

Help American Vote Act of 2002 (“HAVA”) requires the Secretary to provide county boards of elections with such meaningful access to the “mismatch” data. *Ohio Republican Party v. Brunner*, ___ F.3d ___, 2008 WL 4571959 (6th Cir. Oct. 14, 2008) (*en banc*); ___ F. Supp. 2d ___, 2008 WL 4560772 (S.D. Ohio Oct. 9, 2008); *see also Brunner v. Ohio Republican Party*, 555 U.S. (2008) (vacating TRO on jurisdictional grounds) The Court’s expedited review of this petition is warranted in light of the need to ensure that the Secretary complies with her legal obligations prior to the opening of absentee ballots, which is scheduled to occur as early as October 25 according to a recent Directive from the office of Secretary. Absent this Court’s immediate intervention, the votes of qualified Ohio voters risk being diluted, and public confidence in the integrity of the electoral process will be severely undermined.

Relator states for his Verified Petition and Complaint:

INTRODUCTION

1. This petition once again calls upon this Court to direct the Secretary of State to perform her obligations under Ohio law to safeguard the integrity and fairness of the electoral process. At issue here is the fundamental right to vote. As this Court has only recently underscored, that right “is a part of the very warp and woof of the American ideal and it is a right protected by both the constitutions of the United States and of the state.” *State ex rel Colvin v. Brunner*, Slip Opinion No. 2008-Ohio-5041, ¶ 62 (Ohio, Sept. 29, 2008).

2. The right to vote is protected by federal and state statutes, including the federal Help America Vote Act of 2002, (“HAVA”), 42 U.S.C. §15301 *et seq.*, and implementing Ohio legislation, *see* R.C. 3503.15. These statutes recognize that the constitutionally protected right to vote can be abridged in two ways: either by denying qualified voters access to ballots, or by granting unqualified or fraudulent voters access to ballots and thereby diluting the votes of

qualified voters. These statutes thus strike “a balance between promoting voter access to ballots on the one hand and preventing voter impersonation on the other.” *Florida State Conf. of the NAACP v. Browning*, 522 F.3d 1153, 1168 (11th Cir. 2008).

3. To prevent registration fraud and vote dilution, HAVA requires each State to establish a statewide voter registration database (SWVRD) listing the names of registered voters and to “match” the information in that database with information in the database of the State Bureau of Motor Vehicles (BMV) “to verify the accuracy of the information provided on applications for voter registration.” 42 U.S.C. § 15483. Ohio passed implementing legislation further specifying that the SWVRD must be “continuously available to each board of elections,” and must include a computer program that, among other things, (1) “harmonizes the records contained in the database with records maintained by each board of elections,” (2) “allows access to the records contained in the database by each board of elections,” and (3) includes a search program “capable of verifying registered voters and their registration information by name, driver’s license number, birth date, social security number or, current address,” R.C. 3503.15(A), (C).

4. The problem here is that the Secretary is not complying with her duties under federal or state law to ensure that voter registration is verified before votes are counted. Astonishingly, while the Secretary *has conceded* that she is required by law to “match” the information in the SWVRD with information in the database of Ohio’s Bureau of Motor Vehicles to verify the accuracy of the information provided on voter registration applications, the Secretary *admits* that she does not provide the county boards of elections with a meaningful way to access the resulting mismatches. In short, the Secretary is content to ignore evidence of potentially invalid or fraudulent voter registrations and refuses to set up a straightforward

mechanism allowing county boards to receive, and act upon, this evidence. The Secretary's refusal is particularly inexplicable on the facts of this case, given her admission that SWVRD used to operate so as to provide such a mechanism in the past and that this mechanism could be re-established in a manner of days. *Ohio Republican Party*, 2:08-cv-00913 (Def's Mot. to Stay TRO at *3 (Oct. 16, 2008)) (Todd Aff., Tab A).

5. The Secretary's obligation to provide county boards of electors with meaningful access to the "mismatches" identified by SWVRD has now been made clear by two federal courts, including the U.S. Court of Appeals for the Sixth Circuit sitting *en banc*. See 2008 WL 4571959 (6th Cir. Oct. 14, 2008) (*en banc*); 2008 WL 4560772 (S.D. Ohio Oct. 9, 2008). While this Court has an independent authority to examine and construe applicable federal law, it has the benefit of an extensive and reasoned analysis of the Secretary's obligations under the relevant provisions of HAVA already conducted by its federal brethren. While the United States Supreme Court has vacated the Temporary Restraining Order imposed by the U.S. District Court for the Southern District of Ohio, it did so solely on the jurisdictional grounds that a private litigant may not bring a suit to enforce the applicable provision of HAVA in federal court. *Brunner v. Ohio Republican Party*, 555 U.S. ___ (2008) (*per curiam*). The U.S. Supreme Court took care to emphasize that its decision should not be read as expressing any opinion on the determination by the two federal courts below that HAVA was not being properly implemented. *Id.*

6. Given the U.S. Supreme Court's clarification that federal courts lack jurisdiction to entertain a private suit to enforce the requirement of HAVA at issue here, Relator is forced to petition this Court to intervene in order to ensure that the Secretary follows her obligations under both federal and state law. Indeed, the Secretary's obligations under *federal* law to provide

county boards of elections with meaningful access to “mismatches” identified by the SWVRD are linked directly to the Secretary’s obligations under *state* law to ensure that the SWVRD records are harmonized with the records maintained by each board of election and that voter registration information is verified before votes are counted. In fact, the Secretary’s compliance with her obligations under HAVA, as clarified *by the* federal courts that have examined the issue, is a necessary predicate to the fulfillment of her obligations under the state law. Unless the Secretary directs *county* boards of elections to make use of this information, the entire HAVA matching process will be rendered meaningless, and voter registration information will not be verified before votes are counted. Because the Secretary is not complying with her obligations under state election law, relator brings this action to compel such compliance.

7. This problem is particularly acute with respect to absentee ballots cast by newly registered voters, since such persons have been allowed to register and cast such ballots without ever having shown any identification for verification. The Secretary and the entire Ohio voting public know that some unknown (but potentially large) number of false or incorrect new registrations correspond to some of those absentee ballots.¹

8. Accordingly, relator hereby seeks narrowly tailored emergency relief to require local bipartisan boards of election to do their jobs, and to protect his right to vote from unlawful

¹ According to both *The Columbus Dispatch* and *The Cleveland Plain Dealer*, a national voter-registration group active in Ohio, The Association of Community Organizations for Reform Now (“ACORN”), has admitted that is unable to control voter fraud in its own operations. ACORN, which is under indictment or investigation in multiple states for voter fraud, has turned in at least 65,000 voter registration cards in Cuyahoga County alone. See *The Columbus Dispatch*, “ACORN Says It Can’t Eliminate Fraudulent Registrations” October 8, 2008; *The Cleveland Plain Dealer*, “Voter-Registration Cannot be Totally Fraud Free, Group Says” October 8, 2008. Similarly, a story in the *New York Post* reported on an interview with a Cleveland individual who claims to have registered to vote 72 times in exchange for cash and cigarettes offered as bribes by ACORN workers. See *New York Post*, “1 Voter, 72 Registrations: ‘ACORN Paid Me in Cash and Cigs’” October 10, 2008. It is near certain that a number of these ACORN-collected registrations are fraudulent. Recent stories have confirmed that these bogus registrations can lead, and in fact have led, to fraudulent absentee voting. See *New York Post*, “Bogus Voter Booted Amid Probe of ACORN: 4,000 of Left-Wing Group’s Sign-Ups are Shady” October 14, 2008. A Writ from this Court would ensure that votes cast during the recent flurry of registrations are indeed legitimate and would not dilute the votes of other Ohioans.

dilution in the upcoming election. Relator seeks a writ of mandamus to compel the Secretary to comply with Ohio law and to order the boards of elections to review the “mismatches” identified by HAVA matching *before* counting the vote of any voter registered after January 1, 2008. And this issue is of the utmost urgency: the Secretary currently allows boards of elections to begin removing absentee ballots from their envelopes as early as October 25, see Ohio Secretary of State Directive 2008-67 (Aug. 15, 2008) (Todd Aff., Tab B), and once an absentee ballot has been removed from its envelope, it is untraceable and unchallengeable. To prevent the votes of qualified voters from dilution, and to instill confidence in the integrity of the electoral process, this Court should grant the emergency relief requested

PARTIES, JURISDICTION, AND VENUE

9. David Myhal (“Relator”) is a resident of Frankling County and is a qualified elector in the State of Ohio.

10. Respondent Jennifer Brunner is the Ohio Secretary of State. Pursuant to R.C. 3501.05, Respondent must, *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).

11. 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).

CLAIM FOR RELIEF

12. Section 303 of the Help America Vote Act (“HAVA”) requires that Ohio create a computerized statewide voter registration list that contains the name and registration information of every legally registered voter. 42 U.S.C. § 15483(a).

13. HAVA also requires that Ohio verify a prospective voter’s registration information. 42 U.S.C. § 15482(a)(5). Under HAVA, “an application for voter registration for an election for Federal office may not be accepted or processed by a State unless the application includes the applicant’s driver’s license number or the last four digits of the applicant’s social security number.” *Id.* (emphasis added). Ohio must also “determine whether the information provided by an individual is sufficient to meet the requirements of [HAVA], *in accordance with State law.*” *Id.* (emphasis added).

14. The Ohio General Assembly enacted R.C. 3503.15 to codify HAVA’s mandates into state law. R.C. 3503.15 makes clear that the SWVRD is not merely a depository for registration information, but is to be used to determine the veracity of registration information. This database must be “*capable of verifying registered voters* and their registration information *by name, driver's license number, birth date, social security number or, current address,*” and have “safeguards and components to ensure that the integrity, security, and confidentiality of the voter registration information is maintained.” R.C. 3503.15(C)(4) and (5). Additionally, R.C. 3503.15(C)(2) provides that the statewide voter registration database must “*harmonize[]* the records contained in the database *with records maintained by each board of elections.*” The

requirement that the database must verify registrations and must harmonize voter registration information necessarily requires more than simply identifying social security number (“SSN”) or drivers license number (“DLN”) non-matches and doing nothing more. (all emphasis added). Similarly, county boards have an affirmative duty to “maintain voter registration records, make reports concerning voter registration as required by the secretary of state, and remove ineligible electors from voter registration lists in accordance with law and directives of the secretary of state.” R.C. 3501.11(U).

15. The duty to “investigate irregularities, nonperformance of duties, or violations of Title XXXV of the Revised Code by election officers and other persons” also falls to the county boards of elections. R.C. 3501.11(J). Further, R.C. 3501.11(Q) requires county boards of elections to “[i]nvestigate and determine the residence qualifications of electors”, presumably, at least in part, via the SWVRD and the county database they are required to maintain. R.C. 3501.11(T) (boards must “[e]stablish and maintain a voter registration database of all qualified electors in the county . . .”).

16. Secretary Brunner was recently sued in federal court for failing to conduct identification matches as required under federal law. *See Ohio Republican Party, et al. v. Brunner*, 2:08-cv-00913 (S.D. Ohio 2008). In her briefs, as well as in oral argument, counsel for defendant stated that the Secretary of State’s office did, in fact, compare the information to the records held by the BMV and/or the SSA, but *does not forward discovered mismatches on to county boards of elections*. Instead, she relies on the county boards to affirmatively access SWVRD to verify the eligibility of mismatches. As counsel for defendant admits:

The secretary’s database has a technological limitation; it does not allow for batch sorting of the mismatches. In other words, after a voter’s information is inputted into the database, the county boards of election can then query that voter’s name to determine if a

mismatch was generated. But the database cannot generate a list or spreadsheet [for the country boards] of every voter record containing a mismatched entry.

Ohio Republican Party, et al., v. Brunner, 08-4322 (6th Cir. 2008) (Def.'s Mot. to Vacate or Stay TRO at 14 (Oct. 10, 2008)). (Todd Aff, Tab C). Last night, the Secretary told the district court that there are some problems with the mismatch data she has, see *Ohio Republican Party*, 2:08-cv-00913 (Def's Mot. to Stay TRO (Oct. 16, 2008)) (Todd Aff., Tab A) but she did not deny that she has shared no information on mismatches with the county boards of elections.

17. The Secretary of State has argued that the county boards of elections, rather than her office, are responsible for determining voter's eligibility in light of demonstrated mismatches. "As implemented in Ohio, and consistent with the requirements of HAVA, state and local officials have designated responsibilities. *The gatekeeping function falls to local boards of elections.*" See *Ohio Republican Party, et al. v. Brunner*, 2:08-cv-00913 (S.D. Ohio Oct. 8, 2008) (Def.'s Opp to Renewed Motion for TRO (Doc. 43), at 9) (Todd Aff., Tab D); "Boards of elections are the frontlines of elections administration in Ohio." Ohio Secretary of State Directive 2008-96 (Oct. 14, 2008) (Todd, Aff., Tab E). "The Secretary of State uses the official statewide voter registration database to identify duplicate registrations *and instructs boards on a regular basis to correct those registrations.*" See *Ohio Republican Party, et al. v. Brunner*, 08-4242 (6th Cir. 2008) (Def's Resp. to Pltf's Motion for an Inj. Pend. Appeal at 8) (Todd Aff., Tab F).

18. Relator will suffer irreparable injury in the absence of the requested Writ. Removal of absentee ballots from their identification envelopes will effectively moot any subsequent attempt to ensure that the information contained in a voter's registration application, has been verified. It is therefore imperative that the county boards of election verify the

eligibility of absentee voters whose data reveals a mismatch *prior* to these ballots being removed from their identification envelopes.

19. Because the universe of potential ballots to be checked pursuant to the proposed Writ is limited both by time and by type, it does not represent an undue or impossible burden on local boards. Indeed, such a Writ would simply require the county boards of elections to perform their duties as mandated in the Revised Code.

20. There is no disagreement between the parties that “[b]oards of elections are the frontlines of elections administration in Ohio” who must “ensure, through prompt and thorough investigations, the integrity of the electoral process” and must “investigate and determine the residence qualification of electors.” Directive 2008-96 (citing R.C. 3501.11(J) and (Q)). As county boards of elections serve as the chief bulwark against election fraud, it is critical that they actually perform the duties assigned to them under the Revised Code. As the Secretary of State has previously admitted that the county boards of elections are responsible for affirmatively checking the identities of new absentee registrants against her SWVRD, and further admitted that she does not affirmatively provide information concerning mismatches to the local boards of election or even know if local boards of election actually use the information, relator seeks a directive from the Secretary of State compelling county boards not to count any absentee ballot votes from newly-registered voters as to whom there is mismatch with on data contained in the SWVRD, unless and until the county board has determined the person to be a eligible voter.

WHEREFORE, Relator requests relief from this Court as follows:

(A) A Writ of Mandamus compelling Respondent Secretary of State to direct all Ohio county boards of election not to remove any absentee ballot from its identifying outer envelope and not to count any absentee ballot from voters registered after January 1, 2008 (i) without first

accessing the SWVRD to ensure there is no mismatch between the registration information provided by the voter and the data available the SWVRD and (ii) if there is a mismatch, such ballot shall not be removed from its identifying outer envelope or counted unless and until the county board has determined the person to be an eligible voter.

