

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

Project Vote, Northeast Ohio Coalition for)
the Homeless, IMatters, Sherie Penix, and)
Daniel Robert George,)

Plaintiffs,)

v.)

Madison County Board of Elections,)

and)

Jennifer Brunner, Secretary of State of Ohio,)
in her official capacity)

Defendants.)

Civil Action No. 08-2266

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

This is an action under 42 U.S.C. § 1983 and the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202. As set forth more fully below, the County Defendants have denied Plaintiffs' rights under federal voting rights and election statutes and the United States Constitution, by

denying or seeking to deny an absentee ballot to voters until 30 days after they register or change their registration. Defendants' actions and threatened actions: (1) impose unconstitutional durational residency requirement and impose an unauthorized, unnecessary and undue burden on the fundamental right to vote, in violation of the First and Fourteenth Amendments to the United States Constitution; (2) arbitrarily deny otherwise eligible voters the ability to vote absent voter's ballots in violation of the Equal Protection and Due Process Clauses of the Fourteenth Amendment; (3) violate federal laws prescribing the date for presidential and congressional elections; (4) violate Section 202 of the Voting Rights Act guaranteeing the availability of absentee ballots and prohibiting durational residency requirements, 42 U.S.C. § 1973aa-1, *et seq.*; (5) violate the Civil Rights Act of 1964, 42 U.S.C. § 1971 (a)(2)(A); (6) violate the National Voter Registration Act of 1993, 42 U.S.C. 1973gg, *et seq.*, and (7) violate state statutory law providing that voters are eligible if they register at least 30 days before an election.

Parties

1.

The plaintiffs are as follows:

- (a) Project Vote is a nonpartisan, non-profit organization incorporated in Louisiana; its principal office in Ohio is located at 3615 Superior Avenue, 4th floor, Cleveland, Ohio 44114. Since its founding in 1982, Project Vote has assisted in registering and helped turned out to vote millions of low-income and minority citizens nationwide, trained hundreds of low-income and minority organizers, and provided registrants with nonpartisan, follow-up voter education. It has assisted citizens in Ohio to register to vote since 1982, either directly or in collaboration with other Ohio-based community groups. Project Vote also provides professional training, management, evaluation, and technical

services for voter engagement and voter participation activities in low- and moderate-income communities, including in Ohio.

- (b) The Northeast Ohio Coalition of the Homeless (“NEOCH”) is a non-profit, non-partisan membership organization that empowers and organizes homeless and at risk men, women and children to break the cycle of poverty through public education, advocacy and the creation of nurturing environments. One of its goals is to work to assure that all eligible homeless people are registered to vote and to reduce barriers to homeless people registering and casting ballots. In furtherance of its missions and goals, NEOCH plans to run shuttles to the Boards of Elections during the time period of September 30, 2008 through October 6, 2008, in order help homeless individuals to register and vote absentee.
- (c) 1Matters (“1Matters”) is a non-profit, non-partisan organization that provides services including voter registration and absentee ballot assistance to homeless people in the Lucas County area. 1Matters assists with registering voters, verifying and updating registration, requesting absentee ballots, providing transportation to take advantage of early voting, and providing volunteers to accompany voters overcome barriers. In furtherance of its mission and goals, 1Matters has included voter mobilization activities into this year’s Tent City event. Tent City is an annual weekend long community event begun in 1990 for and with the homeless that provides medical and other resources to those who need it. This year’s Tent City will include a homeless townhall, a “meet the candidates” event, and shuttles to and from the Lucas County Board of Elections to take advantage of early voting. It will occur October 31 through November 2, 2008. 1Matters plans to assist area homeless voters register or re-register up until the October 6 deadline, and plans to assist with early voting from September 30 up until the November 4, 2008

election. IMatters expects to bring at least 500 homeless individuals and volunteers to vote early this year.

(d) Sheri Penix is a resident of Madison County, Ohio. She meets all of the requirements to register to vote and intends to register before October 6, 2008. She intends to cast a ballot for the November 4, 2008 election by completing an absent voter's ballot. Voting on Election Day will be a hardship for her because of her work schedule and family obligations.

