No. 08A332

In The Supreme Court Of The United States

JENNIFER BRUNNER,
OHIO SECRETARY OF STATE,
Applicant,

v.

OHIO REPUBLICAN PARTY, *et al.*,
Respondents.

ON APPLICATION FOR STAY FROM
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

APPLICANT'S REPLY BRIEF IN SUPPORT OF HER APPLICATION FOR A STAY OF A TEMPORARY RESTRAINING ORDER

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INTRODUCTION

To a large extent, ORP's opposition to the Secretary's stay application rests on this mistaken premise: Because the Secretary is doing her best to comply with the district court's order, the TRO does not harm her. But of course the Secretary is trying to comply with the order; anything less would risk contempt of court.

Those good faith efforts only support, rather than undermine, the need for a stay here. As the Secretary explained in her stay application, she has diverted substantial resources from her important pre-Election Day administrative responsibilities to comply with the TRO, to the detriment of Ohio's electoral processes. The district court's order therefore has interfered in the internal administrative workings of Ohio's chief election official in the days before an election. Congress in no way contemplated this kind of federal court oversight of elections, and the Secretary has amply demonstrated the TRO's harmful effects.

Which raises a larger point: It is not the Secretary who bears the burden here; it is ORP. And ORP has not discharged that burden. ORP has shown *no* likelihood of success on the merits, because ORP has no private right of action to enforce the administrative provisions of the Help America Vote Act ("HAVA") under 42 U.S.C. § 1983. Nor has ORP substantiated its claims of irreparable injury—the dilution of legitimate votes by fraudulent ones—with any evidence.

Not to mention that ORP's burden is heightened here by the eleventh-hour nature of its challenge. The Secretary's predecessor—not the current Secretary—set up the database to withhold the mismatch reports that ORP seeks. That action

was fully consistent with HAVA. More to the point, that action was taken *more than two years ago*. ORP has not explained (because it cannot) why it waited so long to sue. Instead, its defense on this score—that the "Secretary affirmatively changed" the database "at some later date," Opp. at 14—is patently false. The Secretary has repeatedly explained that she did not change the database, and ORP (which bears the burden) has introduced no evidence to the contrary. In any event, regardless of the reason ORP came tardily to the court, the fact is that ORP's late filing has yielded a hasty TRO entered just weeks before Election Day.

This Court in *Purcell v. Gonzalez*, 127 S. Ct. 5 (2006) (per curiam), could not have said more clearly that these kinds of last-minute challenges are not to be countenanced so close to an election. Indeed, this TRO is even more troublesome than the one in *Purcell*, because the injunction there was a *negative* one—barring enforcement of a statute—whereas the injunction here is an *affirmative* one—forcing a state official to take actions that massively disrupt the electoral process. If a federal court is to issue such an intrusive order, it should handle the matter carefully, on the basis of a factual record, not based on a seat-of-the-pants hearing devoid of testimony. The approach of the courts below—enjoin first, ask questions later—is untenable.

To be sure, the district court's discretion is considerable. But it does not reach so far as to allow a district court (1) to upend principles of federalism (2) by micromanaging a state official's administration of a statewide election (3) based on

an erroneous understanding of applicable federal law (4) without undertaking a meaningful factual inquiry (5) just weeks before Election Day.

This Court's intervention is needed to restore order to Ohio's electoral process.

ARGUMENT

A. The Secretary properly presented her stay application to Justice Stevens.

ORP's various arguments that the Secretary did not properly present her stay application to Justice Stevens are mistaken. Justice Stevens unquestionably has the authority, as circuit justice, to stay the TRO. In *INS v. Legalization Assistance Project*, 510 U.S. 1301, 126 L. Ed. 410, 412 (1993) (O'Connor, J.), Justice O'Connor encountered an "exceptional case," like this one, that required a stay because the plaintiffs lacked a cause of action. Noting that the plaintiffs fell outside the zone of interests of the applicable federal statute, she found that the lower court's order was "not merely an erroneous adjudication of a lawsuit between private litigants, but an improper intrusion by a federal court into the workings of a coordinate branch of the Government." 126 L. Ed. at 414-15.

ORP's additional arguments concerning the lack of authority to stay the TRO are similarly unavailing. First, ORP suggests that this Court cannot, or should not, consider this stay because a TRO is a non-final order—but ORP is wrong, and wants to have it both ways. True, most TROs are non-final, but as everyone below agreed, TROs such as this one, which have permanent effects and thus are non-reviewable,

are reviewable in circuit courts. If the order was final for appellate review below, it is final for further review here, as this Court's jurisdiction, as to finality, derives from the appeals court's. *See Mc-Graw Hill v. Procter & Gamble*, 515 U.S. 1309 (1995) (Stevens, J.) (finding jurisdiction doubtful when circuit court had found jurisdiction lacking).