(B) Such further and additional relief as is necessary and appropriate.

Respectfully submitted,



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CERTIFICATE OF SERVICE

A copy of the foregoing Petition has been served by hand-delivery upon the following this 17th 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



James B. Hadden

IN THE SUPREME COURT OF OHIO

THE STATE OF OHIO ex rel.)
David Mahal)
1378 Havant Drive)
New Albany, Ohio 43054)

Case No. _____

Original Action in Mandamus

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

Relator,)

vs.)

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

Respondent.)

DECLARATION OF WILLIAM M. TODD

I, William M. Todd, declare and state as follows:

1. I am an attorney licensed to practice in the State of Ohio and in good standing.

My Ohio bar number is 23061.

2. I serve as counsel to Larry Wolpert, a qualified Ohio elector, and the Ohio

Republican Party, the plaintiffs in *Ohio Republican Party, et al. v. Brunner*.

3. This case has been argued and briefed in both the United States District Court for the Southern District of Ohio, see case number 2:08-cv-913, as well as the United States Court of Appeals for the Sixth Circuit, see case numbers 08-4242, 08-4243, 08-4251, and 08-4322, and the United States Supreme Court, see case number 08-A332.

4. Attachment A to this declaration is a true and accurate copy of Defendant's Motion for Stay of Temporary Restraining Order Pending Appeal, or in the Alternative, Extension of Temporary Restraining Order, as filed in the United States District Court for the Southern District of Ohio on October 16, 2008.

5. Attachment B is a true and accurate copy of Defendant's Directive 2008-67, issued on August 15, 2008.

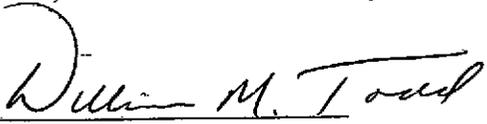
6. Attachment C is a true and accurate copy of Defendant's Emergency Motion to Vacate or Stay District Court's Temporary Restraining Order as filed in the Sixth Circuit Court of Appeals on October 10, 2008.

7. Attachment D is a true and accurate copy of Defendant's Memorandum in Opposition to Plaintiff's Renewed Motion for Temporary Restraining Order and Preliminary Injunction as originally filed on October 8, 2008 in United States District Court for the Southern District of Ohio, before the district court's grant of Defendant's Motion to file a corrected brief.

8. Attachment E is a true and accurate copy of Defendant's Directive 2008-96, issued on October 14, 2008.

9. Attachment F is a true and accurate copy of Defendant's Response to Plaintiffs' Emergency Motion for Injunction Pending Appeal and Reply to Plaintiffs' Response to Defendant's Motion to Vacate or Stay District Court's Temporary Restraining Order, as filed in the Sixth Circuit Court of Appeals on September 30, 2008.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed this 17th day of October, 2008 in Franklin County, Ohio.


WILLIAM M. TODD

Sworn and subscribed before me this 17th 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.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

OHIO REPUBLICAN PARTY, et al.	:	
	:	
Plaintiffs,	:	
	:	Case No. 2:08CV913
v.	:	
	:	JUDGE SMITH
JENNIFER BRUNNER,	:	
Secretary of State of Ohio,	:	MAGISTRATE JUDGE KING
	:	
Defendant.	:	

**MOTION OF DEFENDANT SECRETARY OF STATE JENNIFER BRUNNER FOR
(1) STAY OF TEMPORARY RESTRAINING ORDER PENDING APPEAL, OR IN THE
ALTERNATIVE, (2) EXTENSION OF TEMPORARY RESTRAINING ORDER**

Defendant Secretary of State Jennifer Brunner hereby moves this Court for: (1) a stay of its temporary restraining order (Doc. 55) issued on October 10, 2008, or in the alternative, (2) an extension of the October 17, 2008 completion date in paragraph 3 of the temporary restraining order. A memorandum in support is attached.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

On October 10, 2008, this Court issued its order and opinion granting Plaintiffs' Renewed Motion for Temporary Restraining Order and mandating that Ohio Secretary of State Jennifer Brunner comply with the requirements of the Help America Vote Act ("HAVA") and ordering Secretary Brunner to establish a process by October 17, 2008, by which the county boards of elections can access the information generated by the Statewide Voter Registration Database ("SWVRD") and review "mismatches." The Court provided two methods by which the Secretary can comply with its order: (1) The Secretary can provide lists of the mismatches to all the boards of elections; or (2) The Secretary can provide all the boards of elections with a method to search the SWVRD database such that they can isolate and review the mismatches and take appropriate action. Order, Oct. 10, 2008, at ¶ 4 (Doc. 55).

The Secretary requests a stay of the Court's order for several reasons. First, Plaintiffs' have shown no likelihood of success on the merits because they do not have a private right of action to enforce HAVA under 42 U.S.C. § 1983.

Second, compliance with the TRO would cause grave and irreparable harm to voters who might be subject to investigations from the county boards of election based on false alerts of mismatches reported from the current SWVRD. Since the Court's order, the Information Technology and Legal departments of the Secretary of State's Office have been working virtually non-stop to determine in detail the capabilities and working of the SWVRD, which was inherited from the former Secretary of State. In doing so, Secretary Brunner's office has discovered numerous problems with the database, making it apparent that implementation of the

Court's order will require a full diagnostic review and reprogramming of the database in order to ensure the accurate reporting of mismatches.

Third, compliance with this Court's TRO without further review of the reporting mechanisms in SWVRD exposes elections officials to possible liability under the confidentiality and use restrictions established by federal law.

Fourth, reprogramming or altering the database now – without full review of the system - - could cause irreparable damage to the database itself. Implementation of last-minute changes to a complex database should not be rushed just to meet the Court's October 17, 2008 deadline.

Finally, the Court's TRO, issued this close to Election Day, forces the Secretary of State's Office to shift attention and resources away from elections preparation to the reprogramming of the database. The Secretary of State's Office is currently in the midst of preparations for an election of unprecedented scale, and the interruption of those time-sensitive and statutory duties jeopardizes the administration of this election.

In the alternative, Secretary Brunner moves for a two-week extension of the October 17, 2008 completion date of the TRO, or for an extension of a duration determined by the Court.

II. STATEMENT OF FACTS

The Help America Vote Act required States to develop Statewide Voter Registration Databases. Although HAVA left implementation of the system up to the States, it directed that certain types of activities be conducted by specific State or federal entities. When a voter registers to vote, HAVA mandates that the voters' pertinent information be placed in the Statewide Voter Registration Database. This information includes the voter's name, address, and date of birth. A voter also has the opportunity to include his driver's license number or the last four digits of his social security number.

HAVA further mandates that once the Secretary of State receives that information, she forward it to the State's Bureau of Motor Vehicles. If the registrant supplies a driver's license number, the BMV is statutorily obligated to check its database to see if there is a match. Only if the registrant provides the last four digits of his social security number is the BMV to forward that information to the Social Security Administration to check and see if there is a match with the information on file.

Secretary of State Brunner has learned, during her investigation of Ohio's Statewide Voter Registration Database, that Ohio's Bureau of Motor Vehicles is sending information to the Social Security Administration seeking out a match for the four digits SSN number even in cases in which the voter supplied his driver's license number, not his social security number. Since this programming was done by the Bureau of Motor Vehicles, not the Secretary of State's office, Secretary Brunner could not have discovered this programming error on her own. The reason that Secretary Brunner would have been unaware of the programming problem at the BMV was that the previous Secretary of State, in June of 2006, decided to reprogram the Statewide Voter Registration Database so that various error notifications from BMV's non-matches or mismatches were not automatically sent to the boards of elections. Worley Affidavit.

III. ARGUMENT

A. Plaintiffs Have No Private Right of Action Under HAVA.

To determine whether a TRO should be stayed upon appeal, the court considers the same factors considered in determining whether to issue a TRO or preliminary injunction. *Northeast Ohio Coalition for the Homeless v. Blackwell*, 467 F.3d 999, 1009 (6th Cir. 2006). Those factors -- which are not "prerequisites" but are "interrelated considerations that must be balanced together" -- 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 would cause substantial harm to others, and (4) whether the public interest would be served by granting the stay. *Id.*

The law is clear that Plaintiffs cannot succeed on the merits of their HAVA claim because they have no rights under HAVA that are enforceable in a § 1983 action. For a statute to be enforced in a § 1983 suit, Congress must have clearly intended to create a private right. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283-85 (2002). By its plain terms, § 1983 provides a remedy only for “rights, not the broader or vaguer ‘benefits’ or ‘interests’”; thus, the question is “whether Congress *intended to create a federal right.*” *Id.* at 283. To “unambiguously confer[]” a privately enforceable right, *id.*, the statutory “text must be ‘phrased in terms of the persons benefited,’” *id.* at 284 (quoting *Cannon v. Univ. of Chicago*, 441 U.S. 677, 692 n.13 (1979)). Moreover, even where “explicit rights-creating terms” exist, “a plaintiff suing under an implied right of action still must show that the statute manifests an intent ‘to create not just a private *right* but also a private *remedy.*” *Id.* (quoting *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001)). The statute must show a “concern[] with ‘whether the needs of any *particular person* have been satisfied.” *Id.* (quoting *Blessing*, 520 U.S. at 343) (emphasis added).

The HAVA provision under which ORP seeks relief—HAVA section 303, codified at 42 U.S.C. § 15483(a) (cited at Compl. ¶ 42)—in no way reflects a congressional intent to protect particular persons by creating a privately enforceable right. HAVA section 303 concerns statewide registration databases. It requires Ohio, “through [its] chief election official”—the Secretary—to “implement, in a uniform and nondiscriminatory manner, a single, uniform, official, centralized, interactive computerized statewide voter registration list.” 42 U.S.C. § 15483(a)(1)(A). The database must “contain[] the name and registration information of every

legally registered voter in the State and assign[] a unique identifier to each legally registered voter in the State,” *id.*, and “[t]he computerized list,” in turn, “shall serve as the official voter registration list for the conduct of all elections for Federal office in the State,” *id.* § 15483(a)(1)(A)(viii). Section 303 imposes on the Secretary additional administrative duties related to the database. *Id.* § 15483(a). The provision addresses only the obligations of state election officials; nowhere does it discuss the rights of individuals or even groups.

Congress’s singular focus in HAVA section 303 on state officials’ administrative duties is underscored by the remedies it supplied for shortcomings in the discharge of those duties. *See Gonzaga*, 536 U.S. at 289 (explaining that the failure of the Family Educational Rights and Privacy Act of 1974 (“FERPA”) “to confer enforceable rights is buttressed by the mechanism that Congress chose to provide for enforcing those provisions”). As part of the administrative scheme, Congress required each State to establish an administrative complaint procedure for resolving grievances under the statute. 42 U.S.C. § 15512. Congress also authorized the United States Attorney General to bring a civil action to enforce HAVA against the States, 42 U.S.C. § 15511—much as FERPA provided for enforcement by the Secretary of Education, *see Gonzaga*, 536 U.S. at 289. Congress would have had no reason to create these review mechanisms if it believed citizens already had a private cause of action under the statute. As with other administrative schemes—like FERPA, for instance, *see Gonzaga*, 536 U.S. at 289—Congress intended to remedy violations of that administrative scheme through administrative means.

Therefore, because HAVA section 303 contains no rights-conferring language, it cannot form the basis of a civil rights action under § 1983. Thus, there is *no* likelihood that Plaintiffs will succeed on its HAVA claim.

B. Granting Of A Stay Is Necessary to Prevent Irreparable Harm to Voters, To the Voter Registration System, and to Elections Officials.

1. **Compliance with the TRO would cause grave and irreparable harm to voters by subjecting them to unwarranted investigations from the county boards of elections.**

The Secretary of State's recent review of the SMVRD reveals that the database appears not to have been correctly designed during the administration of the previous Secretary of State. The result is that the verification of voter registration information now being performed may result in false alerts of "mismatches" subjecting voters to improper and unnecessary investigations by the boards of elections. The Secretary of State has identified several problems with the database that may improperly inform the boards of a "mismatch" where no actual discrepancy has taken place.

Improper verification by social security number is resulting in "non-matches" and false negatives

The first problem is that state officials are using social security numbers (SSN) to verify voter information, even when the voter has not submitted an SSN as an identifier. Under Ohio law, a person registering to vote is required to supply **either** his driver's license number, **or** the last four digits of his social security number. R.C. 3503.14(A)(5). Local election officials then enter that data electronically from individual voter registration systems into the state computerized SWVRD. Robert Mangan Aff., ¶ 6, attached as Ex. A. When the SWVRD receives a new registration from local election officials, it automatically sends the following pertinent information to the BMV: (1) the first name; (2) middle name (if provided); (3) last name; (4) name suffix (if provided); (5) the date of birth; (4) the driver's license number; and (5) the last four numbers of the social security number ("SSN4") (if provided). *Id.*, ¶ 8. By way of agreement with the Secretary of State's office, the Bureau of Motor Vehicles ("BMV") compares

the information uploaded on SWVRD with information on the BMV's database. *Id.*, ¶ 7. The BMV then performs a series of information checks and reports its findings back to the SWVRD in a set of coded responses. *Id.*, ¶ 9.

The Secretary of State's Office has discovered, however, that searches are conducted in the BMV's database by SSN even when the registrant has not submitted an SSN on his voter registration card and is not required to. *Id.*, ¶ 13; Jeffrey W. Clouse Aff., ¶¶ 7-8, attached as Ex. B. When the BMV conducts a search based on a complete SSN, that SSN is retrieved from the SSN that was entered into the BMV's own database when the voter applicant physically presented themselves to the BMV to receive a driver's license. Clouse Aff., ¶ 8(b). In other words, the BMV database is checking a SSN provided by its own system, and not an SSN provided by the voter or the Secretary of State's office. As a result, it is most likely that a large number of "mismatches" should actually be coded as false negatives, as described below.

Improper forwarding of queries to the Social Security Administration

It appears that review of voter information may not be consistent with the plan contemplated by the Help America Vote Act ("HAVA") or with the Social Security Act. More specifically, it appears voter registration information is improperly being forwarded to the Social Security Administration ("SSA") in order to perform verification checks. The Secretary's investigation to date is thus consistent with a letter sent to her by the SSA dated October 3, which states, in part, that the volume of verification requests sent to the SSA "appears to be much greater than one would expect." Exhibit C.

Under the express terms of the Social Security Act, the SSA is authorized to do a database match with the SSA database ONLY when "the last 4 digits of an SSN are provided [by the registrant] instead of a drivers' license number." 42 U.S.C. 405(r)(8)(C). In other words, the

SSA is **not authorized** to do verification checks under HAVA where a driver's license number was provided by the voter registrant rather than the last four digits of his social security number.

