

IN THE SUPREME COURT OF OHIO

THE STATE OF OHIO ex rel. )  
DEWEY STOKES )  
750 Willow Bend Lane )  
Columbus, OH 43204 )

Relator, )

Case No. 08-1950

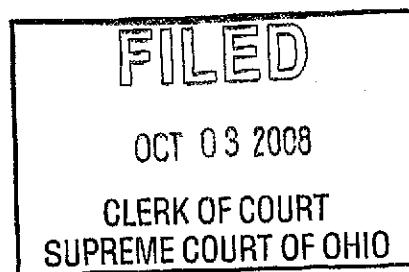
Original Action in Mandamus

Expedited Election Matter  
Under S. Ct. Prac. R. X. § 9

vs. )

JENNIFER BRUNNER, )  
Ohio Secretary of State )  
180 East Broad Street, 16th Floor )  
Columbus, Ohio 43215 )

Respondent. )



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PETITION FOR WRIT OF MANDAMUS

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This action is brought in the name of the State on the relation of Dewey Stokes, who is requesting a Writ of Mandamus. Relator states for his Verified Petition and Complaint:

INTRODUCTION

1. In keeping with Justice Brandeis' familiar maxim that "sunlight is the best disinfectant," American states—including Ohio—have a long tradition of allowing citizen observers into polling places. These observers act as the public's eyes and ears and, in so doing, deter and detect mistake, malfeasance, and outright fraud by election workers and voters.

2. Ohio Secretary of State Jennifer Brunner insists on the unprecedented position that Ohio's elections should be shielded from public scrutiny. In direct defiance of Ohio law (and contradicting her own earlier pronouncement that "[p]oll observers play an important role in assuring the public that election processes are open and transparent, affecting public trust of the process, and thus, the potential for future participation in the democratic process," *see* Secretary of State Directive 2008-29 (issued February 25, 2008)), Secretary Brunner has issued a last-minute official Advisory to all Boards of Elections permitting these boards to turn away election observers at the door. *See* Secretary of State Advisory 2008-24 (issued September 23, 2008); *see also* Exhibit B to Stokes Affidavit. This Advisory further warned Boards of Elections that they risked litigation if they admitted observers into the in-person absentee polling places. *Id.*

3. Thousands of Ohioans (and, according to disturbing news reports, even some non-Ohioans) have already voted during the so-called "Golden Week," and huge numbers of additional early votes are expected to be cast this weekend, when Senator Obama's campaign will host a Bruce Springsteen concert where attendees will be transported en masse to register and cast ballots. Relator asks only that this voting take place in the open, so that observers from both parties can ensure the integrity of the process. Relator respectfully requests that this Court take immediate action to maintain public confidence in Ohio's election processes by directing Secretary Brunner to permit observers in all early voting locations, in accordance with Ohio law.

#### **PARTIES, JURISDICTION, AND VENUE**

4. Dewey Stokes ("Relator") is a resident of Franklin County and is a qualified elector in the State of Ohio.

5. Respondent Jennifer Brunner is the duly elected Ohio Secretary of State. Pursuant to R.C. 3501.05, Respondent shall, *inter alia*, "(B) Issue instructions by directives and

advisories in accordance with section 3501.053 of the Revised Code to members of the boards as to the proper methods of conducting elections . . . ; (C) Prepare rules and instructions for the conduct of elections; [and] (M) Compel the observance of election officers in the several counties of the requirements of the election laws . . . .” R.C. 3501.05; *see also* R.C. 3501.053(A). Respondent Jennifer Brunner is an election officer and bound by the requirements of the state’s election laws. R.C. 3501.01(U)(1).

6. The Court possesses jurisdiction over the subject matter of this action and over Respondent pursuant to Article IV, § 2(B) of the Ohio Constitution. *See also State ex rel. Melvin v. Sweeney*, 154 Ohio St. 223 (1950) (noting that where the Secretary of State has erroneously informed members of the boards of elections as to their duties, the matter may be corrected through a Writ of Mandamus); *State ex rel Colvin v. Brunner*, Slip Opinion No. 2008-Ohio-5041, at 6-7 (Ohio, Oct. 1, 2008).