(e) Daniel Robert George is a resident and registered voter in Cuyahoga County, Ohio. He is the volunteer organizer of a program to help elderly individuals and those residing in assisted living care centers to register to vote and request absentee ballots for the November 4, 2008 election. This effort includes a program currently scheduled for September 30, 2008 in Cleveland, Ohio to register new voters at a local senior center and either help them file absentee ballot request forms or arrange for them to vote early at the board of elections. He also will drive a shuttle to and from the Cuyahoga County Board of Elections and the Northeast Ohio Coalition for the Homeless to assist homeless individuals wishing to register and vote early from September 30, 2008 through October 6, 2008.

2.

The defendants are as follows:

(a) The Madison County Board of Elections ("Madison County") is, and at all times relevant hereto was, a public quasi-corporation, a body corporate and politic, organized under the laws of the State of Ohio, charged with conducting, managing, and overseeing elections

within its geographical jurisdiction, and is for all purposes herein a “person” within the meaning of 42 U.S.C. §1983.

(b) Jennifer Brunner (“Secretary Brunner”) is sued in her official capacity as the Secretary of State of Ohio. Under the Ohio Election Code (OHIO REV. CODE §§ 3501.01 *et seq.*), the Secretary of State functions as the chief election officer of the state (OHIO REV. CODE § 3501.04). In that capacity, she is charged with the duty of providing general supervision over the administration of the election laws throughout the state of Ohio, including OHIO REV. CODE §§ 3505, 3509. She is also responsible for promulgating rules, instructions, and directives for the conduct of elections in Ohio, and compelling election officers to observe the requirements of all state and federal election laws (OHIO REV. CODE §§ 3501.01, 3501.05 and 3501.053(A)).¹

Jurisdiction and Venue

3.

This case arises under the Constitution and laws of the United States. This Court has subject matter jurisdiction of this action under 28 U.S.C. §§ 1331, 1343(3) & (4), and 42 U.S.C. §§ 1971(d), and 1973j(f). This suit is authorized by 42 U.S.C. § 1983. This court has jurisdiction to grant both declaratory and injunctive relief under 28 U.S.C. §§ 2201 and 2202. This court has supplemental jurisdiction over the state law claims under 28 USC § 1367(a).

¹ Although Secretary of State Brunner is named as a Defendant in this action, by virtue of her position as the state’s chief election official, Plaintiffs understand that Brunner’s legal position on the merits is in accord with that taken by Plaintiffs. She is named as a defendant for purposes of ensuring that complete relief may be obtained, particularly in the event that the Secretary of State is ordered in the now-pending state court action before the Ohio Supreme Court to take action that violates the rights of plaintiffs and other voters under federal law.

4.

Venue in this district and division is proper under 28 U.S.C. § 1391(b) because this action is predicated upon a federal question and a substantial part of the events or omissions giving rise to the claims alleged herein occurred, and will continue to occur, in this district.

Ohio Voter Registration and Absent Voter Qualifications

5.

The Constitution of the State of Ohio sets forth the qualifications to vote in Ohio elections: “Every citizen of the United States, of the age of eighteen years, who has been a resident of the state, county, township, or ward, such time as may be provided by law, and has been registered to vote for thirty days, has the qualifications of an elector, and is entitled to vote at all elections...” Article V, §1.

6.

Ohio Rev. Code § 3503.07 sets for the requirements in order to register to vote in the state of Ohio: “Each person who will be of the age of eighteen years or more at the next ensuing November election, who is a citizen of the United States, *and who, if he continues to reside in the precinct until the next election, will at that time have fulfilled all the requirements as to length of residence to qualify him as an elector shall*, unless otherwise disqualified, be entitled to be registered as an elector in such precinct. When once registered, an elector shall not be required to register again unless his registration is canceled.” (emphasis added)

7.

The Ohio Revised Code sets forth the requirements to have one’s ballot counted: “[e]very citizen of the United States who is of the age of eighteen years or over and who has been a resident of the state thirty days immediately preceding the election at which the citizen

offers to vote, and has been registered to vote for thirty days, has the qualifications of an elector and may vote at all elections in the precinct in which the citizen resides.” OHIO REV. CODE § 3501.01.