Second, ORP is equally mistaken in suggesting that a separate certiorari petition was required, and to the extent that a likelihood of certiorari is part of the likelihood of success assessment, the Secretary meets that test. First, the Court does not require stay applicants formally to file a certiorari petition, and it treats stay applications, when necessary, as incorporating that element. *See Purcell,* 127 S. Ct. at 6 ("We construe the filings of the State and the county officials as petitions for certiorari; we grant the petitions; and we vacate the order of the Court of Appeals."). Second, the Secretary showed in her Application the importance of the questions at issue, both in their effects here and on the broader question of whether HAVA is enforceable by private suits under Section 1983. Those recurring issues—as shown by the election-related litigation, much of it HAVA-related, that now repeats itself every election cycle—do warrant certiorari review, and thus meet the Court's test for assessing the likelihood of certiorari. See *Gregory-Portland Independent Sch. Dist. v. United States*, 448 U.S. 1342 (1980) (Rehnquist, J., in chambers) (explaining that a Circuit Justice, in considering a stay application, is "to determine whether four Justices would vote to grant certiorari, to balance the so-

called 'stay equities', and to give some consideration as to predicting the final outcome of the case in this Court").

Finally, ORP suggests that the en banc nature of the decision below undercuts the need for the Court's review, but the opposite is true, and ORP's attempt to have it both ways is telling. ORP seems to suggest that this Court should be less willing to review an appeals court's decision reviewing a TRO when the appeals court sat en banc. But the reverse is true: Although en banc review and certiorari review are different animals, they are similar enough that cases meeting the test for the one are at least fair game for the other. Review of a garden-variety TRO should have ended with the panel. But ORP insisted that the issue was so important that it justified even *initial* en banc review, and then en banc rehearing after the panel ruled against it. Those same factors counsel in favor of this Court's consideration. ORP suggests that the issues here could tip the balance in Ohio's elections, and if that is true, it cuts both ways.

B. The district court abused its discretion in considering a claim that came too late, and that ORP had no right to bring.

ORP objects that the Secretary is circumventing the district court's discretion to modify the TRO. On the contrary, tonight the Secretary is asking the district court to modify the TRO. Since the district court issued the TRO, the Secretary and her staff have worked diligently with the Ohio Bureau of Motor Vehicles ("BMV"), Ohio's boards of elections, and other state agencies to comply with the TRO. The Secretary is returning to the district court only after gathering enough information to have a good faith basis for requesting the TRO's modification. Based on the

Secretary's estimates, her extension motion will request more than an additional week for compliance.

ORP adds that, as facts change or develop, the Secretary can return to the district court again and again for TRO modifications. Opp. at 10. But creating and changing election rules and procedures through court orders creates chaos. *See Purcell*, 549 U.S. at 7. In addition, this scenario (of repeated modification requests) risks continuous litigation: If the district court grants a modification, ORP may appeal; if the district court denies a modification, the Secretary may appeal. Finally—and most important—Art. II, §1, cl. 2 of the U.S. Constitution entrusts *States* to run elections. And HAVA respects this balance by permitting States to choose various methods of compliance. *See* 42 U.S.C. § 15485. Yet, under ORP's solution, *a federal judge* will run Ohio's election. Ohio's state election officials will be continually waiting for court rulings, rather than following the election procedures the Ohio General Assembly and the Secretary have promulgated.

In any event, ORP's arguments about the district court's discretion to modify the TRO misses the larger point: that this TRO never should have been entered in the first place, for several reasons.

For one thing, ORP came to the courthouse too late. ORP excuses its tardiness by asserting "that the Ohio voter registration database operated in precisely the way plaintiffs argue it should operate until the Secretary herself changed her policy '[f]or reasons that the record does not reveal and at a time the record does not reveal.'" Opp. at 14 (quoting 6th Cir. En Banc Op.). This statement

is patently false. The Secretary has repeatedly explained that she did not change this feature of the database—her predecessor did. That is why the record is "silent" on when the Secretary made the change—*because she never did*. ORP, which bears the burden, has introduced no evidence to rebut that truth, and ORP therefore has no excuse for their eleventh-hour filing.

In repeating this falsity, ORP relies heavily on the en banc Sixth Circuit's opinion. But the en banc court, like ORP, was simply wrong on this fact, just as the en banc court was wrong on other facts. For good reason: In this hurried and harried process, sufficient time has not existed to allow careful factfinding. And that is precisely why a TRO here was imprudent—because, as this Court warned in *Purcell*, electoral processes should not be enjoined on the basis of scant or nonexistent factual records. *Purcell*, 127 S. Ct. at 8 (Stevens, J., concurring).