### **FACTUAL ALLEGATIONS**

7. Secretary of State Brunner directed county boards of election to permit potential voters to register and cast an absentee ballot in a single step during the period from September 29 to October 6, 2008. Ohio Secretary of State Directive 2008-63 (Aug. 13, 2008). She specifically directed the boards to “expedite the processing of voter registrations received during the week immediately preceding the voter registration deadline for the 2008 general election . . . , notwithstanding the provisions of R.C. 3503.19(C)(1).” *Id.* The directive requires boards of election “to develop procedures to the newly registered elector of the county at the time of registration.” *Id.*; *see also Colvin*, ¶ 6.

8. Senator Obama’s supporters have labeled this one-week period—where people can register, request an absentee ballot, and submit an absentee ballot simultaneously—“Golden

Week.” See <http://votetodayohio.blogspot.com>; <http://www.actblue.com/page/votetodayohio>; <https://donate.barackobama.com/page/event/detail/voterregistrationdrive/g5z4b>. During this period, the Obama campaign has arranged numerous events to “get out the vote,” including a free rock concert with Bruce Springsteen next to the early voting site in Columbus, Ohio. See <http://my.barackobama.com/page/content/springsteenoh>. At a similar registration event tomorrow in Philadelphia, the Obama campaign estimates that Bruce Springsteen will attract a crowd of 50,000 people. [http://www.philly.com/philly/hp/news\\_update/29993674.html](http://www.philly.com/philly/hp/news_update/29993674.html). All of the Ohio attendees will be encouraged to vote during the Golden Week.

9. Nevertheless, Secretary of State Brunner has stated that the absentee voting and registration sites, like those near various Obama-related rallies, are polling places under Ohio law and, thus, “must meet all applicable requirements for polling places.” Directive 2008-50 (July 8, 2008) (emphasis in original). To support this position, Secretary Brunner relied on R.C. 3501.11(Z), which states: “*On any day on which an elector may vote in person at the office of the board or at another site designated by the board, [such a place is considered] a polling place for that day. All requirements or prohibitions of law that apply to a polling place shall apply to the office of the board or other designated site on that day.*”

10. Ohio law makes clear that political parties have a right to request poll observers at polling places. R.C. 3505.21 provides that political parties during a general election “may appoint to the board of elections or to any of the precincts in the county or city one person, a qualified elector, who shall serve as observer for such party or such candidates during the casting and counting of the ballots . . . .”

11. In addition, Secretary Brunner has emphasized that her office “wants to ensure that Ohio elections are free, fair, open and honest; and to encourage the highest level of

participation in our democracy.” See <http://www.sos.state.oh.us/SOS/elections.aspx>. To that end, Secretary Brunner issued another directive highlighting the importance of poll workers in the electoral process. See Directive 2008-29 (issued on Feb. 25, 2008). “Poll observers play an important role in assuring the public that election processes are open and transparent, affecting public trust of the process, and thus, the potential for future participation in the democratic process.” *Id.*

12. Despite clear Ohio law and Secretary Brunner’s purported commitment to open and honest elections, she issued an eleventh hour Advisory authorizing Boards of Elections to bar election observers within absentee polling places. Ohio Secretary of State Advisory (Advisory) 2008-24 (Sept. 23, 2008). In that Advisory, Secretary Brunner instructed boards of election that “the Ohio General Assembly has not provided for election observers during the 35-day period for in-person absentee voting at boards of election’s offices or other designated sites.” *Id.* She further warned these boards not to grant a request for observers because such action “may result in court challenges based on disparate treatment between counties.” *Id.*

13. Recently, in a separate case, United States District Judge George Smith of the Southern District of Ohio determined that the absentee voting locations are polling places under Ohio law. See *Ohio Republican Party v. Brunner*, No. 2:08-cv-00913, slip op. at 7 (S.D. Ohio Sept. 28, 2008) (order granting temporary restraining order in part). Judge Smith noted the important role played by poll workers in ensuring that voters have a chance to vote freely. *Id.* (citing *Summit County Democratic Central and Exec. Comm. v. Blackwell*, 388 F.3d 547 (6<sup>th</sup> Cir. 2004)). He further stated that “allowing observers at polling places will serve the important state interests of deterring and detecting voter fraud, deterring voter intimidation and safeguarding voter confidence.” *Id.*

14. Secretary Brunner appealed this temporary restraining order to the United States Court of Appeals for the Sixth Circuit where a divided panel concluded that the district court abused its discretion by entering the temporary restraining order because plaintiffs in that case had not shown that they were likely to succeed on the merits. In so ruling, however, they noted that important state law questions, such as the election related ones raised in *Ohio Republican Party*, are best construed by the appropriate state court. Here, the instant question of whether the in-person absentee voting centers are polling locations, and thus subject to the same regulations governing poll observers, has never before been ruled upon by the Supreme Court of Ohio. This Court's prompt decision on the matter is all the more critical given the nature of Golden Week and the large number of new registrants expected.