However, the Secretary of State's Office has discovered that under the current system, voter registration queries are sent to the SSA, even when the registrant has submitted a driver's license number. Clause Aff., ¶ 11. The discovery of this problem by the Secretary of State's Office is also confirmed by the October 3, 2008 SSA letter in which the SSA informed the Secretary that since October 1, 2007, the SSA has received over 740,000 requests for verification from Ohio. Accordingly, the SSA requested that the Secretary "look into this matter to ensure that your election officials are verifying only those newly-registered voters who do not have suitable State-issued identification."

The BMV "Voter Verification SSA Processing" document, issued in June 2006, further illustrates that Ohio appears to be over-querying the SSA. The relevant portion of that document reads as follows:

If the driver is found [in the BMV database] by DLN or Name and DOB, and the last four digits of the SSN provided matched and the DL record is verified[,] SSA will not be called. But, if the last four digits of the SSN provided does not match the DL record a mismatch will be indicated and SSA will be called.

This procedure, in querying SSN when a driver's license number was provided by the voter, does not comport with the Social Security Act or with the BMV-SSA User Agreement. While the BMV has a Social Security number associated with a driver's license number, under HAVA, SSA is not to be contacted unless it was the voter who provided that number – the fact that BMV is able to "connect" the two numbers together does not provide authorization for verification based on SSN to occur. Under both the Social Security Act and the BMV-SA User Agreement, if a driver's license is provided at all by the voter, the SSA need not, and should not, be contacted. See BMV-SSA User Agreement, Art. III ("if a valid driver's license exists the

[BMV] shall compare it to its records and return the result to the voter registration authority. If **no valid driver's license exists and** the application has an SSN, the [BMV] may request verification of application information from SSA.”). In other words, in every instance where the BMV finds that a driver's license number was provided on a registration form – even if the driver's license number is wrong – **no query need be forwarded to the SSA**. If a mismatch of driver's license number is found, that mismatch itself justifies further investigation by a county election official as to whether the registration is valid. However, under the express terms of HAVA, the Ohio BMV's ability to query the SSA is dependent upon the registrant's initial choice to provide the last four digits of his social security number to meet the identification requirements for voter registration.

This over-forwarding of all voter registration queries to the SSA has consequently created the related problem of erroneous reporting and coding of “mismatches” in the voter registration database. The Secretary of State's office has discovered that the vast majority of “mismatches” reported by SSA to the voter registration database are actually “nonmatches” or false negatives. A bona fide “mismatch” should be limited to those situations where the information entered into the SWVRD fails to match the records of the BMV or the SSA because there is an affirmative discrepancy between the data contained in the two systems. Thus, a real “mismatch” occurs, for example, where a voter submits an SSN4 to the boards of elections and those four numbers of different from the four numbers recorded in the BMV and the SSA databases.

However, the automatic forwarding of all queries to the SSA, even where no SSN4 was provided, is resulting in “nonmatches” being coded as “mismatches.” For example, where a voter did not provide a SSN4 on a voting registration form, the voter's record is still being checked against the SSA database which then reports a failure to validate. The SSA computer

returns an error report because, when its system searches for a match for a SSN4 number in its records, it fails to find one. This is entirely understandable, because the data forwarded to the SSA did not include a SSN4. Under the current system, these “nonmatches” are improperly being marked as non-verified, even though a voter properly provided all the required information for registration.

Thus, before the Secretary of State can produce an accurate list of all HAVA voter registration mismatches in compliance with this Court’s order, the Secretary of State has to develop a query to trigger the SWVRD to determine whether false negatives are being included as “mismatches,” and begin a testing process to ensure its accuracy. *Mangan Aff.*, ¶ 15. Compliance with the Court’s order will require reprogramming of a computer system that interfaces with databases maintained by the Bureau of Motor Vehicles, the Social Security Administration, and 88 county boards of elections. The boards’ databases are maintained by three separate vendors. With less than three weeks before the election, any substantial reprogramming of the SWVRD can lead to a breakdown in the boards’ ability to properly prepare accurate lists of voters for each precinct. Thus, Secretary Brunner respectfully requests this Court stay its order granting the Plaintiffs’ motion for a temporary restraining order.

2. A stay is necessary to prevent the disclosure of confidential information on the SWVRD.

Compliance with this Court’s TRO without further review of the reporting codes on the SWVRD exposes elections officials to possibility liability under the confidentiality and use restrictions established by federal law. Under 42 U.S.C. 405(r)(8)A(ii), matching information provided by the SSA must be afforded confidentiality and may lawfully be used “only for the purpose of maintaining [election officials] records. It is a felony to use that data for any other purposes.” The BMV is under a contractual obligation as well to maintain confidentiality and to

assure that SSA matching information is not inappropriately disseminated. 42 U.S.C.

405(r)(3)(F) expressly provides:

Applicable information provided by the Commission pursuant to an agreement under this paragraph or by an individual to any agency that has entered into an agreement under this paragraph shall be considered as strictly confidential and shall be used only for the purposes described in this paragraph and for carrying out an agreement under this paragraph. Any officer or employee or former officer or employee of a contractor of a State who, without the written authority of the Commissioner, publishes or communicates any applicable information in such individual's possession by reason of such employment or position as such an officer, shall be guilty of a felony and upon conviction thereof shall be fined or imprisoned, or both, as described in section 408 of this title."

42 U.S.C. 405(r)(3)(F). See also, 42 U.S.C. § 15483(a)(3) ("The appropriate State or local official shall provide adequate technological security measures to prevent the unauthorized access to the computerized list established under this section."). Accordingly, a stay of this Court's TRO is necessary so that elections officials are not in jeopardy of committing felonies for unauthorized disclosure.

3. Last-minute changes to the database without comprehensive review may cause irreparable harm to the database itself.

As stated earlier, compliance with the Court's order will require the alignment of many moving parts. It will require reprogramming of a computer system that involves databases maintained by the BMV, the Social Security Administration, the Secretary of State's Office, and 88 county boards of elections. Additionally, the boards' databases are maintained by three separate vendors. In order to provide workable data for the boards of elections, the Secretary of State would have perform testing and assessment of underlying data from each of the county boards of elections. Mangan Aff., ¶¶ 17-18. Furthermore, various aspects of the SWVRD system were created by outside vendors hired by the previous Secretary of State. *Id.*, ¶ 10. At this late date, any substantial reprogramming of the SWVRD could possibility cause irreparable

damage to the database itself. The Court should not require implementation of last-minute changes to a complex database in a rushed manner. That will be the result unless the Court extends its October 17, 2008 deadline. The TRO poses a real and substantial interruption to the ability of election officials to perform their duties. .

4. The TRO poses a real and substantial interruption to the ability of election officials to perform their duties.

Finally, the Court's TRO, issued this close to Election Day, is an inordinate disruption on the elections process and forces the Secretary of State's Office to shift attention and resources away from elections preparation to the reprogramming of the database. Now through November 3, 2008, the Secretary of State and her staff must perform numerous statutory duties in connection with the general election to be held on November 4, 2008, including but not limited to:

- Processing the return of 20,768 state issue petitions from the county boards of elections and updating our worklog of the number of valid and invalid petitions and number of valid and invalid signatures contained on those petitions;
- Processing voter registrations and sending absent voter ballot applications;
- Responding to hundreds of phone calls and respond to emails from voters, the general public, interest groups, and other agencies;
- Preparing reporting instruction manuals, instructions sheets and reporting forms for county boards of elections in submitting unofficial results for the November 4 general election;
- Prepare simulated results for conducting trial runs of the submission of unofficial results reporting with election staff and county boards of elections;
- Preparing directives, advisories and/or memoranda to be sent to county boards of elections for conducting the unofficial and official canvass of results for the November 4 general election;
- Preparing and providing directives and instructions on conducting the special congressional election on November 18 to fill the vacancy in the office of U.S. Representative for the 11th Congressional District;

- Constantly communicating with the county boards of elections to address technical administrative questions on election preparation procedures.

Patricia Wolfe Aff., ¶ 5. The additional task of overhauling the SWVRD in order to comply with the Court's TRO strains the resources of the Secretary of State, at best, and flies in the face of judicial admonitions discouraging last-minute judicial orders enjoining election processes close to Election Day. See *Purcell v. Gonzales*, 127 S.Ct. 5, 7 (2006).

Therefore, because the issuance of the TRO creates substantial and irreparable harm to voters, to the integrity of the voter registration database, and to elections officials, a stay of the TRO is necessary and warranted.

C. An Extension for Completion of the Court's Order is Needed to Address Problems in the Voter Registration Database Discovered Recently by the Secretary of State's Office.

In the alternative, the Secretary of State requests an extension of the October 17, 2008 completion date of the TRO. Despite the diligence of the Secretary of State's Office, the discovery of problems with the database make it apparent that implementation of the Court's order will require substantially more time than the one-week implementation period originally established by the Court. This is so regardless of whether the Secretary implements option 1 (providing lists of names to the boards of elections) or option 2 (giving counties more useable access to the database) of the fourth paragraph of the TRO. Therefore, Secretary Brunner moves for an extension until October 24, 2008 to comply with this Court's order.

IV. CONCLUSION

For the reasons set forth above, Defendant Secretary of State Jennifer Brunner respectfully asks this Court for: (1) a stay of its temporary restraining order, or in the alternative, (2) an extension of the October 17, 2008 temporary restraining order.

Respectfully submitted,

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Certificate of Service

This is to certify a copy of the foregoing was served upon all counsel of record by means of the Court's electronic filing system on this 16th day of October, 2008.

/s Richard N. Coglianesse



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DIRECTIVE 2008-67

August 15, 2008

TO: ALL COUNTY BOARDS OF ELECTIONS
MEMBERS, DIRECTORS, AND DEPUTY DIRECTORS

RE: Procedures for Processing Absent Voter's Ballots Prior to Election Day

More Ohio voters are taking advantage of voting by mail or early voting in a board of elections office. As a result, several boards of elections have expressed the concern that, for elections with an exceptionally heavy turnout of voters, such as a presidential general election, boards may have difficulty meeting the statutory reporting deadline for the unofficial count if they are required to wait until Election Day to begin processing and scanning absent voter's ballots. In light of this, boards of elections are directed to follow the procedures below for processing absent voter's ballots.

Procedures for Early Processing of Absent Voter Ballots

Boards of elections may begin *processing* absent voter's ballots no sooner than ten days prior to Election Day. For the purposes of this directive, "processing" means the handling and examining of absent voter ballots, but **excludes tabulation** of them. "Processing" includes any of the following:

- Examining the sufficiency of absent voter's ballot identification envelope and, if determined to be sufficient, opening the absent voter's ballot envelope;
- Determining the validity of the absent voter's ballot (e.g., whether the stub is removed);
- Preparing the absent voter's ballot for scanning;
- Scanning of the absent voter's ballot *but only if the voting system used by a county board of elections allows the absent voter's ballot to be fed through the ballot scanning device without tabulating or counting the votes on the ballots scanned*; and
- Identifying absent voter's ballots that cannot be "read" or are "rejected" by the ballot scanning device for purposes of determining if the ballot needs to be remade so that it can be read by the scanner.

If the voting system used by your board of elections allows you to feed the absent voter's ballot through the ballot scanning device without "tabulating" or "counting" the votes on the ballot, your board may begin to *scan* absent voter's ballots **no sooner than ten days** prior to Election Day.

If the voting system used by your board of elections does **not** allow you to feed the absent voter's



ballot through the ballot scanning device without "tabulating" or "counting" the ballot, your board shall not **scan** absent voter's ballots prior to 12:01 a.m. on Election Day; however, your board may begin other processing of the ballots as described above.

No "counting" or "tabulating" of absent voter's ballots on the central tabulation server shall occur until 7:30 p.m. on Election Day.

Remakes

No ballot for which voter intent is at issue may be remade unless and until the board of elections has, by majority vote in public session, confirmed or determined voter intent. Please see Directive 2007-31 or the most recent directive in effect for prescribed procedures for remaking an optical scan ballot.

Observers

Observers, as that term is defined in R.C. 3505.21, may observe the examination and opening of identification envelopes for absent voter's ballots. If your board of elections decides to begin processing absent voter's ballots prior to Election Day, you must notify all appointed observers of the time and place at which the board will process absent voter's ballots prior to Election Day.

Under no circumstances may tabulation of any votes occur before 7:30 p.m. on Election Day. In the event of a court order extending polling hours in any precinct of the state, boards will receive instructions from the Secretary of State's office regarding when results may be released. In this circumstance, boards will be permitted to begin tabulation, but prohibited from releasing results until all polls in the state have closed. Pursuant to R.C. 3509.06(E), no person, including election officials and observers, shall disclose any count or any portion of a count of absent voter's ballots prior to the time of the closing of the polling places on Election Day, and no person shall recklessly disclose the count or any portion of the count of absent voter's ballots in such a manner as to jeopardize the secrecy of any individual ballot. This must be strictly observed.

If you have any questions concerning the handling of absent voter's ballots prior to Election Day or the procedures set forth in this directive, please contact the elections attorney assigned to your county at (614) 466-2585. Thank you for your efforts.

Sincerely,



Jennifer Brunner

No. 08-4322

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Ohio Republican Party, et al., :
 :
 :
 Plaintiffs-Appellees, : On Appeal from
 : the United States District Court
 v. : for the Southern District of Ohio:
 : District Court Case No. 2:08CV913
 :
 Jennifer Brunner, :
 Secretary of State of Ohio, :
 :
 Defendant-Appellant :

EMERGENCY MOTION OF DEFENDANT-APPELLANT
OHIO SECRETARY OF STATE TO VACATE OR STAY DISTRICT COURT'S
TEMPORARY RESTRAINING ORDER

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INTRODUCTION

For the second time in less than two weeks in the very same case, the district court has issued an unfounded temporary restraining order (“TRO”) that wreaks havoc with the upcoming presidential election in Ohio. The court’s hasty, factually mistaken order threatens to disrupt the State’s voter registration rolls—more than a week after the start of early voting, and less than a month before Election Day. As it did just last week, this Court should vacate or stay the TRO.

First, the district court lacked jurisdiction in two respects: (1) The district court was divested of jurisdiction because the claim at issue, raised by Plaintiffs Ohio Republican Party, et al. (“ORP”) under the Help America Vote Act (“HAVA”), 42 U.S.C. §§ 15483(a)(1)(A) & (a)(5)(B)(i), is currently pending before this Court as a result of last week’s appeal; and (2) the HAVA provisions at issue do not create a private right of action enforceable under 42 U.S.C. § 1983.

Second, even assuming *arguendo* that the district court had jurisdiction, the court abused its discretion by issuing a TRO after voting in Ohio has begun. The Supreme Court has admonished that “[c]ourt orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls.” *Purcell v. Gonzalez*, 549 U.S. 1, 7 (2006) (per curiam). The district court therefore wrongly interfered in the conduct of an election, and this Court should stay the TRO pending appeal.