8.

Ohio Revised Code Chapter 3509 sets forth the laws governing absent voters ballots. Pursuant to OHIO REV. CODE § 3509.01 the “board of elections of each county shall provide absent voters ballots for use at every primary and general election...” OHIO REV CODE § 3509.02(A) provides that “[a]ny qualified elector may vote by absent voter’s ballots at an election.”

9.

Regardless of when a voter has completed his registration, an absent voter’s ballot is counted, not when it is cast, but after election officials determine an elector’s eligibility. OHIO REV. CODE § 3509.06(D) states:

Each of the identification envelopes purporting to contain absent voter’s ballots delivered to the presiding judge of the precinct or the special judge appointed by the board of elections shall be handled as follows: The election officials shall compare the signature of the elector on the outside of the identification envelope with the signature of that elector on the elector’s registration form *and verify that the absent voter’s ballot is eligible to be counted under section 3509.07 of the Revised Code*. Any of the precinct officials may challenge the right of the elector named on the identification envelope to vote the absent voter’s ballots upon the ground that the signature on the envelope is not the same as the signature on the registration form, or upon any other of the grounds upon which the right of persons to vote may be lawfully challenged. If no such challenge is made, or if such a challenge is made and not sustained, the presiding judge shall open the envelope without defacing the statement of voter and without mutilating the ballots in it, and shall remove the ballots contained in it and proceed to count them. (emphasis added)

OHIO REV. CODE § 3509.07 states:

If election officials find that the statement accompanying an absent voter’s ballot or absent voter’s presidential ballot is insufficient, that the signatures do not

correspond with the person's registration signature, *that the applicant is not a qualified elector in the precinct*, that the ballot envelope contains more than one ballot of any one kind, *or any voted ballot that the elector is not entitled to vote*, that Stub A is detached from the absent voter's ballot or absent voter's presidential ballot, or that the elector has not included with the elector's ballot any identification required under section 3509.05 or 3511.09 of the Revised Code, the vote shall not be accepted or counted. The vote of any absent voter may be challenged for cause in the same manner as other votes are challenged, and the election officials shall determine the legality of that ballot. Every ballot not counted shall be endorsed on its back "Not Counted" with the reasons the ballot was not counted, and shall be enclosed and returned to or retained by the board of elections along with the contested ballots. (emphasis added).

10.

In order to vote for the November 4, 2008 federal general election, a person must register by Monday, October 6, 2008. Absentee voting for general elections begins on September 30, 2008. Though absent voters execute their ballots before Election Day, the board of elections will not count the votes until election night. OHIO REV. CODE § 3509.06(E); Directive 2008-67 (Attached hereto as Attachment 2).

11.

On August 13, 2008, Secretary Brunner issued Directive 2008-63 (Exhibit A of Attachment 1). This Directive ordered all Ohio County Boards of Elections to "expedite the processing of voter registrations received during the week immediately preceding the voter registration deadline" in light of the "significant number of new and changed registrations ... generated by voter registration drives conducted up to the registration deadline."

12.

Directive 2008-63 instructs the County Boards of Elections that "there are several days before the 2008 general election during which a person may appear at the board of elections and simultaneously submit for that election applications to register to vote or to update an existing registration and to request an absentee ballot."

13.

The Directive further orders that “County Boards of elections are required to develop procedures to immediately register the applicant and issue an absentee ballot to the newly registered elector of the county at the time of registration, *reserving the right to delay registration and immediate absentee voting if a board is not satisfied as to the validity of the application or the applicant’s qualifications*” (emphasis added).

14.

On September 11, 2008, Secretary Brunner issued Directive 2008-91 (attached hereto as Attachment 3) which, in part, elucidated the ways in which counties are to process in person new or changed registrants who request to vote absentee ballots in person at the board’s office or satellite locations during the days before the registration deadline. It further explains that voters may be challenged “for cause in the same manner as other voters are challenged, and election officials shall determine the legality of that ballot.”

15.