15. On October 3, 2008, Relator received credentials to serve as a poll observer in Franklin County on October 3. *See* affidavit of Dewey Stokes, ¶ 3.

16. On October 3 at approximately 11:05 a.m., Relator presented himself at an early voting location inside a building at Franklin County Veterans Memorial and announced his intention to serve as an observer. *See id.*, ¶ 4-5.

17. While inside the building, Relator personally observed people obtaining absentee ballots and submitting them. *See id.*, ¶ 4.

18. When he presented himself as an observer, Relator was approached by Michael Stinzanio, Director of Franklin County Board of Elections, and Matthew Dammschroeder, Deputy Director of Franklin County Board of Elections, who, purporting to be acting under the authority of the Secretary of State, informed Relator that he would not be permitted to serve as an observer. Unable to perform his duties as an election observer, Relator left. *See id.*, ¶ 5.

## CLAIM FOR RELIEF

19. There can be no doubt that the absentee voting sites at issue are polling places where voters may obtain, complete, and submit ballots votes, and, as such, poll admission of observers to these sites is mandated under Ohio law. In particular, R.C. 3505.21 permits political parties to appoint poll observers to polling places “during the casting and counting of the ballots.” Moreover, Secretary Brunner herself has recognized that these absentee voting sites are polling places under Ohio law and, thus, “*must meet all applicable requirements for polling places.*” See Directive 2008-50.

20. Protecting the integrity of the system is especially important given the understandable confusion and disorder caused by this entirely new process. Observers are therefore necessary to ensure that identities of newly registered voters are verified and that voters are not intimidated. Unfortunately, the Secretary’s Advisory has given rise to uneven procedures regarding observers, effectively rendering the voters of some counties less protected by public oversight. Specifically, although many counties have permitted poll observers in the polling places, other counties, like Franklin County, have refused to allow such observations based on Advisory 2008-24. See Exhibit B to Stokes Affidavit.

21. Secretary Brunner’s Advisory 2008-24 has resulted in county Boards of Election, including the Board of Elections in Franklin County, refusing entry to duly-credentialed observers, in direct contravention of Ohio law.

22. The absence of observers during early voting has resulted in a grave risk of mistakes, malfeasance, fraud, and other violations of established election procedures and laws.

23. Relator Dewey Stokes is a qualified and registered elector in the state of Ohio. He and others similarly situated will be irreparably harmed if their right to observe the election process, as mandated by Ohio law, is denied.

WHEREFORE, Relators requests that this Court issue a Writ of Mandamus directing Respondent Secretary of State:

- (A) To declare that Observers are permitted at all active polling places;
- (B) To issue appropriate guidance directing local election officials to permit observers in all early voting locations, pursuant to the procedures in R.C. 3505.21; and
- (C) Such further and additional relief as is necessary and appropriate.

Respectfully submitted,



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James B. Hadden (0059315)  
Porter Wright Morris & Arthur LLP  
Huntington Center  
41 South High Street  
Columbus, OH 43215-6194  
614-227-2168  
jhadden@porterwright.com  
Attorney for Relator

**CERTIFICATE OF SERVICE**

A copy of the foregoing Petition has been served by hand-delivery upon the following this 3<sup>rd</sup> day of October, 2008:

JENNIFER BRUNNER,  
SECRETARY OF STATE OF OHIO  
180 East Broad Street, 16th Floor  
Columbus, Ohio 43215

KENT SHIMEAL  
Chief of Ohio Attorney General  
Constitutional Offices Section  
30 East Broad Street, 16th Floor  
Columbus, Ohio 43215

IN THE SUPREME COURT OF OHIO

THE STATE OF OHIO ex rel. )  
DEWEY STOKES )  
750 Willow Bend Lane )  
Columbus, OH 43204 )

Case No. \_\_\_\_\_

Original Action in Mandamus

Expedited Election Matter  
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Relator, )

vs. )

JENNIFER BRUNNER, )  
Ohio Secretary of State )  
180 East Broad Street, 16th Floor )  
Columbus, Ohio 43215 )