Third, the district court disregarded this Court's instructions just last week to exercise care in considering factual disputes and balancing the equities. This election-related dispute, as this Court recently underscored, is factually intensive. At issue is a complicated system of computer databases that interface to allow Ohio election officials to verify the voter registration rolls. The Secretary asked the district court for an opportunity to present fact witnesses concerning the operation of these databases, but the district court denied the request. Instead, the court recklessly ordered the Secretary to reprogram her statewide computer database, with no understanding of the database's operation and even less regard for the disorder that its ill-informed order injects into the presidential election. In forcing the Secretary to redo a state computer system to the district court's liking, the TRO threatens to throw Ohio's entire statewide database—which in less than two weeks will be used to make the State's poll books—into chaos.

The district court's cavalier attempt to micromanage Ohio officials' administration of this election is breathtaking. This Court's immediate intervention is required.

STATEMENT OF THE CASE AND FACTS

ORP filed this action on Friday, September 26, 2008, seeking a temporary restraining order and injunctive relief against the Secretary under various federal statutory and constitutional provisions, including HAVA. Compl. ¶ 1, Dist. Ct.

Dkt. No. 2. ORP's Complaint stated five claims for relief. As pertinent here, Claim 2 alleged that the Secretary "violated both the letter and the spirit of HAVA," *id.* ¶ 48, by "failing to verify voter registration against [a statewide] computerized database." *Id.* ¶¶ 45-47. In response to the HAVA claim, the Secretary argued that HAVA does not create an enforceable private right of action. Secretary's Mem. in Opp. at 20-22 (Sept. 29, 2008), Dist. Ct. Dkt. 15.

After the district court granted the TRO in part, both the Secretary and ORP filed emergency requests for relief with this Court. The Secretary asked the Court to vacate or stay the district court's order pertaining to Advisory 2008-24 (related to election observers). Secretary's Emergency Mot., No. 08-4242 (Sept. 30, 2008). ORP opposed that request and additionally moved for emergency relief under, among other things, HAVA. ORP Resp., Nos. 08-4242, 08-4243 (Sept. 30, 2008), at 13. Specifically, ORP argued that the Secretary's "failure to establish a plausible system for verifying the absentee ballots cast by newly registered (and hence unverified) voters violates the Help America Vote Act." *Id.* ORP added that the Secretary was failing to discharge her duties under HAVA "to create a computerized statewide voter registration list of every legally registered voter and to verify a registrant's information to prevent fraud." *Id.* at 13-14 (citing 42 U.S.C. § 15483(a)(5)(A)). In response, the Secretary explained that she is complying with HAVA. Secretary's Resp. at 7-8 (Sept. 30, 2008).

This Court granted the Secretary's motion to stay the district court's TRO and denied ORP's request for relief. *Ohio Republican Party v. Brunner*, Nos. 08-4242, 08-4243-08-4251, 2008 U.S. App. LEXIS 20677 (6th Cir. Sept. 30, 2008) ("*ORP I*"). The Court then issued a briefing schedule, ordering the Secretary to file her initial brief on November 17, 2008. Briefing Letter (Oct. 6, 2008).

Before the district court, ORP then filed a "Renewed Motion for Temporary Restraining Order Following Interlocutory Appeal" on Sunday, October 5, 2008. Renewed TRO Mot., Dist. Ct. Dkt. No. 36. The motion stated that the district court "had not yet ruled on Plaintiffs' HAVA claim"—"Count II of the original Complaint"—and it asked the court "to do so now." *Id.* at 1-2. The Secretary opposed the motion both for lack of jurisdiction and on the merits. Opp. to Renewed Mot. (Oct. 8, 2008), Dist. Ct. Dkt. No. 43. The Secretary also asked for a hearing on the TRO request, noting that the "factual issues raised in the Plaintiffs' filing would be best addressed by means of a hearing" at which the Secretary could cross-examine ORP's affiants and explain the voter database. Secretary's Mot. for Hr'g at 1 (Oct. 8, 2008), Dist. Ct. Dkt. No. 42. The district court granted the motion for an oral hearing but denied the Secretary's request for an opportunity to cross-examine ORP's affiants and to present testimony concerning the statewide database. Order on Mot. for Hr'g (Oct. 8, 2008), Dist. Ct. Dkt. No. 47.

Following an oral hearing as well as an in-chambers conference to which the district court invited the media, the court again granted a TRO. Op. & Order (“TRO Order II”), Dist. Ct. Dkt. No. 52 (attached as Ex. 1).

ARGUMENT

This Court should vacate the TRO because the district court lacked jurisdiction on two grounds: first, this Court’s decision just nine days earlier in *ORP I* divested the district court of jurisdiction over ORP’s HAVA claim; and second, ORP has no private right of action under HAVA. Moreover, even if the district court had jurisdiction over the ORP’s renewed TRO request, the court abused its discretion in ordering relief that runs roughshod over the public interest in an orderly election after voting has begun.

A. This Court should vacate the TRO because the district court lacked jurisdiction to grant relief on ORP’s HAVA claim.

1. This Court’s decision last week in *Ohio Republican Party v. Brunner* divested the district court of jurisdiction over ORP’s HAVA claim.

This Court has seen ORP’s HAVA claim before; indeed, that exact claim remains pending before this Court. To be precise, still pending before this Court is the question whether ORP was entitled to emergency preliminary relief on its HAVA claim. Given that pending claim, the district court lacked jurisdiction to entertain again ORP’s claim for preliminary relief under HAVA.

ORP raised its allegation that the Secretary is not complying with HAVA's electronic database requirement in its original request for preliminary injunctive relief. Compl. ¶¶ 42-48. As explained above, both parties briefed the HAVA issue before the district court. What is more, the issue was discussed at several points during oral argument on ORP's first TRO motion. See Tr. at 12.11 – 13.9; 18.25 – 19.15; 37.12 – 38.15; 47.5 – 49.11 (Sept. 29, 2008) (excerpts attached as Ex. 2). Counsel for ORP, Mr. Todd, stated: We would like to point out that the Secretary's actions here are exacerbated by her failure . . . for over six years now to implement the federally mandated database that would allow registration for all individuals in Ohio on a realtime basis. . . . That database doesn't exist, Your Honor, in our State." *Id.* at 12.11-18. Later, the district court asked Mr. Todd to "expand on" the allegation "that Ohio has failed to follow and provide for a statewide computerized program." *Id.* at 18.25 – 19.2. The court also engaged counsel for the Secretary on this issue, asking, "[t]his is how you comply with HAVA; is that correct?" *Id.* at 48.23-24.

ORP then appealed the HAVA issue to this Court last week, specifically asking for emergency relief on its HAVA claim. ORP Resp., Nos. 08-4242, 08-4243 (Sept. 30, 2008), at 13-14 ("[D]efendant's failure to establish a plausible system for verifying the absentee ballots cast by newly registered (and hence unverified) voters violates the Help America Vote Act ("HAVA"), 42 U.S.C.

§ 15301 *et seq.*”). The Secretary expressly rebutted ORP’s HAVA argument. Secretary’s Resp. at 7-8 (Sept. 30, 2008).

ORP’s request for emergency HAVA relief was therefore squarely before this Court—and that is where it remains. “In general, filing of a notice of appeal confers jurisdiction on the court of appeals and divests the district court of control over those aspects of the case involved in the appeal.” *Marresse v. Am. Acad. of Orthopaedic Surgeons*, 470 U.S. 373, 379 (1985); *see also Hogg v. United States*, 411 F.2d 578, 580 (6th Cir. 1969). To be sure, “an appeal from an interlocutory order does not divest the trial court of jurisdiction to continue deciding *other issues* involved in the case.” *Weaver v. Univ. of Cincinnati*, 970 F.2d 1523, 1528-29 (6th Cir. 1992) (emphasis added). In this case, however, the question of emergency relief on ORP’s HAVA claims was an “aspect[] of the case involved in the appeal” to this Court, *Marresse*, 470 U.S. at 379, not one of the “other issues” referred to in *Weaver*. Because this Court continues to exercise jurisdiction over that appeal, *see* Briefing Letter (Oct. 6, 2008), the district court lacked jurisdiction over the claim.

The district court offered no sound reason for retaining jurisdiction to decide the HAVA issue. The court asserted that its previous order only addressed Directive 2008-63 (concerning the five-day window) and Advisory 2008-24 (concerning election observers), not HAVA. TRO Order II at 6. But as explained above, the district court unmistakably considered the HAVA claim; after all, that

claim was stated in the Complaint, briefed by the parties, and discussed at the hearing. ORP then explicitly asked this Court for emergency relief on its HAVA claim. And it is the fact that one of the parties expressly appealed the issue—not the district court’s reference (or not) to the statute in its order—that divests the district court of jurisdiction. *See Weaver*, 970 F.2d at 1528.

Simply put, ORP asked for emergency relief on its HAVA claim in the district court, asked again in this Court on appeal, and asked *again* in a renewed motion in the district court. ORP does not get a second bite at the apple while its appeal is pending.

2. HAVA does not confer a private right of action that ORP may enforce under § 1983.

The district court lacked jurisdiction over ORP’s HAVA claim for a second reason: ORP has no rights under HAVA that are enforceable in a § 1983 action.

Because “HAVA does not itself create a private right of action,” *Sandusky County Democratic Party v. Blackwell*, 387 F.3d 565, 572 (6th Cir. 2004) (per curiam), it is enforceable, if at all, only through a civil rights action under § 1983. But “statutory language that merely ‘benefits’ putative plaintiffs without specific rights-creating language is insufficient to confer a personal federal right enforceable under § 1983.” *Johnson v. City of Detroit*, 446 F.3d 614, 621 (6th Cir. 2006) (citing *Gonzaga Univ. v. Doe*, 536 U.S. 273, 282 (2002)). In other words, no basis for a § 1983 action exists “where the text and structure of a [federal]

statute provide no indication that Congress intend[ed] to create new individual rights.” *Gonzaga*, 536 U.S. at 286. Thus, HAVA is enforceable in a § 1983 suit only if HAVA evinces “an explicit congressional intent to create an entitlement . . . enforceable . . . under § 1983.” *Johnson*, 446 F.3d at 623.

The HAVA provisions at issue in this case do not create an explicit, enforceable right of action. ORP seeks relief under the HAVA provisions concerning statewide registration databases—specifically, 42 U.S.C. § 15483(a). Compl. ¶ 42. That part of the statute provides that “each State, acting through the chief State election official, shall implement, in a uniform and nondiscriminatory manner, a single, uniform, official, centralized, interactive computerized statewide voter registration list.” 42 U.S.C. § 15483(a)(1)(A). The statute imposes administrative requirements on the Secretary as Ohio’s chief election official. *Id.* But nowhere does it mention a privately enforceable right. Instead, the statute elsewhere requires that each State establish an administrative complaint procedure for resolving grievances under the statute. *See* 42 U.S.C. § 15512. The absence of “an explicit congressional intent to create” a privately enforceable entitlement concerning statewide databases under HAVA means that no such entitlement exists. *Johnson*, 446 F.3d at 623.

The district court was wrong to locate a private HAVA right of action in this Court’s decision in *Sandusky County Democratic Party*, because that case involved

a different HAVA provision than is at issue here. This Court in *Sandusky* considered a claim under the HAVA provision related to provisional ballots and noted that “HAVA . . . refers explicitly to the ‘right of an individual to cast a provisional ballot.’” *Sandusky*, 387 F.3d at 573 (quoting 42 U.S.C. § 15482(b)(2)(E)); see also *id.* (quoting statute’s protection of “these rights”). In light of this rights-creating language, the *Sandusky* Court found that HAVA provides a right of action enforceable under § 1983 for individuals “whose right to vote provisionally has been denied or abridged.” *Id.* But the Court spoke only of rights related to provisional ballots; it nowhere referred to other sections of HAVA.

HAVA’s statewide-database provisions, unlike the provisional-ballot provision at issue in *Sandusky*, do not create individual rights. On the contrary, HAVA expressly vests considerable discretion in the States in deciding how to implement the statute, showing that Congress intended limited federal oversight—not, as here, close judicial scrutiny. See 42 U.S.C. 15485.

B. ORP is not entitled to the extraordinary relief of a TRO that interferes with a presidential election after voting has begun and so close to Election Day.

Because “[i]nterference with impending elections is extraordinary,” *Southwest Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 919 (9th Cir. 2003) (en banc), federal courts repeatedly have refused to enjoin state election laws in cases brought too close to Election Day. See *Purcell*, 549 U.S. at 7; *Reynolds v.*

Sims, 377 U.S. 533, 585-86 (1964). For its part, this Court “require[s] that any claims against the state [election] procedure be pressed expeditiously.” *Kay v. Austin*, 621 F.2d 809, 813 (6th Cir. 1980).

ORP could have brought its HAVA claim well before now. The Secretary’s office began implementing HAVA and creating a statewide database before the current Secretary took office in 2007. Indeed, ORP has offered no explanation for waiting until the eleventh hour to file this claim. Meanwhile, the risks of ORP’s last-minute litigation, and the district court’s reckless TRO, could be no higher. The district court’s order could potentially create errors in the voter registration rolls because sufficient time does not exist to implement carefully the court’s confusing instructions. Not to mention that voting in Ohio has begun.

The district court’s extraordinary action appears to rest in large part on the court’s concern with fraud—a concern founded on newspaper articles rather than record evidence. TRO Order II at 13. Setting aside the fact that the statewide database amply protects against fraud—indeed, that is why the database exists—the district court’s rationale provides no basis for the last-minute TRO. The Supreme Court encountered the same argument in *Purcell*—that the risk of fraud warranted relief close to the election—and squarely rejected it in favor of a deliberative adjudication following factfinding. 549 U.S. at 7-8; *see also id.* at 8

(Stevens, J., concurring). This Court should therefore apply settled precedent and rule that a TRO after voting has begun is not an appropriate form of relief.

C. The district court abused its discretion in issuing a TRO based on the Secretary's purported violation of HAVA.

Even assuming *arguendo* that the district court had jurisdiction, that ORP has a private right of action under HAVA, and that *Purcell* does not bar relief at this late date, this Court still should stay the district court's order under the four familiar factors applicable to injunctive relief. *See Northeast Ohio Coalition for Homeless v. Blackwell*, 467 F.3d 999, 1009 (6th Cir. 2006).

1. Contrary to the district court's flawed analysis, the Secretary has complied with HAVA by implementing a computerized statewide voter registration database.

HAVA requires each State to implement "a single, uniform, official, centralized, interactive computerized statewide voter registration list . . . that contains the name and registration information of every legally registered voter in the State." 42 U.S.C. § 15483(a)(1)(A). The Secretary of State has indisputably created such a statewide database; it contains the names and registration information of every legally registered voter in the state. *See Maragos Aff.* ¶ 6, Dist. Ct. Dkt. No. 44 (attached as Ex. 3). When a citizen registers to vote, local election officials record the citizen's name, address, date of birth, and either an Ohio driver's license number or the last four digits of the citizen's social security

number in the local voter registration database. That information is then automatically uploaded into the Secretary's database. *Id.* ¶ 6.

