do not permit, let alone mandate the injunction sought. There is no irreparable harm because federal law permits the

right to cast a provisional vote whenever there is a dispute and because anyone properly registered thirty days before the election will have the right to vote. Granting the injunction would cause irreparable harm to others and undermine the public interest since it would violate HAVA and undermine Ohio's legitimate interest in smooth and effective administration of the voting process.

WHEREFORE, Defendant Madison County Board of Elections respectfully submits that Plaintiffs' motion for a temporary restraining order should not be granted.

Respectfully submitted,

/s/ Donald C. Brey

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**CERTIFICATE OF SERVICE**

I hereby certify that on September 28, 2008, a copy of the foregoing *Memorandum of Defendant Madison County Board of Elections in Opposition to Motion for Temporary Restraining Order* was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. All other parties will be served by regular U.S. mail. Parties may access this filing through the Court's system.

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