Respondent. )


**AFFIDAVIT OF DEWEY STOKES**

Dewey Stokes, being first duly cautioned and sworn, deposes and says:

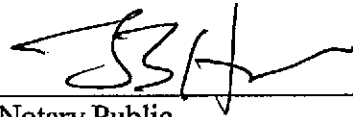
1. I am an adult over 18 years of age, and am competent to testify as to all matters set forth in this affidavit.
2. I am a resident of Franklin County, Ohio.
3. I was appointed to serve as a poll observer at Franklin County Veterans Memorial for the date of October 3, 2008. My duly signed credentials are attached as Exhibit A.
4. At approximately 11:05AM on the morning of October 3<sup>rd</sup>, 2008 I attempted to enter Veterans Memorial and perform my duties as an observer. I waited in front of the registration table for a few minutes and observed people registering and casting ballots.

5. I was approached by Michael Stinziano, Director of the Franklin County Board of Elections, and Matthew Damschroeder, Deputy Director of Franklin County Board of Elections, who, purporting to be acting under the authority of the Secretary of State, told me I was not permitted to act as an observer of the election activities then occurring at Veterans Memorial. I then left Veterans Memorial. They handed to me a Notice, attached hereto as Exhibit B.

FURTHER AFFIANT SAYETH NOT.

  
\_\_\_\_\_  
Dewey Stokes

Sworn to and subscribed in my presence this 3rd day of October, 2008.

  
\_\_\_\_\_  
Notary Public



JAMES B. HADDEN, Attorney At Law  
NOTARY PUBLIC, STATE OF OHIO  
My commission has no expiration date.  
Section 147.03 R.C.

**CERTIFICATE OF APPOINTMENT OF OBSERVER**  
By the Executive/Central Committee of a Political Party

To be filed with the Presiding Judge of the Precinct on the day of the Election.  
R.C. 3505.21, 3506.13

To the Presiding Judge of Election, Precinct Alternate Polling Location  
Franklin County, Ohio.  
(Township or Ward and City or Village)

We, the undersigned, Chairperson and Secretary of the Franklin County  
(City, County, State)

Executive/Central Committee of the Republican Party supporting  
candidates to be voted upon at the absentee balloting period of the general Election to be held on  
(Primary, General or Special)  
Nov. 4<sup>th</sup>, 2008, hereby appoint Dewey R. STOKES  
a qualified elector, to serve as observer in this precinct.

Dated this 30<sup>th</sup> day of September, 2008.

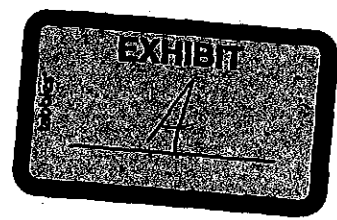
F-L-H

(Signature of Chairperson)

[Handwritten Signature]

(Signature of Secretary)

WHOEVER COMMITS ELECTION FALSIFICATION IS GUILTY OF A FELONY OF THE FIFTH DEGREE



**BOARD OF ELECTIONS**

Michael Stinziano, Director      Matthew M. Damschroder, Deputy Director

**NOTICE**

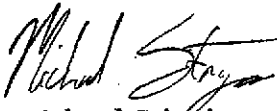
The Franklin County Board of Elections, per Secretary of State Advisory 2008-24 (attached), is not accepting filings for election observers during the 35-day period for in-person absentee voting.

As provided in the Secretary of State's Advisory:

The principal statute on election observers, R.C. 3505.21, appears only to address observers on Election Day.... The General Assembly has not specifically provided for election observers during the 35 in-person absentee voting period immediately proceeding Election Day. Additionally, the General Assembly appears to have intended to foreclose such observers during that time by limiting the expressly provided-for presence of observers, with respect to absentee voting, to the processing and counting of absentee ballots. See R.C. 3509.06(E).

Please note that the Board, per Secretary of State Directive 2008-67, will accept duly appointed observers for the processing of absentee ballots.