Consistent with the requirements of HAVA, the Secretary and the Ohio Bureau of Motor Vehicles ("BMV") have "enter[ed] into an agreement to match information in the database of the statewide voter registration system with information in the database of the [BMV]," the purpose of which is "to enable each official to verify the accuracy of the information" provided by the would-be voter. 42 U.S.C. § 15483(a)(5)(B)(i). The county boards of elections first input the voter's data into their systems, and that data is then automatically uploaded to the Secretary's database. The Secretary of State then automatically and electronically transmits the following information to the BMV for verification: the voter's first name, last name, date of birth, driver's license number, and the last four digits of the voter's social security number. *See Maragos Aff.* ¶ 9.

Upon receipt, the BMV automatically and electronically compares the information on the application to the data in its own system, and it further transmits that data to the federal Social Security Administration for additional validation when required. *Id.* ¶¶ 8,10. The BMV's system automatically notifies the Secretary whether it can or cannot verify the registration information. But the system generates far more than a simple "yes" or "no" answer: The BMV reports back any problem or discrepancy in the data—name, driver's license number,

social security number, and birthday. *Id.* ¶ 14. This information is then automatically reflected on the Secretary's database, which the county board of elections can then access in real time. *Id.* ¶ 5.

The Secretary's database has a technological limitation; it does not allow for batch sorting of the mismatches. In other words, after a voter's information is inputted into the database, the county boards of election can then query that voter's name to determine if a mismatch was generated. But the database cannot generate a list or spreadsheet of every voter record containing a mismatched entry.

The district court concluded that this technological limitation deprived the county boards of elections from having an "effective way to identify or isolate mismatches from the rest of the pile." TRO Order II at 11. The court next concluded that this deficiency violated § 15483(a)(5)(B)(i) because the Secretary had not created an effective system to match the information in her database with the information in the BMV database. *Id.* at 11-12.

The court further determined that ORP would suffer irreparable harm absent emergency intervention: "[C]onfidence in the electoral process will be undermined if new voter registrations are not verified in accordance with HAVA, and if unqualified individuals are permitted to cast votes." *Id.* at 12. To support its conclusion, the court cited to statements by a national voter-registration organization in two recent newspaper articles that the organization could not

eliminate all fraud in its voter registration operations. *See id.* at 13 (noting that ACORN was “unable to spot duplicate voter-registration cards or cards that my [sic] have been filled out by workers to make quotas”). By comparison, neither the Secretary nor the electorate, the district court said, would suffer any harm from a TRO. *Id.* at 14.

In light of these conclusions, the district court issued four specific decrees: first, the Secretary shall “perform[] the required verification of a new registrant’s identity”; second, the Secretary shall “establish a process by which the county boards of elections can access the information generated from the checks”; third, the Secretary shall provide the boards access to such information on or before October 17, 2008; and fourth, such access must be in the form of “lists of the mismatches” or “a method to search the [Secretary’s] database” that allows for “isolat[ion] and review of the mismatches.” *Id.* at 15-16.

2. The district court’s findings on the merits of ORP’s HAVA claim are factually unsupported and legally flawed.

The Secretary requested on October 8, 2008, that the district court conduct an evidentiary hearing on ORP’s TRO motion. That request was consistent with this Court’s earlier opinion, rejecting ORP’s emergency request for an injunction directing the Secretary to segregate absentee ballots cast by newly registered voters for independent verification: “[T]his motion raises factual issues concerning whether the absentee ballots by newly registered voters are properly handled by

county boards of elections. . . . We believe that such *factually-intensive issues* are best presented, in the first instance, to the district court.” *ORP I*, 2008 U.S. App. Lexis 20677, at *9-*10 (emphasis added). In much the same vein, ORP’s instant motion raises factual issues concerning whether the county boards of elections can adequately utilize the Secretary’s database, in its current form, as a tool to compare new voter information with information in the BMV database.

The district court’s refusal to allow any factual development of this issue was an abuse of discretion, and undermines its entire analysis. The central premise of the Court’s reasoning is that, due to the technological limitations of the database, the county boards of elections lack an effective method of identifying mismatches. But the record is silent on the question of effectiveness. How many mismatches occur in a given county? How onerous is it for a county board of election to query each new voter by name in the Secretary’s database to confirm the presence or absence of a mismatch? Have the boards even attempted to perform these queries, and have they done so successfully?

Moreover, even if this Court were to accept the district court’s mischaracterization of the Secretary’s database, there is still no violation of HAVA. The Secretary presented un rebutted evidence that the county boards of election have ready, real-time access to her database and that, upon entry of the voter’s name, her system identifies whether the information on the voter card

matches BMV records. This fully satisfies the plain language of HAVA. *See* 42 U.S.C. § 15483(a)(5)(B)(i) (requiring the Secretary to “enter into an agreement to match information in the database of the statewide voter registration system with information in the database of the motor vehicle authority”). Whether or not the district court could design a better, more user-friendly database is beside the point.

The district court’s central conclusion—that the Secretary has failed to create a HAVA-complaint system to match voter information to the BMV database—has no basis in fact or law. It must be reversed.

3. The district court’s remedy ignores the potential for irreparable harm to the Secretary, the county boards of elections, and, ultimately, the electorate.

The centerpiece of the district court’s remedy was an order that the Secretary provide “effective access” to voter mismatch information. TRO Order II at 16. This requires that the Secretary modify her database to allow county boards of elections, either through list generation or search capacities, a method to produce a master roll of all voter mismatches in a particular county. The court crafted this relief without any testimony from those individuals that operate and oversee the database, and without any discussion of how such relief would impact the database’s stability.

Now, only twenty-five days before the election, the Secretary must develop new codes and instructions for the database. It is not clear how long such a process

will take. Although the court surmised that such a process would require two to three days, *see* TRO Order II at 14, counsel for the Secretary affirmatively stated that the development and reprogramming of the database would require *at least four to five days*. *Cf. Reynolds*, 377 U.S. at 585 (“In awarding or withholding immediate relief, a court . . . should consider the proximity of a forthcoming election and the mechanics and complexities of state election laws.”).

Additionally, the Secretary cannot accurately predicate the hidden dangers of reprogramming her database at this late juncture. The database is complex. It is connected to the individual systems of the 88 county boards of election, and to the BMV’s database, which is, in turn, connected to the Social Security Administration’s verification system. The entire system was created by multiple vendors, is comprised of multiple databases with multiple interfaces, and can be accessed by multiple entities across the State. The court’s timeline and the looming election does not allow for thorough testing of any reprogramming efforts. Such testing is necessary to ensure that the database continues to operate successfully, as it has for several years now, and to ensure that new programming does not endanger the voter registration files for the approximately eight million registered voters in Ohio who are already casting absentee ballots and who will go to the polls in just over three weeks.

Finally, the district court concluded that the database was limited to voter registration, and played no role in the vote-casting stage. *See* TRO Order II at 14 (“The Court does not find any other harm to others if a temporary restraining order is issued. The new voter registration deadline has passed.”). The district court could not have been more wrong: In only eleven days, the Secretary’s database will be used to generate the Election Day poll books. As with any complex, interconnected network, last-minute reprogramming of the database has the potential to threaten the stability of the system, risking delays and inaccuracies in the creation of the poll books.

4. The district court relieved ORP of its burden of establishing a likelihood of irreparable harm.

The district court concluded that ORP had shown irreparable harm—specifically, the threat of vote dilution. *See* TRO Order II at 12. But ORP must show an “actual and imminent” risk that, absent intervention by the district court, unqualified voters will cast ballots in the upcoming election. *Abney v. Amgen, Inc.*, 443 F.3d 540, 552 (6th Cir. 2006).

This record contains no such evidence. ORP instead speculates that throngs of out-of-state residents are flooding into Ohio, registering to vote with false social security numbers and addresses. *See* Renewed TRO Motion at 5, Dist. Ct. Dkt. No. 36. Yet it cannot cite one reported instance where this hypothetical circumstance has occurred. As discussed above, the county boards of elections

have ready, real-time access to the Secretary's database to verify the bona fides of a particular voter registration card or absentee ballot. For those who show up to the polls on Election Day, the State now requires the presentation of identification. In light of this framework, ORP's lone invocation of the "voter fraud" strawman cannot serve as a basis for last-minute judicial micromanagement of an election.

ORP's real concern is not voter fraud; it is a desire to acquire a list of mismatch hits—that is, a roll of voters whom ORP can later challenge as unqualified. An untold number of new voters in Ohio will then have to reestablish the bona fides of their vote before the county boards of elections and perhaps even before a judge. ORP's desire to lodge these voter challenges hardly warrants a TRO that interferes with the electoral process.

CONCLUSION

For all of the above reasons, this Court should either vacate or stay the district court's TRO.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify a copy of the foregoing was served upon all counsel of record by means of the Court's electronic filing system on this 10th day of October, 2008.

/s/ Richard N. Coglianesse
RICHARD N. COGLIANESE

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

OHIO REPUBLICAN PARTY, et al.	:	
	:	
Plaintiffs,	:	
	:	Case No. 2:08CV913
v.	:	
	:	JUDGE SMITH
JENNIFER BRUNNER,	:	
Secretary of State of Ohio,	:	MAGISTRATE JUDGE KING
	:	
Defendant	:	

**MEMORANDUM OF DEFENDANT JENNIFER BRUNNER, SECRETARY OF STATE
OF OHIO, IN OPPOSITION TO PLAINTIFFS' RENEWED MOTION FOR
TEMPORARY RESTRAINING ORDER
AND PRELIMINARY INJUNCTION**

I. Introduction

Since the passage of the Help America Vote Act ("HAVA") in 2002, the Ohio General Assembly and Ohio Secretaries of State from both major political parties have worked diligently to implement its requirements. The Plaintiffs have produced no evidence of any weight or substance to support their claim that Defendant Secretary of State Brunner is not processing new voter registrations through the Ohio Bureau of Motor Vehicles and the Social Security Administration, as required by HAVA. The Plaintiffs have been unable to support that claim with evidence, because the claim is simply untrue. Secretary of State Brunner, building on a system first established by her Republican predecessor, has fully and continuously implemented the requirements of HAVA Section 303, codified at 42 U.S.C. § 14583(a)(1)(A). Section 303 requires states to establish and maintain 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 and assigns a unique identifier to each legally registered voter.” In Ohio, that registration list is referred to as the Statewide Voter Registration Database” (“SWVRD”).

This Court has already rejected the HAVA claims raised in Plaintiffs’ motion once. Plaintiffs’ allegation that Secretary Brunner is not complying with HAVA’s electronic database requirement was part of the Plaintiffs request for an order from this Court that would have disenfranchised thousands of qualified Ohio voters who chose to both register and vote an absentee ballot on the same day during the first week of October. Between this Court, Sixth Circuit Court of Appeals and the Ohio Supreme Court, all of Plaintiffs’ legal theories were rejected and discredited. Now, Plaintiffs have filed a second motion for temporary restraining order that simply expands upon the HAVA-related claims Plaintiffs made in last week’s TRO, asking this Court to compel the Secretary of State to comply with HAVA. No injunction is needed, because the Secretary has already ensured that Ohio’s voter verification system meets or exceeds federal requirements.

Rather than renewing this aspect of last week’s request for an injunction, Plaintiffs could have simply asked Defendant about the central tenet of their “renewed” motion, namely that the Ohio Secretary of State has failed to comply with relevant provisions of HAVA relating to the SWVRD. Had Plaintiffs done so, they undoubtedly would not have filed their renewed motion for a TRO, which needlessly involves this Court in a groundless proceeding designed, to create doubt in the minds of voters about the fairness of Ohio’s election by conjuring the specter of non-existent voter fraud and to produce chaos in the administration of the upcoming election in all 88 boards of elections.

II. Relevant Facts: A Brief Review Of The Relevant Issues Already Presented To This Court

This Court already once denied Plaintiffs' request for injunctive relief against the Secretary on the same grounds it now presents in its renewed motion for TRO. It again seeks an injunction so narrowly restrictive of effective election administration that the basic provisions of HAVA for maintaining the consistency of information in Ohio's voter database. Furthermore, the order might result in the disenfranchisement of voters who have properly registered to vote but have not updated their address information with the Ohio Bureau of Motor Vehicles. Such a purpose was expressly *not* intended by HAVA. *See* Proposed Order (Doc. 36-7); *see also* HAVA Plaintiffs' allegation that Secretary Brunner is not complying with HAVA's electronic database requirement was raised in Plaintiffs' original request for injunctive relief. Compl. for TRO and Prelim. & Perm. Injunction (Doc. 2) ¶¶42-48. The issue was then discussed at several points during oral argument on that motion. *See* Transcript of Oral Argument at 12.11 – 13.9; 18.25 – 19.15; 37.12 – 38.15; 47.5 – 49.11. Counsel for Plaintiffs, Mr. Todd, stated:

We would like to point out that the Secretary's actions here are exacerbated by her failure ... and the office's failure for over six years now to implement the federally mandated database that would allow registration for all individuals in Ohio on a realtime basis. ... That database doesn't exist, Your Honor, in our State.

Id. at 12.11-18. Later, the Court asked Mr. Todd to "expand on" the allegation "that Ohio has failed to follow and provide for a statewide computerized program." *Id.* at 18.25 – 19.2. This Court also engaged Counsel for the Secretary on this issue, asking, for example "[t]his is how you comply with HAVA; is that correct?" *Id.* at 48.23-24. Finally, the Court allowed Mr. Todd another opportunity to make the case regarding Plaintiffs' HAVA claims, stating, "but the database - - you got this thing started." *Id.* at 49.10-11.

Following the oral argument, this Court denied the request for a restraining order (except on the narrow question of admitting observers, a decision the Sixth Circuit subsequently reversed). The Court neither expressly based its ruling on a rejection of the HAVA claim nor expressly reserved that issue for future consideration. When a court denies relief without explanation, it is presumed that the court has implicitly overruled that argument. *Kusens v. Pascal Co.*, 448 F.3d 349 (6th Cir. 2006).

Plaintiffs then appealed this Court's denial of their motion for TRO/PI on all issues except the presence of election observers, and asked the Court of Appeals for emergency relief to enjoin this Court's denial pending appeal. *See O.R.P.*, Nos. 08-4242/4243/4251, Plaintiffs' Response to Emergency Motion for Stay Pending Appeal and Emergency Motion for Injunction Pending Appeal (filed Sept. 29, 2008). Plaintiffs' second basis for relief in the Court of Appeals was that "[D]efendant's failure to establish a plausible system for verifying absentee ballots ... violates the Help America Vote Act." *Id.* at 13. Plaintiffs argued there that "the commingling of all absentee ballots will make it impossible as a practical matter to verify the registration of unverified voters, and hence will render any verification process a nullity, in violation of HAVA." *Id.* at 13-14 (citation omitted). Plaintiffs' appeal raised *precisely* the same legal and factual argument that it now seeks to assert in its "renewed" motion.

The Court of Appeals denied Plaintiffs' request for emergency injunctive relief. *ORP*, Nos. 08-4242/4243/4251, slip op. at 4. The case remains pending before the Sixth Circuit, a fact that is detrimental to Plaintiffs' quest to whittle away qualified voters from the rolls. While the Court of Appeals has ruled on the emergency motions, it has maintained jurisdiction over the question of the temporary restraining order. Therefore, this Court has no jurisdiction over the issue.