OHIO REV. CODE § 309.09(A) provides that each county's “prosecuting attorney shall be the legal advisor of the ... board of elections . . . , and any of them may require written opinions or instructions from the prosecuting attorney in matters connected with their official duties.” A number of Prosecuting Attorneys have advised their County Boards of Elections that the Secretary of State's Directive 2008-63 is unlawful and should be disregarded.

16.

On September 5, 2008, Stephen J. Pronai, Madison County, Ohio Prosecuting Attorney, issued an opinion to the Madison County Board of Elections that it needed to follow the law as stated in the Ohio Revised Code with regard to processing voter registration applications, in

particular with regard to newly registered voters applying for an absentee ballot at the time of registration, and not Directive 2008-63. A true and accurate copy of the September 5, 2008 Opinion Letter of the Madison County Prosecuting Attorney is attached hereto as Exhibit D to Attachment 1 (hereinafter, "Madison County Opinion Letter"). The Madison County Opinion Letter provides that "[a]ccording to Ohio law, an absentee ballot cannot be issued to a person who is not a qualified elector. One of the requirements to be a qualified elector is to be a registered voter for 30 days. Therefore, according to the law you cannot issue an absentee ballot until the voter has been registered for 30 days." The Madison County Opinion Letter also advises the Madison County Board of Election that the County Prosecutor is "unclear of the Secretary of State's reasoning" and he "urge[s] the Board of Elections to follow the law as statue [sic] in the Ohio Revised Code."

17.

The Secretary of State as chief election official of the State has statutory authority to issue directives interpreting statutory provisions governing election administration that take precedence over the opinions of the members of and legal counsel for county boards of elections. OHIO REV. CODE § 3501.05.

18.

The Secretary of State as chief election official of the State has the power to remove board members for not adhering to or disregarding any directive issued by her governing election administration, including registration and issuance of absent voter's ballots. OHIO REV. CODE § 3501.16. Secretary Brunner has not exercised her authority under this provision against the Madison County.

19.

The next federal election will be held on November 4, 2008.

20.

There is a petition for writ of mandamus filed by two individual voters, Rhonda L. Colvin (Colvin) and C. Douglas Moody (Moody) (a copy of that complaint is attached at Attachment 1) pending in the Supreme Court of Ohio which seeks to override Defendant Brunner's directive and prohibit newly registered voters from requesting, receiving, or executing an absentee ballot until after they have been registered to vote for 30 days.

21.

Colvin and Moody claim that a voter must reside in the state of Ohio for 30 days prior to receiving an absentee ballot. Under their allegations, in order for any voter to cast an absent voter's ballot on September 30, 2008, that voter must have been registered on or prior to August 31, 2008.

22.

Furthermore, the arguments put forth by Colvin and Moody would preclude many newly registered voters from voting an absent voter's ballot. Any voter who registers close to the October 6, 2008 registration deadline would be unable to vote absentee at all, whether during the 5-day window or any other time prior to November 4, 2008.

23.

If Colvin and Moody are successful, Ohio voters will be prevented from requesting, receiving, or submitting an absentee ballot within 30 days of registration, in violation of the federal laws set forth below.

24.

In the absence of intervention from Secretary of State Brunner under OHIO REV. CODE §§ 3501.16 or 3501.05, Madison County will preclude many newly registered voters from voting an absent voter's ballot. Any voter who registers close to the October 6, 2008 registration deadline would not be allowed to vote absentee at all, whether during the 5-day window or any other time prior to November 4, 2008.

25.

In the absence of intervention from Secretary Brunner, Madison County is applying a presumption of non-residency to newly registered voters. By subjecting them to challenge, and requiring them to be treated differently from other qualified absent voters, they have denied plaintiffs and other qualified voters the equal right to vote, the equal protection of the laws, and from enjoying the equal rights, privileges, and immunities of citizens under the laws of the United States and of the State of Ohio.

CLAIMS FOR RELIEF

CLAIM ONE

Defendants' Actions violate Section 202 of the Voting Rights Act

26.

The allegations of paragraphs 1 through 25 above are hereby incorporated as allegations of paragraph 26 of the complaint.