Sincerely,



Michael Stinziano  
Director



Matthew M. Damschroder  
Deputy Director





**JENNIFER BRUNNER**  
**OHIO SECRETARY OF STATE**

180 EAST BROAD STREET, 16TH FLOOR  
COLUMBUS, OHIO 43215 USA  
TEL: 1-877-767-6446 FAX: 1-614-644-0649  
WWW.SOS.STATE.OH.US

**ADVISORY 2008-24**

September 23, 2008

To: ALL COUNTY BOARDS OF ELECTIONS

Re: Observers During In-Person Absentee Voting

This office has received requests from boards of elections, political parties, advocacy groups and advocates seeking clarification on whether Ohio law provides for election observers during the 35-day period for in-person absentee voting at board of elections offices or other designated sites.

Upon review of the relevant provisions of the Ohio Revised Code, it appears that the Ohio General Assembly has not provided for election observers during the 35-day period for in-person absentee voting at boards of elections' offices or other designated sites. As indicated in Directive 2008-29, there are five distinct points during an election at which the General Assembly has provided for the presence of election observers in the Revised Code:

- During the **processing and counting** of absent voters' ballots, and military and overseas ballots (R.C. 3509.022, R.C. 3509.06, R.C. 3505.21, and R.C. 3511.11);
- On Election Day at precincts or at the boards of elections (R.C. 3505.21);
- During the processing of provisional ballots (R.C. 3505.183(D) and R.C. 3505.21);
- During the official canvass (R.C. 3505.32(B) and R.C. 3505.21; and
- During any recount (R.C. 3515.03).

The principal statute on election observers, R.C. 3505.21, appears only to address observers on Election Day. This limitation is reinforced by its placement in Chapter 3505, a chapter devoted to Election Day issues, as well as the fact that the General Assembly saw it necessary to include separate provisions for observers with respect to the processing and counting of absentee and provisional ballots, the official canvass, and recounts. Additionally, R.C. 3509.06(E), the most specific statute for observers relating to absentee voting, provides:

Observers may be appointed under section 3505.21 of the Revised Code to witness the *examination and opening of identification envelopes and the counting of absent voters' ballots* under this section.

The rules of statutory construction mandate that I presume that legislative silence or inaction is deliberate; if the General Assembly had intended to allow for observers during in-person absentee voting, it could have included such a provision in R.C. §§ 3509.04 and/or 3509.05, the statutes governing the delivery of absentee ballots to electors and the procedures for voting absentee ballots. Alternatively, when the General Assembly amended R.C. 3505.21 as part of Am. Sub H.B. 3 in 2006 – at the same time it first allowed for “no fault” in-person absentee voting during the 35-day period prior to Election Day – it could have amended 3505.21 to clearly apply to the in-person absentee voting period as well as Election Day. However, it did not. Instead, the General Assembly amended the provisions of R.C. 3503.21 (principal statute on election observers) and R.C. 3509.06 (counting of absent voters’ ballots), without providing for the presence of observers during the 35-day period of in-person absentee voting before an election (other than during the processing and counting of absentee ballots).

In sum, the General Assembly has not specifically provided for election observers during the 35-day in-person absentee voting period immediately preceding Election Day. Additionally, the General Assembly appears to have intended to foreclose such observers during that time by limiting the expressly provided-for presence of observers, with respect to absentee voting, to the processing and counting of absentee ballots. For all of these reasons, I am advising Ohio’s boards of elections that they are not required to allow election observers during the 35-day in-person absentee voting period immediately preceding Election Day.<sup>1</sup>

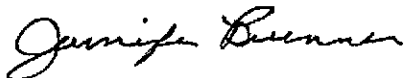
Individual boards may receive requests that they exercise their discretion to allow opportunities for observers to be present at board offices or satellite locations during hours when in-person absentee voting takes place. The allowance of these requests may result in court challenges based on disparate treatment between counties. If all boards operate consistently in following the advice contained in this advisory, which is issued pursuant to R.C. 3501.05(B), any litigation regarding this advisory would necessarily be centered on the secretary of state rather than individual boards, allowing boards to proceed with election preparation unhindered by litigation. In addition, no statute provides deadlines for filing requests to be observers or conduct of observers during periods of in-person absentee voting, leaving a board open to challenge on rules established for such observers by that individual board.

Finally, boards are advised and reminded that the Ohio Supreme Court has held that when a statute is open to two equally reasonable but differing interpretations, it is the court’s duty to defer to the secretary of state’s interpretation. Therefore, an opinion of a county prosecutor contrary to this advisory is subordinate to the advice and interpretation of law contained in this advisory or any other interpretation by the Secretary. See, *Whitman v. Hamilton County Bd. Of Elections*, 97 Ohio St. 3d 216, 2002-Ohio-5923.