II. This Court Lacks Jurisdiction To Grant A Temporary Restraining Order

As a preliminary matter, Plaintiffs' "renewed" request for a temporary restraining order relating to HAVA compliance should fail because this Court lacks jurisdiction over that aspect of the case. Jurisdiction over that legal issue rests exclusively with the U.S. Court of Appeals for the Sixth Circuit, until such time as it remands the case back to the District court. Alternatively, the motion should fail based on the "law of the case" doctrine.

As a general rule, filing a notice of appeal operates to transfer jurisdiction of the case to the court of appeals, and the district court thereafter lacks jurisdiction except to act in aid of the appeal. *Hogg v. United States*, 411 F.2d 578 (6th Cir. 1969). There is an exception to that rule, however: an appeal from an interlocutory order does not divest the trial court of jurisdiction to decide *other issues* in the case. *Moltan Co. v. Eagle-Picher Industries, Inc.*, 55 F.3d 1171 (6th Cir. 1995). But the trial court *is* divested of jurisdiction over those questions that were raised and decided in the appealed order. *Mountain Solutions v. State Corp. Comm'n*, 982 F. Supp. 812 (D. Kansas 1997); *Int'l Paper Co. v. Whitson*, 595 F.2d 559, 561-62 (10th Cir. 1979).

As discussed above, the "renewed" TRO request clearly involves one of the identical issues Plaintiffs appealed to the 6th Circuit, namely whether the Secretary's alleged "failure to establish a plausible system for verifying absentee ballots ... violates the Help America Vote Act." Thus, until the Sixth Circuit remands the case, this Court lacks jurisdiction to revisit this issue.

C. Alternatively, "The Law Of The Case Doctrine" Applies

The "law of the case" doctrine "precludes a court from reconsideration of issues 'decided at an early stage of the litigation, either explicitly or by necessary inference from the disposition.'" *Westside Mothers v. Olszewski*, 454 F.3d 532 (6th Cir. 2006), quoting *Hanover*

Ins. Co. v. Am. Eng'g Co., 105 F.3d 306, 312 (6th Cir. 1997) (additional citations omitted). That doctrine precludes reconsideration of an issue a court has already decided in a particular matter unless there are “exceptional circumstances” characterized by at least one of the following three factors:

- (1) where substantially different evidence is raised on subsequent trial;
- (2) where a subsequent contrary view of the law is decided by the controlling authority; or
- (3) where a decision is clearly erroneous and would work a manifest injustice.

Id. at 538 (citing *Hanover Ins. Co.*, 105 F.3d at 312).

This Court has already necessarily rejected the HAVA claim once. *See Kusens*, 448 F.3d 349. Plaintiffs cannot re-litigate this issue, at least not until the appellate court has spoken. Allowing this “renewed” motion would not only violate the doctrine, it would create an incentive to piecemeal litigation, a particularly undesirable outcome in election-related litigation one month before Election Day.

VI. Plaintiffs Have No Private Right Of Action Under HAVA

This second bid for injunctive relief is legally flawed because HAVA does not create a private right of action to enforce its terms. *Sandusky County Democratic Party v. Blackwell*, 387 F.3d 565, 572 (6th Cir. 2004) (“HAVA does not itself create a private right of action”).

A statute must be phrased in terms of the persons benefited in order to create a private right of action. *Gonzaga University v. Doe*, 536 U.S. 273, 284 (2002) quoting *Cannon v. Univ. of Chicago*, 441 U.S. 677, 692 n.13 (1979). If a plaintiff shows that the statute creates a right, that right is presumptively enforceable under 42 U.S.C. § 1983. *Gonzaga*, 536 U.S. at 284.

However, if the text and structure of the statute provide no indication that Congress intended to create new individual rights, there is no basis for a private suit. *Id.* at 286.

In the case of HAVA, not only is there no private right of action, but the statute expressly disavows any such right. 42 U.S.C. § 15512 requires states to establish an administrative complaint procedure. Any person who believes there has been a HAVA violation may file a complaint through this administrative process. 42 U.S.C. § 15512(a)(2)(B). There would be no reason for Congress to mandate the creation of a private administrative complaint process if it believed citizens already had a private cause of action under the statute. Or, to frame the argument in slightly different terms, the fact that Congress specifically mentioned enforcement by the United States Attorney General, 42 U.S.C. § 15511, and by private citizens through administrative grievances, but did not mention private civil actions, strongly suggests that Congress intended to create no such remedy.

Plaintiffs' reliance on *Sandusky County Democratic Party v. Blackwell* to support their claim for a right of action under HAVA is misplaced because that case does not apply to the claim before this Court. The *Sandusky* court analyzed a completely different statute than the one at issue before this Court. In *Sandusky*, the Sixth Circuit found that HAVA does provide a right of action enforceable under § 1983 for individuals who were refused the right to cast a provisional ballot, because the language of HAVA in 42 U.S.C. § 15482(b)(2)(E) explicitly refers to the "right of an *individual* to cast a provisional ballot." *Sandusky*, 387 F.3d at 573 quoting 42 U.S.C. § 15482(b)(2)(E).¹ In this case, HAVA does not create an individually

¹ 42 USCS § 15482 reads in pertinent part:

(b) Voting information requirements.

(2) Voting information defined. In this section, the term "voting information" means--
(E) general information on voting rights under applicable Federal and State laws, including information on the right of an individual to cast a provisional ballot and instructions on how to contact the appropriate officials if these rights are alleged to have been violated;

enforceable right under HAVA's verification requirement, because nowhere in 42 U.S.C. § 15483(a) does it mention "individual," nor is it phrased to identify persons benefited. See 42 U.S.C. § 15483(a).²

Plaintiffs also cite *Purcell v. Gonzalez*, 549 U.S. 1 (2006), for its general contention that "voters have an interest in ensuring that their elections are open, honest, and free from dilution" and therefore they have a right to bring an action under HAVA. While undeniably true, such general assertions are insufficient to support the Plaintiffs' claim. Only "unambiguously conferred" rights will support a § 1983 action. *Gonzaga*, 536 U.S. at 283. Here, there are no "unambiguously conferred" rights within 42 U.S.C. § 15483(a) that would support Plaintiffs' Section 1983 action.

III. SWVRD, Ohio's Computer Database, Fully Meets The Requirements Of The Help America Vote Act

Ohio fully complies with HAVA. In suggesting otherwise, plaintiffs both misstate the requirements of HAVA and mischaracterize statements made by the Secretary of State.

The Help America Vote Act, 42 U.S.C. 15483(a), requires each state to implement "a single, uniform, official, centralized, interactive computerized statewide voter registration list . . . that contains the name and registration information of every legally registered voter in the State." 42 U.S.C. 15483(a)(1)(A). Ohio has created that database: it is centralized in the Secretary of State's office, it allows real-time access by local election officials, and it contains the names and registration information of every legally registered voter in the state. [Exhibit 1, Affidavit of

² § 15483 states in pertinent part:

(a) Computerized statewide voter registration list requirements.

(A) In general. Except as provided in subparagraph (B), each State, acting through the chief State election official, shall 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 and assigns a unique identifier to each legally registered voter in the State (in this subsection referred to as the "computerized list") . . .

Gus Maragos, ¶ 5]. HAVA leaves the specific choices on the methods of complying with its requirements to the discretion of the States. 42 U.S.C. § 15485.

As implemented in Ohio and consistent with the requirements of HAVA, state and local officials have designated responsibilities. The gate-keeping function falls to local boards of elections. When a potential voter wishes to register, local election officials must gather the information required by law,³ and enter the information into the computerized list on an “expedited basis.” 42 U.S.C. 15483(a)(1)(A)(vi). As previously noted, the database has already been set up to allow local election officials to promptly enter the data provided by the registrant. [*Id.*, ¶ 6].

The second requirement of HAVA is that the Secretary of State and the Ohio Bureau of Motor Vehicles must “enter into an agreement to match information in the database of the statewide voter registration system with information in the database of the [Bureau of Motor Vehicles],” the purpose of which is “to enable each official to verify the accuracy of the information.” 42 U.S.C. 15483(a)(5)(B)(i). Here again, the required system exists and is in active use in Ohio. When data is received from the county boards of elections, the Secretary of State electronically conveys to the BMV information concerning the voter for verification, including the voter’s: (1) first name; (2) last name; (3) date of birth; (4) driver’s license number; and (5) Social Security number. [Marago Aff., ¶ 9].

The Bureau of Motor Vehicles then matches the information on the application to the data in its own system. [*Id.* at., ¶ 7]. The BMV computer automatically notifies the Secretary whether it can or cannot verify the registration information. But the system generates far more than a simple “yes” or “no” answer: the BMV reports back any problem or discrepancy. For

³ Ohio’s voter application form requires new registrants to provide name, address, date of birth and either their Ohio driver’s license number or the last 4 digits of their social security number (referred to by the shorthand “SSN4”).

example, the BMV/Secretary of State interface is programmed to identify when the driver's license numbers match but the Social Security numbers do not, as well as the converse. The system also reports mismatches between names and birthdates; Social Security numbers that belong to people who are deceased; driver's license numbers that belong to people who are deceased; and instances where a driver's license number simply does not exist in the BMV database. [*Id.*] Plaintiffs assertion that the system *only* checks for duplicate registrations is simply incorrect to. By any measure, the system meets the requirements of 42 U.S.C. § 15483(a)(5)(B)(i).

Moreover, Congress's purpose in requiring a statewide voter registration list was not to based on the premise that new voter registrations should be presumed suspicious. Computerized "mismatches" or "nonmatches" between the three databases at issue (SOS, BMV and SSA) are not cause, in and of themselves, for disqualifying new registrants from voting. Information about fully qualified voters changes over time: people move, people change their names, etc. Accordingly, the provisions of HAVA Section 303 were created in order to assist the States in maintaining updated and current voter information lists. Had Congress intended that computers decide who is eligible to vote and who isn't, or to justify suspicion concerning eligibility to vote based on computer query results, it would have expressly provided so. To the contrary, in Ohio the voter ID requirements established in H.B. 3, requiring all voters to produce ID on election day, provide a guard against voting by ineligible individuals. Plaintiffs seek relief in the form of a proposed order that would, among other things, require counties to mark the names of individuals in pollbooks when mismatches are returned by the computer checks and require those individuals to vote provisional ballots. Plaintiffs' assertion that the relief it seeks is necessary to prevent voting fraud is specious, and is unsupported by any state or federal statutory text.

IV. Plaintiffs Have No Clear And Convincing Evidence Of Non-Compliance By The Secretary Of State

Plaintiffs' current TRO application does not provide any support for the issuance of a temporary restraining order. The "evidence" Plaintiffs put forth to support their contention that the Secretary is violating HAVA consists entirely of statements taken out of context, coupled with affidavit testimony from witnesses who have no first hand knowledge of the Ohio system of electronic transfer of data concerning voter registration verification that regularly occurs between the SOS and BMV and between the BMV and the SSA, and thus rely entirely on speculation.

A. The Cunningham Affidavit

Plaintiffs submit as Exhibit A an affidavit from Keith Cunningham, a witness who, by his own admission, has no first-hand knowledge concerning what matching the Secretary of State and the BMV perform. Mr. Cunningham's allegation of non-compliance consists of pure supposition: according to Mr. Cunningham, the Allen County Board of Elections routinely receives duplication notifications from the Secretary, but not notifications of Social Security or other data mismatches; therefore, Mr. Cunningham concludes that the Secretary is not matching those other data against BMV records. As Defendant's Exhibit B to Maragos' Affidavit demonstrates, however, SWVRD registered 363 SSN4 mismatches for Allen County voters from 2006 until the present. For the same time period, the SWVRD matching process detected nine instances in which an Allen County registrant's Social Security number belonged to someone of "DEAD status." [Maragos Exhibit C]. The report also shows that SWVRD registered another Allen County deceased registrant in 2008. All this information appeared immediately in SWVRD, and was accessible in real-time to county election officials. [Affidavit of Maragos, ¶ Exh D].

These exhibits prove that the Secretary is verifying data by matching information, as required by HAVA. The Cunningham affidavit proves either that Mr. Cunningham is not following up on SWVRD notifications for his newly registered voters or does not understand the SWVRD system.

B. The Kindred Affidavit

The affidavit of Sam Kindred (Plaintiffs' Exhibit C) confirms that SWVRD is HAVA-compliant. According to Mr. Kindred,

When the county database periodically transfers information regarding new voter registration applications to the SWVRD, the SWVRD then performs matching and other functions. If there is a mismatch – for example, the driver's license number or Social Security number submitted by the county does not match the information on file with the BMV – the SWVRD sends a message to the county indicating the failure to match. This message includes a specific code indicating which data did not match.

[Plaintiffs' Exhibit C, ¶ 5]. Thus, Plaintiffs' *own evidence* confirms that the state-wide computer system does more than search for duplicate registrations. The system Mr. Kindred describes is the system still regularly used by the Defendant Secretary, and has been used, with some modifications, consistently in the Brunner administration. Maragos affidavit

Moreover, on October 3, 2008, the SSA sent a letter to the Secretary acknowledging that “Since October 1, 2007 . . . we have received over 740,000 requests” for verification from Ohio.” Farrell Affidavit Exhibit C. There is some irony in the fact that the Plaintiffs suggest that the SOS or the BMV have somehow “turned off” the verification system and have not been electronically forwarding voter registration information to the SSA for verification, while the SSA suggests that the SOS and BMV are sending it too many requests for verification.

C. **Plaintiffs Have Misconstrued The SWVRD System Manual**

The SWVRD System Manual makes plain that verification of registration data, including Social Security numbers, is a routine operation. Specifically, Section 15.4 of the Manual, found on page 17, states:

15.4 BMV Not Confirmed

Upon receipt of a voter registration or update, the SOS SWVRD will validate certain voter information with the BMV. If the SOS is unable to match certain fields in the record with the BMV, the record cannot be confirmed. If this occurs the SOS automatically sets the BMV flag to "N" in the SWVRD. * * * Voter records that are not confirmed . . . must have their information updated by the [Board of Election] and re-sent to the SOS SWVRD and validation with the BMV will be automatically reattempted by the SOS.

[Maragos Affidavit, Exh. A, § 15.4]. Incredibly, Plaintiffs *quote* § 15.4 as saying that the process for matching databases "is currently turned off," [Plaintiffs' Renewed TRO Motion, at 5], even though that phrase appears *nowhere* in the section.

Even more puzzling is the affidavit of Matthew Damschroder. [Plaintiffs' Exhibit B]. Paragraph four of Mr. Damschroder's affidavit states:

It is my understanding that paragraph 15.4 of the Manual, on page 17, titled "BMV Not Confirmed" means that the current version of the SWVRD has the function of validating certain voter information with the Ohio Bureau of Motor Vehicles database disabled or 'turned off.'