27.

Federal law has abolished durational residency requirements as a precondition to voting for President and Vice President and established nationwide, uniform standards relative to absentee registration and absentee balloting in presidential elections.

28.

Specifically, Section 202 of the Voting Rights Act states:

No citizen of the United States who is otherwise qualified to vote in any election for President and Vice President shall be denied the right to vote for electors for President and Vice President, or for President and Vice President, in such election because of the failure of such citizen to comply with any durational residency requirement of such State or political subdivision; nor shall any citizen of the United States be denied the right to vote for electors for President and Vice President, or for President and Vice President, in such election because of the failure of such citizen to be physically present in such State or political subdivision at the time of such election, if such citizen shall have complied with the requirements prescribed by the law of such State or political subdivision providing for the casting of absentee ballots in such election.

...[E]ach State shall provide by law for the registration or other means of qualification of all duly qualified residents of such State who apply, not later than thirty days immediately prior to any presidential election, for registration or qualification to vote for the choice of electors for President and Vice President or for President and Vice President in such election; and each State shall provide by law for the casting of absentee ballots for the choice of electors for President and Vice President, or for President and Vice President, by all duly qualified residents of such State who may be absent from their election district or unit in such State on the day such election is held and who have applied therefor not later than seven days immediately prior to such election and have returned such ballots to the appropriate election official of such State not later than the time of closing of the polls in such State on the day of such election.

42 U.S.C. § 1973aa-1(c), (d).

29.

The actions of Defendants deny Plaintiffs rights protected by 42 U.S.C. § 1973aa-1 generally, including without limitation 1973aa-1(c), (d), in that Defendants are imposing a durational residency requirement on bona fide registered voters and denying them access to absent voter's ballots during a Presidential election.

CLAIM TWO
Defendants' Actions Violate the National Voter Registration Act of 1993

30.

The allegations of paragraphs 1 through 25 above are hereby incorporated as allegations of paragraph 30 of the complaint.

31.

The National Voter Registration Act of 1993 (NVRA), 42 U.S.C. §1973gg *et seq.*, requires Ohio:

In the administration of voter registration for elections for Federal office, each State shall -

(1) ensure that any eligible applicant is registered to vote in an election -

(A) in the case of registration with a motor vehicle application under section 1973gg-3 of this title, if the valid voter registration form of the applicant is submitted to the appropriate State motor vehicle authority not later than the lesser of 30 days, or the period provided by State law, before the date of the election;

(B) in the case of registration by mail under section 1973gg-4 of this title, if the valid voter registration form of the applicant is postmarked not later than the lesser of 30 days, or the period provided by State law, before the date of the election;

(C) in the case of registration at a voter registration agency, if the valid voter registration form of the applicant is accepted at the voter registration agency not later than the lesser of 30 days, or the period provided by State law, before the date of the election; and

(D) in any other case, if the valid voter registration form of the applicant is received by the appropriate State election official not later than the lesser of 30 days, or the period provided by State law, before the date of the election;

42 U.S.C. § 1973gg-6.

32.

Any requirement adopted in conformity with the arguments put forth by the County Defendants would impose a requirement greater than 30 days in violation of 42 U.S.C. §1973gg-6 and the Supremacy Clause (U.S. CONST. ART. VI, Cl. 2).

CLAIM THREE
Defendants' Actions violate the Civil Rights Act of 1964

33.

The allegations of paragraphs 1 through 25 above are hereby incorporated as allegations of paragraph 33 of the complaint.

34.

Election procedures which deny absent voter's ballots to some registered voters but not others violate the Civil Rights Act of 1964, 42 U.S.C. § 1971(a)(2)(A), which provides:

No person acting under color of law shall—

(A) in determining whether any individual is qualified under State law or laws to vote in any election, apply any standard, practice, or procedure different from the standards, practices, or procedures applied under such law or laws to other individuals within the same county, parish, or similar political subdivision who have been found by State officials to be qualified to vote

35.