<sup>1</sup> Please remember that Directive 2008-67, allowing for the processing of absentee ballots prior to election day in some cases, and R.C. 3509.06(E), quoted above, do require that boards of elections must allow duly appointed observers to observe the processing of absentee ballots, even when that occurs prior to election day. However, such observers shall, according to law, be limited to observing the processing of absentee ballots, and are not specifically authorized to observe in-person absentee voting unless those processes occur in the same area.

If you have any questions, please feel free to contact your assigned elections counsel by email or at (614) 466-2585.

Sincerely,

A handwritten signature in cursive script that reads "Jennifer Brunner".

Jennifer Brunner

RECOMMENDED FOR FULL-TEXT PUBLICATION

Nos. 08-4242/4243/4251

**FILED**

UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

SEP 30 2008

LEONARD GREEN, Clerk

OHIO REPUBLICAN PARTY;	)
LARRY WOLPERT,	)
	)
<b>Plaintiffs-Appellees/</b>	)
<b>Cross-Appellants,</b>	)
v.	)
	)
SECRETARY OF STATE JENNIFER	)
BRUNNER,	)
	)
<b>Defendant-Appellant/</b>	)
<b>Cross-Appellee.</b>	)

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ON APPEAL FROM THE  
UNITED STATES DISTRICT  
COURT FOR THE SOUTHERN  
DISTRICT OF OHIO

OPINION

Before: MOORE, GRIFFIN, and BRIGHT,\* Circuit Judges.

KAREN NELSON MOORE, Circuit Judge. Defendant-Appellant Jennifer Brunner, Secretary of State of Ohio (“the Secretary”), brings this emergency motion to stay or vacate the district court’s grant of a Temporary Restraining Order (“TRO”) restraining enforcement of Advisory 2008-24, which advised county boards of elections that they are not required to allow election observers during the 35-day in-person absentee voting period immediately preceding Election Day. The Secretary argues before this court that (1) the district court lacked jurisdiction to issue injunctive relief against state officials on the basis of state law, and (2) the district court abused its discretion in granting the TRO. Plaintiffs-Appellees, the Ohio Republican Party and Larry Wolpert, bring an emergency motion seeking an injunction restraining the Secretary from allowing simultaneous

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\*The Honorable Myron H. Bright, United States Circuit Judge for the United States Court of Appeals for the Eighth Circuit, sitting by designation.

registration and absentee voting to the extent that ballots cast by newly registered voters are not physically segregated from other ballots. For the reasons stated below, we GRANT the Secretary's emergency motion to stay the district court's TRO and DENY the plaintiffs' emergency motion for an injunction.

### I. BACKGROUND

This case involves a dispute over the five-day window (from September 30, 2008, through October 6, 2008) under Ohio election law during which a voter may both register to vote and simultaneously cast an absentee ballot. On August 13, 2008, the Secretary issued Directive 2008-63, which directed county boards of elections to develop procedures for same-day registration and the issuance of absentee ballots at the time of registration. The instant case is the third suit to be filed concerning same-day registration and absentee balloting.

The first suit filed was an original mandamus action against the Secretary filed on September 12, 2008, in the Ohio Supreme Court that challenged Directive 2008-63. *See State ex rel. Colvin v. Brunner*, No. 2008-1813. This was followed by an action brought by a different group of plaintiffs in the United States District Court for the Northern District of Ohio. *See Project Vote v. Madison County Bd. of Elections*, No. 1:08-cv-2266. That suit sought named the Madison County Board of Elections as a defendant because it had indicated that it would not enforce Directive 2008-63 to allow same-day registration and absentee balloting. The instant case was filed by the Plaintiffs in the Southern District of Ohio on September 26, 2008. Each of these actions involved the propriety of Directive 2008-63.

In the instant case, the Plaintiffs also challenged Advisory 2008-24, which was issued by the Secretary on September 23, 2008. Advisory 2008-24 addressed the question of “whether Ohio law provides for election observers during the 35-day period for in-person absentee voting at board of elections offices or other designated sites.” This Advisory explained that Chapter 3505 of the Ohio Revised Code provides for the presence of observers at five distinct points during an election. The Advisory concluded, however, that Chapter 3505 did not “provide[] for election observers during the 35-day period for in-person absentee voting at boards of elections’ offices or other designated sites.” In reaching this conclusion, the Advisory stated that “the principal statute on election observers, [Ohio Revised Code Section] 3505.21, appears only to address observers on Election Day.”