Mr. Damschroder's "understanding" is incorrect. Note that Mr. Damschroder is not attesting to personal knowledge that the SOS/BMV system *has* an "on-off-switch"; he merely intuits this conclusion from the caption "BMV Not Confirmed." But, as quoted above, that section (when read in context) clearly refers to the situation where a match is attempted and the BMV cannot confirm the information. Plaintiffs also point to Section 17 of the Manual (page 19), which does contain some ambiguous language:

17. BMV Not Confirmed Results In Second Voter ID

(BMV confirmation is currently NOT being performed.)

If the SOS cannot confirm the voter record with the BMV and there are no potential duplicates for the voter, the SOS may send a second voter record ID to the BOE.

Plaintiffs want the Court to read the parenthetical sentence as an admission that Secretary of State is not sending data to the BMV for verification. But it would make absolutely no sense for the Manual to say “the Secretary is not conducting BMV verifications” right in the middle of describing how the BMV verification process operates. But Section 17’s meaning is clear when read in conjunction with Section 15.4, quoted above. Plaintiff needed only to have asked the Secretary of State what actually occurs in this process, rather than taxing this Court’s time on a quixotic venture to poke holes in counties’ poll lists and force excessive and unwarranted slowdowns at the polls on Election Day in favor provisional balloting for both Election Day and absentee voting⁴. Although inartfully phrased, the language of Section 17 does not mean that the confirmation process is not being performed. In fact, the confirmation process is and has been performed regularly well before and during the period of time the Plaintiffs cite, i.e., January 2008 to date. Maragos Affidavit.

Section 15.4, as explained above, deals with the situation where, for whatever reason, SWVRD cannot confirm a match: the last four (4) digits of the social security numbers are not the same, etc. When that happens, the SWVRD is updated to reflect the discrepancy, and that information may be accessed by the local boards of elections. Section 15.4 makes it incumbent upon a local board of elections to take action to update and resubmit the voter information, at which time the Secretary attempts a second verification with the BMV.

⁴ There is no provisional voting of absentee ballots until 28 days before the election, so any absentee ballots voted through October 6, 2008, cannot be “provisionalized,” even by court order.

Section 17 adds one gloss to this scenario. HAVA requires that the Secretary of State assign an ID number, a “unique identifier,” to each legally registered voter in the state. 42 U.S.C. §15483(a)(1)(A). When a match comes back “unconfirmed,” Section 17 allows the Secretary to assign a new voter record ID number to the unsuccessful applicant, in order to avoid confusion. This outcome is not well-conveyed in the caption of Section 17: “BMV Not Confirmed Results In Second Voter ID.” (The caption is easier to understand if one places quotation marks around the phrase “not confirmed,” and recognizes that “results” is the verb in the sentence).

This lengthy exegesis of a relatively short passage in the SWVRD Manual is necessary in order to capture the meaning of the strange parenthetical statement upon which so much of Plaintiffs’ case rests. That parenthetical is not an admission that the Secretary is delinquent in her duties. Rather, it is one of two limitations on the Secretary’s ability to assign a second voter record ID number. The first limitation is that the Secretary cannot assign a new voter record ID number if the BMV match came back “not confirmed” because the BMV found potential duplicate registrations. This makes sense: if there are potential duplicates in the system, the last thing that should happen is to assign them multiple numbers.

The parenthetical is a second limitation on the Secretary’s discretion to assign a new ID number. Suppose a BMV match has come back “not confirmed,” the local board of elections has identified and corrected an error in the application, the application has been resubmitted to the Secretary, and a second BMV match is currently underway. At that point in time, common sense says the Secretary should not confuse things by assigning a second ID number. Thus, the parenthetical is a statement of assumption: the Secretary’s ability to assign a new ID number *presupposes* that “BMV confirmation is currently NOT being performed.”

Even if one accepted Plaintiffs' reading of Section 17, one ambiguous parenthetical sentence offered by Plaintiffs, when contrasted with the proof of actual matching presented above, would barely create a dispute of material fact sufficient to survive summary judgment, much less the clear and convincing evidence necessary for extraordinary injunctive relief.

D. The Secretary Did Not “Confirm Her Non-Compliance” In Her Sixth Circuit Brief

In pleadings before the Sixth Circuit – which rejected Plaintiffs' contention that Ohio's early absent voter procedure violated the Voting Rights Act – the Secretary observed that the SWVRD protects against double registration. Plaintiffs seize on this statement of fact to argue that the Secretary's “insistence that her system protects against double registration is, by implication, a concession that she does not conduct the checks of Bureau of Motor Vehicles or Social Security records actually required by HAVA.” [Renewed Motion for TRO, at 6].⁵ This is not evidence – it is not even a logical conclusion. The Secretary emphasized detecting duplication because that was one of the express purposes of HAVA. The fact that she did not refer to the computerized interface with the BMV (in a brief where the BMV matching system was not at issue) does not suggest, much less prove, that there is no such system in use.

V. Plaintiffs Misstate The Requirements of HAVA

At various points in their renewed TRO motion, Plaintiffs complain that the Secretary does not perform BMV verification checks before the boards of elections distribute ballots. Paragraph 5 of the Motion is devoted to a hypothetical in which someone sneaks across the Ohio border, registers with a fake Social Security number, and immediately receives a ballot, with no possibility of detection. The hypothetical is legally and factually flawed.

⁵ Plaintiffs incorrectly assert that HAVA requires the Secretary to check Social Security records. HAVA imposes this responsibility on the Director of the BMV, 42 U.S.C. § 15483(a)(5)(B)(ii), and the Ohio BMV is performing this task.

Plaintiffs are merely rehashing the challenge to same-day registration/absent voter balloting that was rejected by both the Sixth Circuit Court of Appeals in this case and the Ohio Supreme Court in *State ex rel. Colvin v. Brunner*, Slip Op. 2008-Ohio-5041. HAVA does not mandate pre-registration verification, and in fact appears to contemplate the opposite. Plaintiffs' assertion that Ohio has no mechanism in place to verify certain information provided in voter registrations as contemplated in HAVA is purposely and avoidably false, as the evidence above has shown.

Plaintiffs' hypothetical is also a red herring, because it presents a problem that HAVA does not even address. In Plaintiffs' scenario, the fraudulent voter is registered *in another state*. Ohio's procedures to confirm addresses would eventually expunge that fraudulent voter from the rolls, but HAVA provides no protection against that form of voter fraud (and is not designed to do so). Moreover, any voter who would register falsely under penalty of election falsification would face prosecution for at least a fifth degree felony committed in Ohio and face a penalty of a fine of up to \$2500 and imprisonment in Ohio's prison system for a period of six to twelve months.

A HAVA check with the Ohio BMV would show the voter has no Ohio driver's license, but that is not a disqualification from voting. The HAVA check would not disclose that a voter was simultaneously registered in Indiana or West Virginia, irrespective of whether the HAVA check occurred before or after a ballot was distributed, *and irrespective of whether the registered and voted on the same day, voted absentee before the election or voted in person on Election Day*. One might argue that, in a perfect world, there would be a national database, but HAVA does not create one. Secretary of State Brunner, upon taking office, initiated an effort to create an interstate compact with Ohio's contiguous states to compare voter databases. She did not

receive any affirmative response from the secretaries of state of Indiana and Michigan. Pennsylvania and Kentucky expressed interest in the idea, but concerns about administrative feasibility, given the newness of (especially) Pennsylvania's database, have delayed the project. Farrell Aff. At ¶ 14

HAVA contains no "real time" registration or matching requirement. Rather, 42 U.S.C. § 15483(a)(4)(A) says the database must be updated "regularly." HAVA specifically prohibits a board of elections from entering a voter's registration application into the database unless the application contains either the last four digits of the applicant's Social Security number or driver's license number. 42 U.S.C. 15483(a)(5)(A)(i). By contrast, HAVA does *not* say that a match with the BMV is a prerequisite to registration. Indeed, HAVA is silent as to when the data must be put into the system, other than to say that it must be done "on an expedited basis." Ohio law gives local boards twenty days to input registrations, Ohio Rev. Code § 3503.19(C)(1), and the Secretary of State shortened that period to one week for registrations received during the "overlap period." SOS Directive 2008-63. Plaintiffs have no legal basis to claim that HAVA requires instant verification at the time of registration, let alone for this Court to declare it a legal requirement that could be used to force voters into provisional voting or disqualify their registrations or votes, based on Plaintiffs' layered deadlines, starting first with the voter challenge deadlines of R.C. 3501.19 and 3503.24. Plaintiffs seek a first snare of getting information that will be impossible to obtain by the deadline to file challenges, followed by the second snare of marked signature poll books and poll lists, followed by a third snare of provisional voting for Election Day voters. This is so anti-democratically oppressive that this Court should outright reject Plaintiff's claims and dismiss this action.

VII. Plaintiffs Have Failed To Show They Are Entitled To A Temporary Restraining Order.

Before issuing a motion for preliminary injunction, the Court must examine four separate 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 harm to others; and
- (4) Whether the public interest would be served by the issuance of a preliminary injunction.⁶

McPherson v. Michigan High Sch. Athletic Ass’n, 119 F.3d 453, 459 (6th Cir. 1997) (en banc); *Cabot Corp. v. King*, 790 F. Supp 153, 155 (N.D. Ohio 1992). The standard for granting an emergency injunction is more stringent than that required for summary judgment. *Leary v. Daeschner*, 228 F.3d 729, 739 (6th Cir. 2000). This is because it is “an ‘extraordinary remedy involving the exercise of a very far-reaching power, which is to be applied ‘only in [the] limited circumstances’ which clearly demand it.” *Id.* (quoting *Direx Israel, Ltd. v. Breakthrough Med. Corp.*, 952 F.2d 802, 811 (4th Cir. 1991)) (internal quotations omitted). “In making its determination, the district court is required to make specific findings concerning each of the four factors, unless fewer factors are dispositive of the issue.” *Id.* The foregoing are “factors to be balanced, not prerequisites that must be met. Accordingly, the degree of likelihood of success required may depend on the strength of the other factors.” *In re DeLorean Motor Co.*, 755 F.2d 1223, 1229 6th Cir. 1985)

None of the above factors is supported by Plaintiffs’ motion. This memorandum has shown at great length that plaintiffs have no likelihood whatsoever of prevailing on the merits.

⁶ Secretary of State Brunner renews her request for a hearing on the motion to present evidence.

Plaintiffs have failed to show they will suffer any harm in the absence of relief. And the issuance of a preliminary injunction would be contrary to the public interest and would significantly harm the all voters in the State of Ohio. A temporary restraining order would effectively federalize administration of this election by placing all decisions under the direction of the federal courts rather than the Secretary of State. The order would also undermine confidence in Ohio's election, since it suggests the Court has to correct a problem when in fact none exists.

Moreover, the negative impact on the administration of the election by the Secretary and the 88 boards of elections, should the Plaintiffs Proposed Order be entered, cannot be overstated. We are less than one month from the November 4 presidential election. Pollworker training materials have been prepared and distributed. See Farrell Aff. At 12 Entry of Plaintiffs' proposed order would impose duties on pollworkers that they could not be effectively trained to perform within the time remaining before the November 4 election. Plaintiffs would require boards to mark the pollbooks as to every voter where a non-match or mismatch is demonstrated by database comparison. If this Court enters the proposed order, boards would be required to expend their resources to do database maintenance at a time when their attention should, and must, be focused on other responsibilities necessary for election preparedness.

Moreover, the time frames contemplated in Plaintiffs' proposed order call for acts to be completed by the Secretary and the counties by dates as early as October 12 – four days from the date of the filing of this memorandum. Plaintiffs propose that the counties “resolve any discrepancy in the registration application” as revealed by a computer mismatch or nonmatch report or alter their pollbooks to register the nonmatch. All of this, the Plaintiffs suggest, must be done by October 21 –less than two weeks from the date of the filing of this memo. The

Secretary urges the court to take judicial notice of the fact that 88 county boards of elections will be busy performing other election administration duties during the next two weeks. It should also be noted that the SSA intends to shut down its computerized verification system during the period October 10-13 for maintenance and/or upgrading. See Maragos Affidavit at 20.

It is not in the public interest for this court to change the rules in the middle of the game, and that is what plaintiffs seek by asking for an order that counties must make new notations in election day pollbooks and train pollworkers to take additional steps consistent with those notations *after* statewide poll worker training materials have been provided to boards and each poll worker and after significant poll worker training has been accomplished. Included as one of those new additional steps would be the requirement that “marked” voters vote a provisional ballot. Chaos and long lines would undoubtedly be produced on Election Day.

In addition, the order proposed by the Plaintiffs lacks clarity. For instance, it contemplates new responsibilities concerning “all *new* voter registration applications in Ohio received on or after January 1, 2008.” Are “new” voter registrations those provided by citizens who have never voted before? Does a “new” voter registration include a “new” voter registration card filled out by a previously-registered voter who has moved or a voter who has changed her name based on marriage, or who had been registered in the past, but whose registration is no longer active? If not, how are election officials to determine whether any particular “new” registration is “new” for the purposes of the court order? Voter application forms (wisely) do not require the voter to provide a history of any prior voter registration status in Ohio.

In addition the specific relief sought would result in the deplorable and unconstitutional practice of “vote caging.” The proposed order seeks nothing less than an order that the Secretary

create a list of all registrants whose names are flagged in a BMV or SSA search, even if the source of the mismatch or nonmatch is the result of data entry error in any of the three databases or result from a lack of consistency in terms of the names provided (such as reversal of first and middle names). Fully qualified electors would likely be negatively impacted and possibly disenfranchised. Plaintiffs want this Court to enter an order that would require Ohio election officials to create a list of “marked” citizens that could then be improperly used to engage in reprehensible voter suppression activities. (cite *State ex rel. Myles v. Brunner*, near end of decision). The courts should not enable such a perversion of the intent of HAVA.

VIII. Conclusion

Based on the lack of merit of Plaintiffs’ substantive claims, the Secretary respectfully requests that this Court to DENY any injunctive relief.

Respectfully submitted,

**NANCY H. ROGERS
ATTORNEY GENERAL**

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Ohio Secretary of State

CERTIFICATE OF SERVICE

This is to certify a copy of the foregoing was served upon all counsel of record by means of the Court's electronic filing system on this 8th day of October, 2008.

/s Richard N. Coglianesse



**JENNIFER BRUNNER
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DIRECTIVE 2008-96
October 14, 2008

**TO: ALL COUNTY BOARDS OF ELECTIONS
MEMBERS, DIRECTORS, AND DEPUTY DIRECTORS**

RE: Mandatory duty of boards of elections to conduct investigations relating to election integrity and to residence qualifications of electors and to report the findings of such investigations to the Secretary of State and to county prosecutors

Boards of elections are the frontlines of elections administration in Ohio. As a result, R.C. 3501.11(J) empowers boards of elections to ensure, through prompt and thorough investigations, the integrity of the electoral process. Additionally, R.C. 3501.11(Q) authorizes boards of elections to "[i]nvestigate and determine the residence qualifications of electors." Together, these sections of the Ohio Revised Code impose a special duty on boards of elections that must be carried out in a lawful manner and in regard to specific allegations or evidence of a violation of Title XXXV of the Ohio Revised Code.