On the equities, ORP still has not shown *any* likelihood of success on the merits of its HAVA claim, because ORP has no private right of action here.[1] ORP claims that the difference between HAVA section 302 and HAVA section 303 is "a distinction without a difference." But as the Secretary explained in her stay application, the distinction is a meaningful one that Congress itself created. Even assuming that the Sixth Circuit was correct in *Sandusky County Democratic Party v. Blackwell*, 387 F.3d 565 (6th Cir. 2004) (per curiam), section 302 and section 303 are about two different things: provisional ballots on the one hand, and statewide

[1] ORP, in saying that private enforcement is not an "ultimate issue" in this case, Opp. at 6, seems to suggest that it is no issue at all. But this critical threshold issue is inherently part of the likelihood-of-success inquiry. After all, a party cannot succeed if it has no cause of action, just as it cannot succeed without standing—and a stay is therefore warranted. See *Legalization Assistance Project*, 126 L. Ed. at 412 (O'Connor, J.).

computer databases on the other. Congress sensibly chose to allow individuals to sue to gain access to ballots, but not to force state officials to exercise their discretion in particular ways in administering their statewide databases.

The fact that ORP is not at all likely to succeed on the merits is precisely why this Court should stay the TRO. The district court and the en banc Sixth Circuit, at ORP's urging, have changed the status quo on the merits of a critically important matter under HAVA—the Secretary's consistent administration of the statewide database. Were this matter presented in a more orderly proceeding, the courts would never have reached the merits of ORP's HAVA claim, because ORP so plainly lacks a right of action. Yet, bizarrely, ORP in this hasty case has *succeeded* in reaching the merits of its HAVA claim. That outcome is an abuse of the federal courts.

C. The Secretary—but not ORP—has shown irreparable harm.

As an initial matter, the ORP maligns the Secretary's public statement issued after the en banc decision—that she was working to comply with the TRO—as a concession that emergency intervention is not required. Opp. at 9. On the contrary, the Secretary has an affirmative duty to comply with the TRO until it is vacated. *See Walker v. Birmingham*, 388 U.S. 307, 314 (1967). Consistent with this obligation, the Secretary immediately directed her staff to begin attempting the necessary database modifications shortly after the district court issued its order on October 10, 2008. These preparations continued during proceedings before the Sixth Circuit, including the four-day period during which the TRO had been stayed,

and continue at this late hour. Were the Secretary to do or say otherwise, she would risk a contempt citation.

ORP next attacks the Secretary's failure to present evidence of the injury and disruption that will befall the electorate should she comply with the TRO. As the Secretary explained in her stay application, the door to the courthouse was not opened at the TRO stage. The district court did not allow the Secretary to put forward any live evidence about the statewide voter database, even as the court repeatedly demanded specific facts about its operation from counsel. And although the court "in no way limited the Secretary's ability to present as much documentary evidence as she wanted," Opp. at 10, ORP's shifting theories did. The Secretary prepared her arguments, and the accompanying affidavits, in response to ORP's original allegation—that the database did not perform *any* matching with BMV records. The theory then changed during the course of the TRO hearing—the database performed its matching function, but did not do so in an effective manner.

Finally, ORP attacks the Secretary's well-founded concerns about the destabilizing nature of the TRO on the upcoming election, likening it to those arguments rejected by this Court in *Crawford v. Marion County Elections Board*, 128 S. Ct. 1610 (2008). But in *Crawford*, the plaintiffs sought a court order *preventing* state officials from enforcing a state statute—a voter identification requirement. Here, the plaintiffs seek a court order requiring state officials to take *affirmative* steps. There, the litigation occurred at a steady pace; officials had ample time to implement the requirements of the statute and train their workers.

Here, the district court issued its TRO less than a month before the election, with no regard for its consequences.

On substance, ORP downplays the potential impact of the TRO on the election: "[T]he TRO simply requires the Secretary to provide the HAVA 'mismatches' to the county boards of election in a format they can use to verify voter registration before counting ballots." Opp. at 12. Yet, the question for the Secretary—and, ultimately, for the courts—is what the 88 county boards of election will do with that information once it is released. The database will not inform the county boards on whether a particular mismatch is an actual discrepancy, or the result of a typographical error. Nor is there any uniform process in place governing the use of that information—must the voter be notified of a discrepancy, when can a board require her to submit further information, and under what standard can a board drop a particular voter from the rolls. State and local officials cannot be expected to implement such measures on the fly as Election Day nears.

The Secretary is of course not averse to improving the functionality of the statewide voter database in the manner ordered by the district court. Had ORP approached the Secretary, or even filed its suit, earlier, these matters could have been resolved outside of the courtroom using a careful deliberative process. Rather, ORP waited to complain at the eleventh hour—when the Secretary, her staff, and the local officials are focused on other pressing election season matters. This request for judicial intervention is exactly the type of circumstance condemned by

Purcell, HAVA (42 U.S.C. § 15485), and the traditional deference afforded by federal courts to state officials in conducting elections.

Finally, as to HAVA, ORP is simply wrong. The Secretary has complied with the plain language of 42 U.S.C. § 15483(a)(5)(B)(i). She has created a system to share and match information in the statewide database with information in the BMV's database, and she provides the county boards of election—those entities responsible for registering voters and investigating complaints of fraud—with ready access to that system. Local officials can query a voter's match status in the statewide database for any reason at all and respond accordingly when a mismatch is reported.

CONCLUSION

The Court should grant the request for an emergency order staying the temporary restraining order.

Respectfully submitted,

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