On September 27, 2008, the Secretary filed a motion pursuant to 28 U.S.C. § 1404(a) to transfer venue and consolidate the present case with the *Project Vote* case pending in the Northern District of Ohio. That motion was denied by the district court on September 28.

On September 29, the district court in the *Project Vote* case entered a TRO ordering the Madison County Board of Elections to follow Directive 2008-63. Also on September 29, the Ohio Supreme Court ruled in *Colvin* that the Secretary’s interpretation of Ohio law in Directive 2008-63 was correct.

On September 26, the Plaintiffs in the instant case filed a motion for a TRO and preliminary injunction restraining enforcement of both Directive 2008-63 and Advisory 2008-24. Noting the

Ohio Supreme Court's ruling in *Colvin*, the district court "abstain[ed] from ruling on the validity of Directive 2008-63." But the district court granted a TRO with respect to Advisory 2008-24.

## II. ANALYSIS

### A. TRO Restraining Enforcement of Advisory 2008-24

Although we generally lack jurisdiction to hear an appeal of a district court's order granting or denying a TRO, we have allowed interlocutory appeals under 28 U.S.C. § 1291(a)(1) of "TROs which threatened to inflict irretrievable harms before the TRO expired." *Northeast Ohio Coalition for the Homeless v. Blackwell*, 467 F.3d 999, 1005-06 (6th Cir. 2006) ("*NEOCH*"). Given the extraordinary time constraints of the present dispute, the nature and effect of this TRO necessitate an immediate appeal. Accordingly, we conclude that we have jurisdiction to consider this appeal.

We begin by addressing the Secretary's argument that the district court lacked jurisdiction to grant injunctive relief based on the holding of *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 124-25 (1984), that federal courts lack jurisdiction to enjoin state officials on the basis of state law. In granting the TRO restraining enforcement of Advisory 2008-24, the focus of the district court's analysis was on interpreting Ohio state law. Specifically, the district court interpreted Ohio Revised Code Section 3505.21 as being applicable not just to election day but also to the same-day registration and absentee balloting authorized by Directive 2008-63, and therefore the district court ruled that election observers must be allowed during same-day registration and balloting prior to election day. The district court thus ruled that Advisory 2008-24—which concluded that Ohio Revised Code Section 3505.21 was only applicable on election day—was an incorrect interpretation

of state law. Arguing that the district court's order is grounded entirely in state law, the Secretary contends that the injunctive relief against state officials here is barred by *Pennhurst*. We believe that the Secretary's position is well taken. As the Court wrote in *Pennhurst*, "it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law." 465 U.S. at 106. The district court's order granting the TRO appears only to construe the meaning of state law and does not link the issue of observers to any provision of federal law.

However, noting the time constraints under which it issued its decision, we will assume that the district court issued the TRO on the basis of federal law. Specifically, in their motion for a TRO, the Plaintiffs argued that Advisory 2008-24 violates Section 2 of the Voting Rights Act ("VRA").<sup>1</sup> Accordingly, we will assume that the district court granted the TRO on the basis of the federal-law claim under the VRA.

"The district court's decision to grant a temporary restraining order, when appealable, is reviewed by this court for abuse of discretion." *NEOCH*, 467 F.3d at 1009. In determining whether to stay the TRO, we consider "the same factors considered in determining whether to issue a TRO or preliminary injunction." *Id.* These factors are:

- (1) whether the movant has a strong likelihood of success on the merits, (2) whether the movant would suffer irreparable injury absent a stay, (3) whether granting the stay

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<sup>1</sup>The Plaintiffs raised several other federal claims in that motion. But specific argument on these other federal claims was directed only at Directive 2008-63 and not at Advisory 2008-24.

would cause substantial harm to others, and (4) whether the public interest would be served by granting the stay.

*Id.*

We conclude that it is *unlikely* that the Plaintiffs will succeed on the merits. As we explained above, we assume the district court granted the TRO on the basis of the Plaintiffs' claim under Section 2 of the VRA. Thus, we now turn to assessing the likelihood that the Plaintiffs will succeed on the merits of this VRA claim. Section 2 of the VRA provides that "no voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color . . . ." 42 U.S.C. § 1973(a). In essence, the Plaintiffs argue that Advisory 2008-24 violates the VRA because it incorrectly interprets state law so as to bar outside election observers during same-day registration and balloting activities. Because the observers authorized by state law would not be present, the Plaintiffs contend that the Advisory "increases the possibility that voters will suffer intimidation while attempting to exercise their franchise." Plaintiffs' Motion for TRO at 16.