To reinforce our preparations for a successful election that ensures voter confidence, I hereby direct boards of elections to swiftly and fully investigate all specific allegations or evidence of voter registration fraud, illegal voting, or voter suppression in their respective jurisdictions. I further direct that boards of elections promptly vote to forward to the Secretary of State the findings of any such investigations. Boards may also refer the findings of such investigations to their county prosecutors. In carrying out this public duty, boards of elections must comply with the directives, advisories and memoranda issued by the Ohio Secretary of State and with the laws of Ohio and of the United States.

Investigative duties under R.C. 3501.11(J)

According to R.C. 3501.11,

"Each board of elections shall exercise by a majority vote all powers granted to the board by Title XXXV of the Revised Code, shall perform all the duties imposed by law, and shall do all of the following:

(J) Investigate irregularities, nonperformance of duties, or violations of Title XXXV of the Revised Code by election officers and other persons; administer oaths, issue subpoenas, summon witnesses, and compel the production of books, papers, records, and other evidence in connection with any such investigation; and report the facts to the prosecuting attorney or the Secretary of State;"



In 2007, Amended Substitute House Bill No. 119 amended this statute to provide a board of elections the option of reporting the facts adduced in an investigation conducted pursuant to R.C. 3501.11(J) to the Secretary of State or to the county prosecutor.

A board of elections should consult with the Secretary of State and county prosecutor before launching an investigation to ensure that statutory procedures are followed. As set forth in Directive 2008-79, any investigation of the qualifications of a voter must be conducted before the election at which the voter's registration would otherwise qualify him or her to vote and must afford the voter a hearing. If a board of elections determines that a hearing should be held regarding any investigation of alleged violations of election law, the hearing must be held at a public meeting of the board at which a quorum is present. The board shall provide due process to any person or group accused of violating Ohio's elections laws.

Compelling the attendance of witnesses and production of documents

As noted in Advisory 2008-10, boards of elections should consult with the county prosecutor in preparing for any hearing and should follow Ohio's civil rules in compelling the attendance of witnesses or production of documents by subpoena at an investigatory hearing. This requirement should protect boards of elections in the event the investigation produces evidence sufficient to forward the case for review and possible prosecution. Please note, that a witness may appear and refuse to testify at a hearing held by the board of elections under claim of the right against being compelled to testify against himself or herself, under the Fifth Amendment to the United State Constitution. Documents regarding the matters under investigation by the board remain a public record; only documents created at the point where the prosecutor may conduct further investigation and thereafter do the documents and other matters relating to an investigation receive a shield against disclosure, except under Ohio Crim. R. Proc. 16(B)(1)(g) for the purposes of cross-examination of a witness at trial.

Mandatory referral

Under R.C. 3501.11(J), boards of elections must, "Investigate irregularities, nonperformance of duties, or violations of Title XXXV of the Revised Code by election officers and other persons; *** and report the facts to the prosecuting attorney or the Secretary of State." The referral provision of this statute is mandatory. Therefore, a board of elections must refer the facts adduced through an investigation and a hearing to both the Secretary of State and the prosecuting attorney. As has been the practice in the past, the Secretary of State may request the assistance of the Attorney General with a prosecutor's investigation, especially where more than one county may be involved, where resources may be limited in a particular county or where for other reasons the prosecuting attorney may decline to investigate beyond the board's investigation.

When a county board of elections reports the facts of its investigation to the Secretary of State and the prosecuting attorney, it shall do so in writing. The report should provide a historical summary of the matter and a list of the board's factual findings. The board may attach relevant exhibits or other documents to its report.

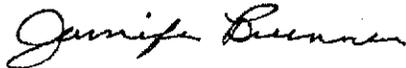
Conclusion

Interference with the required administration or conduct of an election, whether through voter registration fraud, illegal voting or voter suppression, are actionable criminal offenses. Attached to this Directive is a copy of Chapter 3599 of the Ohio Revised Code, containing prohibited offenses and associated penalties. While other sections of the Revised Code contain other prohibitions and offenses, this chapter contains activities that are specifically listed as criminal activities and should be guarded against in the board's administration of elections before, during and after an election.

Boards of elections must clearly demonstrate our shared commitment to fully and fairly investigating specific allegations or evidence of election law violations. The Secretary of State's office, through its regional liaisons and elections attorneys, will continue to support boards in their efforts to protect voter's rights and prevent election fraud.

If you have any questions, please contact your assigned elections attorney at 614-466-2585. Your cooperation is appreciated.

Sincerely,



Jennifer Brunner

Attachment: R.C. 3599

cc: County prosecutors of Ohio's 88 counties
The Honorable Nancy Rogers, Ohio Attorney General

No. 08-4242

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Ohio Republican Party, et al., :
 :
 :
 Plaintiffs-Appellees, : On Appeal from
 : the United States District Court
 v. : for the Southern District of Ohio:
 : District Court Case No. 2:08CV913
 Jennifer Brunner, :
 Secretary of State of Ohio, :
 :
 Defendant-Appellant :

SECRETARY'S RESPONSE TO OHIO REPUBLICAN PARTY'S
EMERGENCY MOTION FOR INJUNCTION PENDING APPEAL AND REPLY
TO OHIO REPUBLICAN PARTY'S RESPONSE TO THE SECRETARY'S
EMERGENCY MOTION TO VACATE OR STAY DISTRICT COURT'S
TEMPORARY RESTRAINING ORDER

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INTRODUCTION

Plaintiffs Ohio Republican Party et al. (“ORP”) seek an emergency stay of the district court’s order abstaining from ruling on ORP’s claims pertaining to the five-day window under which prospective Ohio voters may both register to vote and simultaneously cast an absentee ballot. ORP’s request is extraordinary: The five-day window has already opened, and voters currently are permitted to go to their boards of elections to register and vote absentee. ORP is therefore asking this court to change the rules governing absentee voting in the November 4 election *after absentee voting has begun*. Settled precedent forecloses such disruptive and unnecessary relief. *See, e.g., Purcell v. Gonzalez*, 549 U.S. 1, 7 (2006) (per curiam).

What is more, ORP is wrong on the law. Just yesterday, the Ohio Supreme Court held that the Ohio Secretary of State’s (“Secretary”) interpretation of Ohio law concerning the five-day window is correct. Thus, ORP is asking this Court to override the Ohio Supreme Court’s definitive statement of Ohio law. Meanwhile, Judge Gwin of the Northern District of Ohio yesterday agreed that the Secretary “obviously determined the issue correctly” and held, moreover, that a contrary interpretation would violate federal law. *Project Vote v. Madison County Bd. of Elections*, No. 1:08-cv-2266-JG (N.D. Ohio Sept. 29, 2008), attached as Ex. 1 to Secretary’s Motion. Judge Gwin accordingly ordered the Madison County Board

of Elections to follow the Secretary's directive. That order—which has not been appealed—means that ORP is now asking this Court to create a patchwork of election laws in Ohio: One county (Madison) would be bound by Judge Gwin's injunction to open the five-day window; the other 87 would be authorized by this Court disregard the Ohio Supreme Court's and Secretary's interpretation of Ohio law, as well as Judge Gwin's interpretation of federal law. In short, ORP asks this Court to close the five-day window in all but one Ohio county. That outcome is untenable.

ORP also argues unpersuasively that the Court should reject the Secretary's emergency request for this Court to vacate or stay the district court's temporary restraining order ("TRO") regarding election observers. But ORP has not rebutted what the Secretary showed in her opening brief: (1) that the Eleventh Amendment deprived the district court of jurisdiction to enjoin a state official on state law grounds, and (2) that the Secretary is highly likely to succeed on the merits because her Advisory 2008-24 correctly interprets Ohio law. Furthermore, the harm from the district court's order is presently occurring, because, as voting begins, boards of elections have no law in place to govern the observers whom the district court has ordered into their halls, and it is not possible to apply the existing statute within the established time constraints.

This Court therefore should immediately grant the Secretary's motion to vacate or stay the TRO and deny ORP's request for emergency relief.

ARGUMENT

A. This Court should deny ORP's request for emergency relief because the Ohio Supreme Court has definitively confirmed the Secretary's interpretation of Ohio law, and a contrary interpretation would violate federal law.

Just yesterday, two courts agreed with the Secretary that Ohio law permits—and federal law requires—a five-day window under which prospective Ohio voters may both register to vote and simultaneously cast an absentee ballot. ORP has not shown why this Court, now that the rules are in place and voting has begun, should contradict those judgments.

First and foremost, the Ohio Supreme Court yesterday held, “after construing the pertinent constitutional and statutory provisions” under Ohio law, that the Secretary “correctly instructed boards of elections that an otherwise qualified citizen must be registered to vote for 30 days as of the date of the election at which the citizen offers to vote in order to be a qualified elector entitled to apply for and vote an absentee ballot at the election, and the citizen need not be registered for 30 days before applying for, receiving, or completing an absentee ballot for the election.” *State ex rel. Colvin v. Brunner*, No. 2008-1818, Entry attached as Ex. 1 to Secretary's Motion. Although ORP dismisses this order on the

theory that the Ohio Supreme Court “simply denied a writ of mandamus,” ORP Motion at 14, the *Colvin* court’s order could not be clearer: The court’s entry (with a full opinion still to follow) expressly stated that the court agreed with the Secretary *on the merits*; it did not simply dispose of the case on a technicality.

Even if Ohio law did not clearly permit the five-day window (and it now does under *Colvin*), federal law would require the window. Yesterday Judge Gwin in the Northern District of Ohio held two things: first, that, as a matter of Ohio law, the Secretary “obviously determined the issue correctly,” *Project Vote, supra*, at 2; and second, that a contrary interpretation “would violate the federal Voting Rights Act,” which mandates that all duly qualified residents be allowed to cast an absentee ballot, *id.* at 17-18. Thus, the five-day window ordered by the Secretary is *required* for Ohio law to comply with the Voting Rights Act.

Judge Gwin’s order presents an additional obstacle to ORP’s requested relief. The Madison County Board of Elections—the losing party in *Project Vote*—has not appealed from that judgment. Thus, Madison County is now under a federal court order to implement the five-day window, and this Court currently has no jurisdiction to vacate Judge Gwin’s order. ORP is asking this Court, then, to instruct 87 of Ohio’s counties to close the five-day window even as the window necessarily remains open in another. And ORP asks for all of this after the window has opened everywhere and voting has begun. The Supreme Court has

admonished federal courts to avoid such untenable results in elections cases. *See Purcell*, 549 U.S. at 7. Nor should this Court countenance ORP's efforts indirectly to appeal Judge Gwin's ruling on an issue on which the district court in this case declined to rule.

ORP therefore has not shown that it is entitled to the extraordinary remedy of an injunction of election processes already underway.

B. ORP has offered no sound reason to reject the Secretary's request for this Court to vacate or stay the TRO pertaining to election observers.

In her opening emergency motion, the Secretary established that this Court should do one of two things to the district court's TRO concerning election observers: either (1) vacate the order because the Eleventh Amendment deprived the court of jurisdiction to enter this form of relief, or (2) stay the TRO pending appeal because the district court abused its discretion when it enjoined a part of Ohio's elections process just as voting was about to begin. ORP has not shown why the Secretary is not entitled to her requested relief.

First, as the Secretary explained in her opening brief, the district court's order violates the Eleventh Amendment because it instructs a "state official[] on how to conform [her] conduct to state law." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S., 89, 106 (1984). ORP has made no effort to rebut the Secretary's argument that the district court acted without jurisdiction. In a footnote, ORP, without citing *Pennhurst* or the Eleventh Amendment, appears to

suggest that the Secretary's federalism argument is unfounded because ORP sought relief "based on violations of *state*, as opposed to *federal*, law." ORP Motion at 12. But regardless of ORP's arguments below, what matters is that *the district court's order* instructs the Secretary on how to conform her conduct to state law. The relevant passage of the district court's order discusses only Ohio law governing election observers; nowhere does the district court suggest that it is construing federal, rather than state, law, or assert that it is basing the relief on federal law. *See* TRO Order at 6-8, attached as Ex. 4 to Secretary's Motion.

The district court based its order concerning election observers on state rather than federal law for good reason: because the right to have observers present on Election Day exists only under state law. ORP appears to assume that it enjoys a federal constitutional or statutory entitlement to send election observers into boards of elections in the 35 days preceding Election Day. But ORP has cited no federal statutory or constitutional provision that confers such a right—nor could it, since none exists. Political observers have a right to be present at polling locations or boards of election only because Ohio statutory provisions confer that right. And those state law provisions confer that right only on Election Day—not on the 35 days before Election Day. Thus, the district court's order necessarily rested on state law, and it therefore violated the *Pennhurst* doctrine.

Second, even if the district court had jurisdiction under the Eleventh Amendment, the court abused its discretion in granting the TRO on the day before voting began, and ORP has not shown why this Court should not stay the TRO on that basis. The Secretary established in her opening brief that she is entitled to a stay of the TRO pending appeal because she is highly likely to succeed on the merits—that is, because the Secretary’s Advisory 2008-24 correctly interprets Ohio law governing election observers. ORP has not even attempted to argue that the Secretary misinterpreted Ohio law or that Ohio law somehow requires or permits election observers other than on Election Day. Instead, again, ORP appears to assume that it possesses a federal constitutional or statutory entitlement to send election observers into boards of elections in the 35 days preceding Election Day. But as explained above, no such federal right exists. Any rights that exist with respect to election observers arise only under Ohio law, and the Secretary, as the State’s chief elections official, has authoritatively interpreted Ohio law not to require observers during the 35 days before Election Day.

ORP claims further harm on the ground that the Secretary and boards of elections are not properly handling absentee ballots, and that the Secretary is violating the Help America Vote Act (“HAVA”), but both claims are meritless. First, 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. Absentee ballots that were not properly cast are not counted. Second, the Secretary and county boards are in compliance with HAVA. The county boards input each registration into a statewide database to ensure that no voter has double registered. The Secretary of State uses the official statewide voter registration database to identify duplicate registrations and instructs boards on a regular basis to correct those registrations. Thus, ORP is wrong to claim that it is harmed by deficiencies in the Secretary's and boards' processes.

Not only has ORP failed to show that its rights will be undermined if this Court stays the TRO, but it has failed to rebut the Secretary's argument that the public interest is being harmed as the TRO remains in place. The district court's order creates a statutory vacuum regarding election observers: Because Ohio law does not contemplate election observers during the 35 days that precede Election Day, no mechanisms are in place to govern the observers. Officials at the boards of elections have not been trained; those entities wishing to submit lists of observers for approval have not done so; and other, unforeseen problems could easily arise from this rule change. And all this, again, occurs as voting has begun.

CONCLUSION

For all of the above reasons, this Court should reject ORP's motion for emergency relief and grant the Secretary's emergency motion to vacate or stay the district court's TRO.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify a copy of the foregoing was served on all counsel of record by means of the Court's electronic filing system on this 30th day of September, 2008.

/s/ Richard N. Coglianesi
RICHARD N. COGLIANESE