The application to plaintiffs by Madison County and/or Secretary Brunner in determining whether plaintiffs are qualified to vote in an election of standards, practices and procedures under state law or laws different from the standards, practices or procedures applied under state law or laws to other individuals within the same county who have been found qualified to vote is in violation of 42 U.S.C. § 1971(a)(2)(A).

36.

Madison County seeks to have election officials enforce a durational residency requirement which will treat some voters unequally. Those who have been registered for 30 days and of necessity have been residents for 30 days will be allowed to cast absent voter's ballots. Newly registered voters would be denied this right extended by state law, even though fully qualified residents who have met the registration deadlines.

CLAIM FOUR
Defendants' Actions violate the First and Fourteenth Amendments of the Constitution of the United States

37.

The allegations of paragraphs 1 through 25 above are hereby incorporated as allegations of paragraph 37 of the complaint.

38.

Defendants' actions deny Plaintiffs the right to vote and interfere with their freedom of expression and association. The actions of Defendants are in effect a durational residency requirement imposed upon Plaintiffs in violation of the First Amendment and the equal protection and due process clauses of the Fourteenth Amendment of the Constitution of the United States.

CLAIM FIVE

Defendants' Actions violate the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the Constitution of the United States

39.

The allegations of paragraphs 1 through 25 above are hereby incorporated as allegations of paragraph 39 of the complaint.

40.

Madison County has acted to deprive the voters within Madison County of: (a) the equal protection of the laws by arbitrarily denying absent voter ballots to anyone who has not been registered to vote for 30 days when voters similarly situated in other Ohio Counties may receive an absent voter's ballot; and (b) the due process of law by arbitrarily denying absent voters ballots to anyone who has not been registered for 30 days and, without rational basis, substantially burdens them in the exercise of their right to vote.

CLAIM SIX

Madison County's Actions Violate State Law

41.

The allegations of paragraphs 1 through 25 above are hereby incorporated as allegations of paragraph 41 of the complaint.

42.

By denying Plaintiffs and other voters their right to request, receive, and submit an absentee ballot until 30 days after they have registered or changed their registration, Madison County has acted in violation of OHIO REV. CODE § 3503.06, which specifies that voters need only have been registered for 30 days “at the time of the next election” to be eligible.

Irreparable Harm/Inadequate Remedy at Law

43.

The allegations of paragraphs 1 through 25 above are hereby incorporated as allegations of paragraph 43 of the complaint.

44.

There is a real and actual controversy between the parties. Plaintiffs have no adequate remedy at law other than this action for injunctive and declaratory relief. Plaintiffs will suffer irreparable injury as a result of the acts of Defendants complained of, in unlawfully and unreasonably applying to Plaintiffs an arbitrary presumption of probable cause that they are not residents and eligible voters of the State of Ohio, and in direct consequence thereof denying Plaintiffs the opportunity to cast an absent voter’s ballot, and that injury will continue unless declared to be unlawful and enjoined by this Court.

45.

The acts of Defendants described herein are maintained under color of law of the State of Ohio and under color of law of Defendants’ respective offices.

WHEREFORE, plaintiffs respectfully pray that this Court:

- (a) Take jurisdiction of this matter;

- (b) Declare the actions of Defendants complained of to be in violation of Plaintiffs' rights under the First and Fourteenth Amendments of the Constitution of the United States, and 42 U.S.C. §§ 1971(a)(2)(A), 1973aa-1, 1973gg, and permanently enjoin such actions;
- (c) Enjoin Madison County to comply with state law and Ohio Secretary of State directives 2008-63 and 2008-91, by immediately providing an absentee ballot to otherwise eligible voters who register at least 30 days before Election Day, and enjoin Secretary Brunner to take all steps necessary to ensure that voters will be able to request, receive, and submit an absentee ballot upon their registration;
- (d) Enjoin the Defendants to comply with federal law by allowing otherwise eligible voters to request, receive, and submit an absentee ballot immediately upon their registration.
- (e) Award Plaintiffs the costs of this action, together with reasonable attorney's fees as provided by 42 U.S.C. §§ 1973l(e) and 1988;
- (f) Retain jurisdiction over this matter and grant Plaintiffs any further relief which may be necessary and proper.

Respectfully submitted,

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