Even assuming *arguendo* that Plaintiffs' interpretation of Ohio law is correct and that observers should be permitted, we believe that Plaintiffs have little likelihood of success on the merits of a VRA claim based on these allegations. We are aware of no case—and none was cited in the Plaintiffs' motion—in which a VRA claim has succeeded based on allegations that state-law-authorized observers were unlawfully excluded from a polling facility. Given the absence of any authority for a successful VRA claim based on facts similar to those alleged by the Plaintiffs, we

conclude that this claim would have little likelihood of success on the merits. Because we believe this factor is dispositive, we need not address the other three factors for determining whether to grant a TRO or preliminary injunction. *See, e.g., Bonnell v. Lorenzo*, 241 F.3d 800, 809 (6th Cir.), *cert. denied*, 534 U.S. 951 (2001).

Because we conclude that the district court abused its discretion in granting the TRO, we grant the Secretary's motion for a stay of the TRO.

#### **B. Plaintiffs' Motion for an Injunction**

On cross-appeal, the Plaintiffs move this court for an injunction requiring the Secretary "to order the segregation of the absentee ballots cast by newly registered (and hence unverified) voters and verification of those voters' eligibility prior to counting their ballots, consistent with federal law." Response to Emergency Mot. at 4. The district court never ruled on this issue. Further, this motion raises factual issues concerning whether the absentee ballots cast by newly registered voters are properly handled by county boards of elections. According to the Secretary, "each county board of elections keeps the absentee ballots, once cast, under lock and key. Board employees—one member from each political party—then carefully check each ballot envelope before removing the ballot to ensure that the voter was properly registered and the ballot properly cast." Secretary's Response at 7-8. We believe that such factually-intensive issues are best presented, in the first instance, to the district court. Accordingly, we deny the Plaintiffs' emergency motion for an injunction.

### **III. CONCLUSION**

For the reasons stated above, we **GRANT** the Secretary's emergency motion to stay the district court's TRO and **DENY** the Plaintiffs' emergency motion for an injunction.

GRIFFIN, Circuit Judge, concurring in part and dissenting in part.

I would affirm the district court in regard to both appeals. Thus, I respectfully dissent from the decision by the majority to stay the temporary restraining order. Under the circumstances of this case, the district judge did not abuse his discretion by issuing the temporary restraining order. In deciding defendant's emergency request to stay the temporary restraining order, we consider the following four factors:

(1) whether the movant has a "strong" likelihood of success on the merits; (2) whether the movant would otherwise suffer irreparable injury; (3) whether issuance of a preliminary injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuance of a preliminary injunction.

*Leary v. Daeschner*, 228 F.3d 729, 736 (6th Cir. 2000); see also *Summit County Democratic Cent. & Exec. Comm., et al. v. Blackwell, et al.*, 388 F.3d 547, 550 (6th Cir. 2004). "All four factors are not prerequisites but are interconnected considerations that must be balanced together." *Coalition to Defend Affirmative Action v. Granholm*, 473 F.3d 237, 244 (6th Cir. 2006) (citing *Mich. Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991)).

Defendant Secretary of State seeks to enforce a directive that would authorize county boards of election to exclude election observers from the sites when simultaneous registration and absentee balloting is occurring. The temporary restraining order issued by the district court against this directive should remain in effect. Defendant has failed to establish irreparable injury by the presence of election observers; the public interest served by an exclusion; or the likelihood of success on the merits. See Help Americans Vote Act of 2002 ("HAVA"), 42 U.S.C. § 15301, et seq. and U.S. CONST. amend. XIV.

As noted by Judge Smith in his order:

Moreover, there will be no harm to others if the temporary restraining order is issued. All individuals who seek to register to vote may still do so. Further, those who wish to request an absentee ballot and cast it may do so, and therefore the individual's right to vote has not been burdened in any way. However, if observers were not permitted, there would be tremendous risk of harm to the general public as voter fraud and intimidation are possible, leading to the undermining of voter confidence as a whole.

I would affirm and therefore respectfully dissent from that portion of the majority's order that stays the temporary restraining order.